

COMMISSION IMPLEMENTING DECISION (EU) 2023/1336**of 16 June 2023****on corrective measures to be taken by Belgium and Luxembourg regarding certain performance targets for the third reference period in accordance with Regulation (EC) No 549/2004 of the European Parliament and of the Council***(notified under document C(2023)3852)***Only the Dutch and French texts are authentic****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky ⁽¹⁾ (the framework Regulation), and in particular Article 11(3) point (c), third paragraph, thereof,Having regard to Commission Implementing Regulation (EU) 2019/317 of 11 February 2019 laying down a performance and charging scheme in the single European sky ⁽²⁾, and in particular Article 15(5) thereof,

Whereas:

GENERAL CONSIDERATIONS

- (1) Pursuant to Article 10 of Implementing Regulation (EU) 2019/317, Member States are to draw up, either at national level or at the level of functional airspace blocks ('FABs'), binding performance targets for each reference period of the performance scheme for air navigation services and network functions. Those performance targets have to be consistent with the Union-wide performance targets adopted by the Commission for the reference period concerned.
- (2) In response to the impact of the COVID-19 pandemic on the provision of air navigation services, Commission Implementing Regulation (EU) 2020/1627 ⁽³⁾ set out exceptional derogation measures from Implementing Regulation (EU) 2019/317 for the third reference period ('RP3'). On those bases, Commission Implementing Decision (EU) 2021/891 ⁽⁴⁾ set out revised Union-wide performance targets for the third reference period ('RP3').
- (3) Belgium, Germany, France, Luxembourg, and the Netherlands adopted jointly at the level of Functional Airspace Block Europe Central ('FABEC') a draft performance plan for RP3 ('the draft performance plan') which was submitted to the Commission in October 2021. Following an assessment, the Commission concluded in Implementing Decision (EU) 2022/728 ⁽⁵⁾ that the cost-efficiency performance targets for the Belgium-Luxembourg *en route* charging zone ('Belgium-Luxembourg charging zone') contained in that draft performance plan were

⁽¹⁾ OJ L 96, 31.3.2004, p. 1.

⁽²⁾ OJ L 56, 25.2.2019, p. 1.

⁽³⁾ Commission Implementing Regulation (EU) 2020/1627 of 3 November 2020 on exceptional measures for the third reference period (2020-2024) of the single European sky performance and charging scheme due to COVID-19 pandemic (OJ L 366, 4.11.2020, p. 7).

⁽⁴⁾ Commission Implementing Decision (EU) 2021/891 of 2 June 2021 setting revised Union-wide performance targets for the air traffic management network for the third reference period (2020-2024) and repealing Implementing Decision (EU) 2019/903 (OJ L 195, 3.6.2021, p. 3).

⁽⁵⁾ Commission Implementing Decision (EU) 2022/728 of 13 April 2022 on the inconsistency of certain performance targets contained in the draft national and functional airspace block performance plans submitted by Belgium, Germany, Greece, France, Cyprus, Latvia, Luxembourg, Malta, the Netherlands, Romania, and Sweden pursuant to Regulation (EC) No 549/2004 of the European Parliament and of the Council with the Union-wide performance targets for the third reference period and setting out recommendations for the revision of those targets (OJ L 135, 12.5.2022, p. 4).

inconsistent with the Union-wide performance targets and set out recommendations for the revision of those local performance targets. Switzerland is also member of FABEC and was part of the draft FABEC performance plan. As a Third Country subject to the performance and charging scheme pursuant to the Air Transport Agreement between the EU and Switzerland, Switzerland was notified separately, through Commission Implementing Decision (EU) 2022/780 ⁽⁶⁾ of 13 April 2022, of the inconsistency of the local cost-efficiency performance targets of Belgium and Luxembourg contained in the draft FABEC performance plan.

- (4) On 13 July 2022, Belgium, Germany, France, Luxembourg and the Netherlands submitted a revised draft FABEC performance plan ('the revised draft performance plan') for RP3 to the Commission.
- (5) On 24 October 2022, the Commission in its Decision (EU) 2022/2255 ⁽⁷⁾ initiated the detailed examination referred to in Article 15(3) of Implementing Regulation (EU) 2019/317 ('the detailed examination') with regard to the revised cost-efficiency performance targets proposed for the Belgium-Luxembourg charging zone, included in the revised draft performance plan.
- (6) France, Germany and the Netherlands informed the Commission, on 28 October 2022, 3 November 2022 and 4 November 2022 respectively, that they had withdrawn from the revised draft performance plan established jointly at the level of FABEC. Simultaneously, those Member States submitted to the Commission individual, revised draft national performance plans for RP3.
- (7) Following a new assessment, the Commission found that the respective revised national performance targets were consistent with the Union-wide performance targets and notified France, Germany and the Netherlands thereof through Commission Decisions (EU) 2023/176 ⁽⁸⁾, (EU) 2023/177 ⁽⁹⁾ and (EU) 2023/179 ⁽¹⁰⁾ respectively. Switzerland also informed the Commission of its withdrawal from the revised draft performance plan and simultaneously submitted a revised draft national performance plan on 4 November 2022. The Commission found that the performance targets contained in the revised draft national performance plan of Switzerland are consistent with the Union-wide performance targets and notified Switzerland thereof by Commission Decision (EU) 2022/178 of 14 December 2022.
- (8) Belgium and Luxembourg have not notified any separate national performance plans. As a result, the revised draft performance plan previously established at FAB level, and subject to the Commission's detailed examination initiated by its Decision (EU) 2022/2255, continues to constitute the basis for the assessment of the performance targets of Belgium and Luxembourg.

⁽⁶⁾ Commission Implementing Decision (EU) 2022/780 of 13 April 2022 on the inconsistency of certain performance targets contained in the draft functional airspace block performance plan submitted by Switzerland pursuant to Regulation (EC) No 549/2004 of the European Parliament and of the Council with the Union-wide performance targets for the third reference period and setting out recommendations for the revision of those targets (OJ L 139, 18.5.2022, p. 218).

⁽⁷⁾ Commission Decision (EU) 2022/2255 of 24 October 2022 on the initiation of the detailed examination of certain performance targets contained in the revised draft performance plan for the third reference period submitted at functional airspace block level by Belgium, Germany, France, Luxembourg, and the Netherlands pursuant to Regulation (EC) No 549/2004 of the European Parliament and of the Council (OJ L 297, 17.11.2022, p. 71).

⁽⁸⁾ Commission Decision (EU) 2023/176 of 14 December 2022 on the consistency of the performance targets contained in the revised draft performance plan submitted by France pursuant to Regulation (EC) No 549/2004 of the European Parliament and of the Council with the Union-wide performance targets for the third reference period (OJ L 25, 27.1.2023, p. 70).

⁽⁹⁾ Commission Decision (EU) 2023/177 of 14 December 2022 on the consistency of the performance targets contained in the revised draft performance plan submitted by Germany pursuant to Regulation (EC) No 549/2004 of the European Parliament and of the Council with the Union-wide performance targets for the third reference period (OJ L 25, 27.1.2023, p. 79).

⁽¹⁰⁾ Commission Decision (EU) 2023/179 of 14 December 2022 on the consistency of the performance targets contained in the revised draft performance plan submitted by the Netherlands pursuant to Regulation (EC) No 549/2004 of the European Parliament and of the Council with the Union-wide performance targets for the third reference period (OJ L 25, 27.1.2023, p. 95).

- (9) Therefore, this Decision should be addressed to Belgium and Luxembourg only because France, Germany and the Netherlands have withdrawn from the revised draft performance plan submitted by FABEC and submitted separate national performance plans. Those plans were found consistent with the Union-wide performance targets (see Commission's decisions referred to in recital (7)).
- (10) On 27 October 2022, the Commission services sent a first request for information to Belgium regarding the elements covered by the detailed examination. The letter of the Commission services to Belgium of 27 October 2022 was also sent simultaneously to Luxembourg, for information only. In response to that request, the Belgian authorities forwarded to the Commission services, on 6 November 2022 and 9 November 2022, information received from air navigation service providers ('ANSPs').
- (11) On 9 November 2022, the Commission services held a meeting with the Belgian authorities.
- (12) On 11 November 2022, the Commission services sent a second request for information to Belgium and received additional documents from the Belgian authorities on 28 November 2022. The letter of the Commission services to Belgium of 11 November 2022 was also sent simultaneously to Luxembourg, for information only.
- (13) On 29 November 2022, the Commission services requested additional information from Belgium. The Belgian authorities replied to that request on 8 December 2022 and also complemented the data and information which they had submitted on 28 November 2022. The letter of the Commission services to Belgium of 29 November 2022 was also sent simultaneously to Luxembourg, for information only.
- (14) On 8 December 2022 and 15 December 2022, the Commission services met with the Belgian authorities.
- (15) On 20 December 2022, the Commission services sent a final information request to Belgium. The Belgian authorities provided additional information in response to that request on 12 January 2023. The letter of the Commission services to Belgium of 20 December 2022 was also sent simultaneously to Luxembourg, for information only.
- (16) On 3 February 2023, the Commission services invited Luxembourg to submit any relevant complementary observations or comments to the materials provided by Belgium in response to the information requests referred to in recitals (10), (12), (13) and (15). The authorities of Luxembourg did not submit any information in response to the request of the Commission services.
- (17) On 2 March 2023, the Commission services met with the authorities of Belgium and Luxembourg.

ASSESSMENT OF THE REVISED PERFORMANCE TARGETS DURING THE DETAILED EXAMINATION

Scope of the detailed examination

- (18) The Performance Review Body ('PRB'), assisting the Commission in the implementation of the performance scheme pursuant to Article 11(2) of Regulation (EC) No 549/2004, submitted reports to the Commission on the assessment of the revised draft performance plan and on the detailed examination of the revised cost-efficiency performance targets proposed for the Belgium-Luxembourg charging zone.

- (19) The Commission notes that the safety, capacity and environment performance targets set in the revised draft performance plan remained unchanged. The Commission did not raise any findings on those performance targets in its Implementing Decision (EU) 2022/758 and in its Decision (EU) 2022/2255. Therefore, no further observations are set out in this Decision on the assessment of the safety, capacity and environment performance targets.
- (20) The detailed examination enabled the Commission to further analyze the cost-efficiency performance targets proposed by Belgium and Luxembourg (as presented in the table below), given the doubts set out in Decision (EU) 2022/2255 as to their consistency with the Union-wide performance targets.

<i>En route</i> charging zone of Belgium-Luxembourg	2014 baseline value	2019 baseline value	2020-2021	2022	2023	2024
Revised <i>en route</i> cost-efficiency targets on the determined unit cost , expressed in real terms in 2017 prices ('EUR 2017')	81,78 EUR	83,26 EUR	189,52 EUR	104,47 EUR	94,18 EUR	89,87 EUR

- (21) The detailed examination covered the elements set out in the Annex to Decision (EU) 2022/2255 and focused on services relating to the airspace of Belgium. For that reason, the Commission's services requests for information (see recitals (10) to (15)) were addressed to the Belgian authorities, whilst the relevant national authorities of Luxembourg received those requests for information only.

Assessment of the revised performance targets on the basis of the assessment criteria set out in points 1.4 (a), (b) and (c) of Annex IV to Implementing Regulation 2019/317

- (22) The Commission has assessed the consistency of the revised cost-efficiency performance targets presented in recital (18) with the Union-wide performance targets in accordance with the assessment criteria contained in points 1.4(a), (b) and (c) of Annex IV to Implementing Regulation 2019/317 taking into account the findings of the detailed examination which are set out in recitals (26) to (67) below.
- (23) Concerning the criteria laid down in points 1.4(a) and 1.4(b) of Annex IV to Implementing Regulation (EU) 2019/317, the Commission observes that the cost-efficiency performance targets for the Belgium-Luxembourg charging zone underperform both the Union-wide DUC trend over RP3 and the long-term Union-wide DUC trend over RP2 and RP3 combined. Indeed, the DUC trend for RP3 of +1,9 % of Belgium and Luxembourg fails to meet the Union-wide trend of +1,0 % over the same period, whereas their long-term DUC trend of +1,1 % is significantly above the level of the corresponding Union-wide trend, namely -1,3 %.
- (24) Concerning the criterion laid down in point 1.4(c) of Annex IV to Implementing Regulation (EU) 2019/317, the Commission found that the baseline value for the DUC of EUR 83,26 of Belgium and Luxembourg in EUR2017 is 13,2 % higher than the average baseline value of 73,53 EUR 2017 of the relevant comparator group.
- (25) As part of the detailed examination, the Commission has further substantiated its assessment of the Belgium-Luxembourg cost-efficiency performance targets on the basis of the assessment criteria set out in points 1.4(a), (b) and (c) of Annex IV to Implementing Regulation 2019/317 by analysing the following elements:
- the determined costs for the charging zone, broken down per air navigation service provider ('ANSP');
 - the complexity of the provision of air navigation services in the charging zone;

- the cross-border service provision arrangements with neighbouring countries, and their operational and financial impact; and
- the cost allocation between en route and terminal services.

Findings on the determined costs for the charging zone, broken down per ANSP

- (26) The Commission observes that the revised draft performance plan results in a determined unit cost ('DUC') of EUR 89,87 (in EUR 2017) for year 2024 for the Belgium-Luxembourg charging zone, as presented in recital (18). This is the highest level of DUC for 2024 of all the *en route* charging zones comprised in the scope of the performance and charging scheme.
- (27) Three ANSPs, namely skeyes, the Maastricht Upper Area Control Centre ('MUAC') and the Air Navigation Administration of Luxembourg ('ANA Luxembourg'), are serving the charging zone under examination. In addition, determined costs are incurred in respect of the national supervisory authorities ('NSAs') of Belgium and Luxembourg respectively.
- (28) The table below presents how the cost base of the charging zone is divided per entity and how the respective costs of those entities have evolved over time.

En route charging zone of Belgium-Luxembourg	2014 baseline value (EUR 2017)	2019 baseline value (EUR 2017)	2024 determined costs (EUR 2017)	Variation ⁽¹⁾ per year between 2014 and 2024	Variation ⁽²⁾ per year between 2019 and 2024
skeyes	114 M EUR	131 M EUR	135 M EUR	+ 1,8 %	+ 0,7 %
MUAC	54 M EUR	61 M EUR	75 M EUR	+ 3,7 %	+ 5,5 %
ANA Luxembourg	6 M EUR	6 M EUR	6 M EUR	+ 0,7 %	-0,9 %
NSAs of Belgium and Luxembourg ⁽³⁾	13 M EUR	13 M EUR	12 M EUR	-0,5 %	-1,9 %
Total	187 M EUR	211 M EUR	228 M EUR	+ 2,2 %	+ 2,0 %

- (29) In respect of the determined costs for 2024, the Commission notes that 59 % of the determined costs of the charging zone are incurred by skeyes, whilst MUAC accounts for 33 % of the cost base. The combined share of ANA Luxembourg and of the NSAs of Belgium and Luxembourg represents 8 % of the determined costs.
- (30) The Commission acknowledges that the revised draft performance plan decreases the total determined costs for the charging zone by 19,3 million EUR (in EUR 2017) for year 2024 in comparison with the draft performance plan. The Commission observes that skeyes largely contributes to that decrease with a cost reduction of 16 million EUR (in EUR 2017). According to Belgium, skeyes achieved that cost decrease through:
- productivity improvements (-5,5 million EUR in EUR 2017);
 - the revision of its investment plan and other operational expenses (-4,2 million EUR in EUR 2017); and
 - an exceptional cost reduction funded through the surplus resulting from the difference between the determined costs set in the draft performance plan for year 2021 and the actual costs recorded for that year (-6,5 million EUR in EUR 2017).

⁽¹⁾ Compound annual growth rate (CAGR).

⁽²⁾ Compound annual growth rate (CAGR).

⁽³⁾ The costs incurred by Belgium and Luxembourg in respect of the Eurocontrol International Convention relating to cooperation for the safety of air navigation of 13 December 1960 (as last amended) are included in the NSA costs.

- (31) On the other hand, the Commission notes that the MUAC costs allocated to the charging zone remained almost unchanged in the revised draft performance plan, as only a minor cost reduction amounting to 0,3 million EUR (in EUR 2017) was applied.
- (32) Based on the evaluation made by the PRB, the Commission notes that both skeyes and MUAC have substantially increased their costs in real terms over RP2 and that those costs continued to increase during RP3, mostly driven by higher staff costs and other operating costs. In 2024, the skeyes staff costs are planned to be higher by 6,9 % from their 2019 level, amounting to a difference of 6,5 million EUR (in EUR 2017). For MUAC, the increase of staff costs incurred in the charging zone, in comparison with the situation in 2019, is even more significant, as those costs are planned to be 30 % higher in 2024 than in 2019, which constitutes an increase of 15,0 million EUR (in EUR 2017).
- (33) The determined costs set in respect of ANA Luxembourg and of the NSAs of Belgium and Luxembourg do not give rise to any concerns.

Specific observations regarding skeyes

- (34) In respect of skeyes, which has the largest proportion of determined costs in the charging zone, the Commission has received additional benchmarking analysis from the PRB. That analysis shows that the relative cost-efficiency performance of skeyes has deteriorated in comparison with LVNL⁽¹⁴⁾, which has a very similar operational environment and which is included in the same comparator group for the purpose of assessing performance targets in the key performance area of cost-efficiency⁽¹⁵⁾. At the end of RP2, the unit cost of skeyes for 2019 was 2,2 % higher than the unit cost of LVNL.⁽¹⁶⁾ By the end of RP3, in 2024, after adjusting the unit cost of skeyes for the one-off cost reduction of 6,5 million EUR (in EUR 2017) referred to in recital (30), the unit cost of skeyes is expected to be higher by 9,4 % than the unit cost of LVNL.
- (35) On the basis of the PRB evaluation, this difference in the cost-efficiency between skeyes and LVNL is caused mainly by the staff costs. Based on the revised draft performance plan, skeyes plans to spend in 2024 23 % more on staff costs per *en route* service unit than LVNL. Expressed in monetary terms and adjusted to the annual cost base of skeyes, that gap would represent a surcharge to airspace users of 18,7 million EUR (in EUR 2017) for that year.
- (36) Furthermore, the Commission observes that the cost-efficiency of skeyes is significantly impacted by costs deriving from an early retirement scheme called 'DISPO functional availability regime' ('DISPO scheme' or 'DISPO') which, in accordance with Belgian law⁽¹⁷⁾, allows air traffic controllers ('ATCOs') working at skeyes to withdraw from duty five years before their legal retirement date. During those five years, they receive an allowance equaling between 75 % and 85 % of their last salary. According to the information provided in the revised draft performance plan, ATCOs are currently placed in DISPO at the age of 56 and this age limit is to be raised to 57 from 2025 onwards.
- (37) The Commission notes that the costs of the DISPO scheme are fully borne by skeyes, which passes on those costs to airspace users through its *en route* and terminal cost bases. Based on the historical cost data and the detailed future cost estimates for RP3 provided by Belgium, the *en route* costs resulting from DISPO amount to a total of 29 million EUR (in EUR 2017) over RP3 and have nearly doubled compared to RP2. In respect of year 2024, the *en route* determined costs resulting from the DISPO scheme are reported by Belgium to amount to 8,7 million EUR (in EUR 2017).
- (38) The Commission recognizes that the growing cost of DISPO over time is caused by the higher number of ATCOs benefiting from that scheme. Indeed, whereas Belgium reported for skeyes as a whole a total of 43 FTEs under DISPO in 2022, that number is expected to reach 71 FTEs in 2024. A gradual, steady increase in the number of FTEs under DISPO is expected by Belgium, even after RP3, at least until 2030.

⁽¹⁴⁾ 'Air Traffic Control the Netherlands' (LVNL).

⁽¹⁵⁾ As set out in Article 6 of Commission Implementing Decision (EU) 2021/891.

⁽¹⁶⁾ The unit costs of skeyes and LVNL both exclude the service units attributable to MUAC within their respective charging zones. The unit costs for skeyes and LVNL cover all the *en route* air navigation services, including meteorological services (MET) which in the Netherlands are provided by a MET provider separate from LVNL.

⁽¹⁷⁾ Royal Decree of 23 April 2017.

- (39) The Commission notes that during their placement under the DISPO scheme the ATCOs concerned remain at the disposal of skeyes and may be recalled to service by skeyes at any time, with full remuneration, in order to perform tasks other than those of an operational ATCO. However, information provided by Belgium indicates that only a very limited number of ATCOs placed under DISPO have actually been recalled by skeyes. Since 2015, 17 ATCOs have been recalled, some of them several times for different functions. Having regard to the estimates provided by the PRB, those recalled ATCOs provided a contribution of approximately 4 FTEs in 2022 to activities related to *en route* service provision. Those 4 FTEs represent only one tenth of the total pool of FTEs which could have been available under DISPO. This indicates that skeyes makes a very limited use of the staff available under DISPO.
- (40) Belgium has not proposed any mitigation measures in the revised draft performance plan to limit this growing financial impact of the DISPO scheme on the RP3 cost base.

Specific observations regarding MUAC

- (41) The Commission has further examined how the Member States belonging to the MUAC Agreement⁽¹⁸⁾, namely Belgium, Germany, Luxembourg and the Netherlands ('the MUAC States') allocate the total determined costs incurred by MUAC to their respective charging zones.
- (42) In this respect, the Commission notes that the determined costs of MUAC are distributed between the MUAC States on the basis of one single criterion, namely the number of qualified ATCOs in service or planned to be in service in the three sector groups⁽¹⁹⁾ of MUAC on the 1st of January of each year. The Commission further notes that 92 % of the costs of the Brussels sector group ('Brussels sector') are allocated to the Belgium-Luxembourg charging zone. The two other MUAC sector groups, namely 'the DECO sector group' and the 'Hannover sector group', are located outside of the geographical scope of the Belgium-Luxembourg charging zone and hence do not generate costs allocated to that charging zone.
- (43) The Commission understands that the cost allocation methodology has been set out in the MUAC Agreement and is underpinned by the assumption that the number of ATCOs in each sector reflects the workload for providing the services and hence the costs of the services and the complexity of each sector.
- (44) However, the Commission notes that over the last few years Belgium has expressed its concerns as to the effects of this cost allocation methodology on its charging zone. In particular, Belgium contends that its contribution to the total costs of MUAC, calculated on the basis of the number of ATCOs allocated to the Brussels sector, is disproportionately high when taking into account the fact that the Brussels sector generates a comparatively lower number of service units and related revenue than the other two MUAC sectors. Belgium further points out that the higher complexity of its airspace, which leads to additional workload for ATCOs, explains the higher cost per service unit of the MUAC Brussels sector as compared to the other two MUAC sectors.
- (45) Based on the PRB evaluation, the Commission notes that the share of the total MUAC costs allocated to Belgium and Luxembourg has indeed increased over time, as the number of ATCOs assigned to the Brussels sector has increased. Consequently, whilst Belgium and Luxembourg contributed to 32 % of MUAC costs in 2014, that share has risen to 34 % in RP3. The effect of that change on the cost base of the Belgium-Luxembourg charging zone is further exacerbated by the overall increase of total MUAC costs. The Commission notes that the MUAC determined costs for the Belgium-Luxembourg charging zone are set 39 % higher in real terms for 2024 than in 2014⁽²⁰⁾, whilst the service units for the charging zone in 2024 are forecasted to be only 11 % above their level of 2014.

⁽¹⁸⁾ Agreement relating to the Provision and Operation of Air Traffic Services and Facilities by Eurocontrol at the Maastricht Area Control Centre, signed on 25 November 1986.

⁽¹⁹⁾ MUAC operations are split in three sector groups, namely the 'Brussels sector group', the 'DECO sector group' group and the 'Hannover sector group'.

⁽²⁰⁾ Calculated on the basis of the baseline value for 2014.

- (46) The Commission takes note of the statement made by Belgium during the detailed examination indicating that the methodology for the funding of the costs of MUAC established in 1986 “is based on a cost recovery system” and “does not follow the economic regulation imposed by the performance scheme”. According to the related observations raised by the PRB, MUAC benefits, *de facto*, from a so-called full cost recovery system. Thus, despite being an air navigation service provider falling within the scope of application of the performance and charging scheme in accordance with Article 1(2) of Implementing Regulation (EU) 2019/317, MUAC does not bear the financial risks or apply the financial incentives deriving from the traffic risk sharing mechanism set out in Article 27 of Implementing Regulation (EU) 2019/317, the cost risk sharing mechanism set out in Article 28 of that Implementing Regulation 2019/317 and the incentives for the achievement of capacity targets set out in Article 11(3) of that Implementing Regulation.
- (47) The Commission notes that the information obtained for the first time during the detailed examination on the implementation of the performance and charging scheme in respect of MUAC raises concerns in terms of compliance with the relevant legal requirements. This conclusion is without prejudice to any infringement proceedings, which the Commission may undertake in respect of that matter.

Costs related to the postponed or cancelled RP2 investments

- (48) The Commission notes that, during RP2, both skeyes and MUAC postponed or cancelled several planned investments in fixed assets, which were part of the RP2 performance plan. Airspace users were partially charged for those investments as part of the cost base for the Belgium-Luxembourg charging zone despite the fact that those investments were not completed and thus did not provide the expected operational benefits. According to the calculations made by the PRB, that generated, in nominal terms and for RP2 as a whole, a gain of 7,8 million EUR in respect of skeyes and a gain of 2,1 million EUR in respect of MUAC. Belgium indicates that it does not plan to reimburse to airspace users any amounts charged in RP2 for the planned and not completed investments in fixed assets as it considers that there is no legal requirement to do so in respect of RP2.
- (49) In case some of those RP2 investments are finalised at a later stage, in accordance with Article 22(7) of Implementing Regulation (EU) 2019/317, the NSAs of Belgium and Luxembourg should ensure that any related amounts, which have already been recovered in RP2, are not charged for a second time to airspace users in RP3 or in subsequent reference periods.

Findings on the complexity of the provision of air navigation services in the charging zone, and its evolution over time

- (50) Belgium and Luxembourg argue that airspace complexity is a key factor behind the deviation of their proposed cost-efficiency performance targets from the Union-wide DUC trends. Belgium and Luxembourg explain in particular that the complexity of the Belgium-Luxembourg airspace increases the relative workload of ATCOs and thus weights negatively on ATCO productivity and on the *en route* cost base.
- (51) Having regard to the findings made by the PRB, the Commission acknowledges that the airspace in the charging zone of Belgium and Luxembourg is highly complex due to the high number of flights and the mixture of flight trajectories. Skeyes and MUAC are hence facing complex operating conditions.
- (52) However, the Commission notes that Belgium and Luxembourg have not provided any evidence demonstrating that the operations in RP3 became more complex than in RP2, or that in the remaining months of RP3 the complexity would further increase.
- (53) Based on the available information, which has been further analysed by the PRB, complexity remained relatively stable over RP2 in respect of both skeyes and MUAC. As regards 2020 and 2021, no meaningful conclusions can be drawn on the complexity of operations because of the exceptionally low traffic levels, which resulted from the COVID-19 pandemic. As regards the rest of RP3, there is no evidence to assume that complexity would differ significantly from the situation observed during RP2.

- (54) Given that the relatively high complexity of operations in Belgium and Luxembourg charging zone has been constant over time under normal traffic conditions, as explained in recitals (52) and (53), the Commission considers that such complexity cannot be invoked as a justification for the cost increases in RP3. Hence, the findings in recital (23) with regard to the assessment criteria set out in points 1.4(a) and (b) of Annex IV to Implementing Regulation (EU) 2019/317 are maintained.
- (55) Furthermore, the Commission recalls that the complexity of operations has already been taken into account while defining the comparator groups of ANSPs, which are used for the purpose of the assessment criterion set out in point 1.4(c) of Annex IV to Implementing Regulation (EU) 2019/317. Currently set comparator groups are comprised of ANSPs with similar operational and economic conditions and the comparator group of Belgium and Luxembourg comprises Austria, Switzerland and the Netherlands, which all face a relatively complex operational environment. Hence, the finding in recital (24) with regard to the assessment criterion set out in point 1.4(c) of Annex IV is maintained.

Findings on the cross-border service provision arrangements with neighbouring countries and their operational and financial impact

- (56) In the revised draft performance plan, Belgium and Luxembourg explain that the Brussels sector of MUAC includes the provision of cross-border services in the airspace of France and Germany. Belgium and Luxembourg further specify that the *en route* service units for the flights controlled by MUAC in those cross-border areas are recorded in the charging zones of those Member States, whilst the costs for those provided services are charged to the users flying in the Belgium-Luxembourg charging zone. Belgium and Luxembourg point out that this situation leads to an increased determined unit cost in their charging zone.
- (57) During the detailed examination, the Commission has analysed the cross-border service provision arrangements related to the Belgium-Luxembourg charging zone. The Commission found that MUAC provides services in three cross-border areas located in France and Germany, which are of significance in terms of workload and for which MUAC receives no financial compensation from the Member States having delegated the service provision. The same observation can be made with regard to two cross-border areas located in the airspace of the Netherlands in which the provision of services is delegated to skeyes.
- (58) Based on further analysis conducted by the PRB, the Commission estimates that the services provided by MUAC and skeyes in the cross-border areas referred to in recital (57) represented a total cost of approximately 12,2 million EUR (in EUR 2017) in 2019, of which the share of MUAC amounts to 6,8 million EUR (in EUR 2017) and the share of skeyes to 5,4 million EUR (in EUR 2017).
- (59) The Commission notes, however, that Belgium has not reported any changes in the provision of services by skeyes and MUAC in cross-border areas during RP2 or RP3. Those activities have not expanded in terms of scope and have not generated additional workload for the ANSPs during RP2 and RP3. Hence, as the associated costs have remained proportionally stable as a share of the total cost base of the Belgium-Luxembourg charging zone, the services provided by skeyes and MUAC in cross-border areas do not have a notable impact on the calculation of the cost-efficiency trends. Hence, the findings in recital (23) with regard to the assessment criteria set out in points 1.4(a) and (b) of Annex IV are maintained.
- (60) Finally, whilst the examined cross-border service provision arrangements bring notable benefits by reducing the complexity of operations and enhancing the efficiency of services, the 'user pays' principle set out in Article 15 of Regulation (EU) No 550/2004 entails that "*airspace users should pay for the costs they generate at, or as close possible to, the point of use*" ⁽²¹⁾. Accordingly, Article 21(2) of Implementing Regulation (EU) 2019/317 requires for charging zones to be "*consistent with the provision of air navigation services*" and stipulates that they "*may include services provided by an air navigation service provider established in another Member State in relation to cross-border airspace*". Article 22(1) of that Implementing Regulation further specifies that the cost base for a charging zone "*shall consist of the determined costs related to the provision of air navigation services in the charging zone concerned*".

⁽²¹⁾ Recital 22 of Regulation (EC) No 550/2004 of the European Parliament and of the Council of 10 March 2004 on the provision of air navigation services in the single European sky (OJ L 96, 31.3.2004, p. 10).

- (61) In the light of what has been said in recital (60), the Commission considers that the financing arrangements in place for the provision of air navigation services in the cross-border areas referred to in recital (57), are not in line with the legal requirements underpinning the performance and charging scheme. This conclusion is without prejudice to any infringement proceedings, which the Commission may undertake in respect of this matter.
- (62) Given that the financing of services provided in cross-border areas is not compliant with the legal provisions referred to in recital (60), it cannot be used to justify any adjustment of the baseline value for 2019 for the purpose of the assessment criterion set out in point 1.4(c) of Annex IV to Implementing Regulation (EU) 2019/317. Furthermore, having regard to the findings made by the PRB, even if the baseline value for 2019 of the Belgium-Luxembourg charging zone had been adjusted for services provided in cross-border areas, it would still have resulted in a difference of +5,9 % for the Belgium-Luxembourg charging zone compared to the average baseline value of the comparator group. Hence, the finding in recital (24) with regard to the assessment criterion set out in point 1.4(c) of Annex IV is maintained.

Findings on the cost allocation between en route and terminal services

- (63) Belgium introduced in RP3 a revised cost allocation methodology for the apportioning of determined costs between *en route* and terminal services for RP3. The applied changes concern the allocation of the costs of approach control services ('approach costs') incurred by skeyes and the allocation of the costs incurred by the Belgian NSA. The Commission notes that Belgium has decided to allocate its approach costs almost entirely to *en route* services, which leads to the transfer of additional determined costs to the Belgium-Luxembourg charging zone in RP3.
- (64) The Commission observes that Belgium and Luxembourg adjusted the baseline values for 2014 and 2019 in the revised draft performance plan in order to take account of the changes in cost allocation between *en route* and terminal services. Therefore, those changes do not directly impact the assessment of the cost-efficiency performance targets in accordance with the criteria set out in Annex IV to Implementing Regulation (EU) 2019/317.
- (65) However, having regard to the evaluation made by the PRB, the Commission notes that Belgium increased the 2019 baseline value for the *en route* charging zone by 14,3 million EUR (in EUR 2017) whilst at the same time it reduced the baseline value for its terminal charging zone, which includes Brussels airport (EBBR), by 4,4 million EUR (in EUR 2017). The Commission is aware that skeyes also incurs costs in relation to approach services provided at regional airports, which are outside of the scope of the performance plan in RP3. However, the Commission considers that Belgium has failed to adequately explain and justify the large discrepancy between the adjustments applied to the *en route* and terminal baseline values, as the reallocated approach costs relating to regional airports outside of the scope of the performance plan appear disproportionate.
- (66) Furthermore, the Commission finds that, by including its approach costs almost entirely in the *en route* cost base, Belgium has not allocated those costs in a proportional way between *en route* services and terminal services on the basis of a transparent methodology. The Commission considers that such an allocation of approach costs fails to comply with the requirements laid down in Article 15(2), point (e), of Regulation (EC) No 550/2004 and in Article 22(5) of Implementing Regulation (EU) 2019/317.
- (67) Therefore, in light of the observations in recitals (63) to (66), this Decision is without prejudice to any infringement proceedings, which the Commission may undertake in respect of the changes in the cost allocation methodology applied in RP3 by Belgium.

Conclusion on the assessment on the basis of the assessment criteria set out in points 1.4(a), (b) and (c) of Annex IV to Implementing Regulation 2019/317

- (68) In light of the foregoing observations, the Commission concludes that the cost-efficiency performance targets for the Belgium-Luxembourg charging zone do not fulfil any of the assessment criteria laid down in points 1.4(a), (b) and (c) of Annex IV to Implementing Regulation (EU) 2019/317.

Assessment of the measures invoked by Belgium and Luxembourg to justify the observed deviations from the Union-wide cost-efficiency trends

- (69) Furthermore, pursuant to point 1.4(d) of Annex IV to Implementing Regulation (EU) 2019/317, the Commission has to examine whether the deviations from the criteria set out in points 1.4(a), 1.4(b) and 1.4(c) of that Annex are necessary and proportionate in order to allow the achievement of the performance targets in the key performance area of capacity or to implement restructuring measures within the meaning of Article 2(18) of Implementing Regulation (EU) 2019/317. In particular, the Commission verified whether the observed deviations from the Union-wide DUC trend and from the long-term Union-wide DUC trend are exclusively due to additional determined costs for capacity-related measures.
- (70) Having regard to the calculations made by the PRB, the Commission notes that the estimated difference between the RP3 determined *en route* costs of the Belgium-Luxembourg charging zone for year 2024 and the determined costs that would be required to meet the RP3 Union-wide DUC trend is approximately EUR 8,2 M in EUR2017, whilst a corresponding difference of approximately EUR 43,7 M in EUR2017 is observed in respect of the long-term Union-wide DUC trend.
- (71) The Commission notes that the revised draft performance plan contains seven measures for the achievement of capacity targets ('capacity-related measures'), which are regarded by Belgium and Luxembourg as necessary for the achievement of capacity targets and which according to Belgium and Luxembourg would justify the deviations of their cost-efficiency performance targets from the Union-wide cost-efficiency performance targets.
- (72) Following the findings set out in Decision (EU) 2022/2255 in respect of those capacity-related measures, the Commission has further analysed those measures.

Measure 1

- (73) The first capacity-related measure ('Measure 1') comprises the recruitment and training of ATCOs by skeyes in order to maintain adequate ATCO staffing levels in RP3 and in the fourth reference period ('RP4'). Belgium and Luxembourg explain that Measure 1 is essential in order to address the ageing of the ATCO workforce and the consequent high number of retirements expected during RP3 and RP4. Those retirements derive in particular from the application of the DISPO scheme referred to in recital (36).
- (74) Belgium further emphasised, during the detailed examination, that the number of ATCOs in operations at skeyes would decrease by 15 % by the end of RP3 without the training and recruitment activities foreseen under Measure 1. According to Belgium, that would lead to a significant reduction of capacity.
- (75) In light of the information provided by Belgium, the Commission agrees that the training and recruitment of ATCOs by skeyes is necessary in order to maintain and enhance ATCO staffing levels and to ensure that the number of ATCOs is adequate in light of forecasted future traffic evolution. However, the Commission also notes that the need for such extensive training of new ATCOs results to a large extent from the early retirements deriving from the DISPO scheme.
- (76) The total costs of Measure 1 increased in the revised draft performance plan and amount to approximately 27 million EUR (in EUR 2017) over RP3. In comparison with the draft performance plan, the costs of Measure 1 are higher, in nominal terms, by 22,4 % for 2022, by 49,0 % for 2023 and by 36,8 % for 2024.
- (77) Belgium argues that the increased costs of Measure 1 are justified by the impact of higher inflation and by a more accurate estimation of the actual costs of new recruitments, because of a faster traffic recovery and a higher than expected failure rate of ATCO students in the training cycles already completed during RP3. Specifically, Belgium explains that skeyes has updated its business plan before the submission of the revised draft performance plan and now plans to recruit additional ATCOs at its maximum training capacity during the years 2022 to 2024.

- (78) The Commission notes that, in parallel, under the revised draft performance plan the number of ATCOs planned to be in operations in 2024 is 6 % lower than in the draft performance plan. The Commission assumes that this situation results from the higher than anticipated failure rate of the ATCO students in training at skeyes, mentioned in recital (77).
- (79) The Commission observes that the cost increases concerning Measure 1, referred to in recital (76), are significantly higher than the changes in the inflation index reflected in the revised draft performance plan. The Commission notes that the costs initially presented in the draft performance plan with regard to Measure 1 were limited to the training of controllers for the purpose of the *en route* services provided by skeyes in the scope of the Belgium-Luxembourg charging zone. However, based on the information received from Belgium during the detailed examination, the increased costs of Measure 1 included in the revised draft performance plan also cover the training of controllers by skeyes for terminal air navigation services. Costs relating to the terminal charging zone should not be included in Measure 1.
- (80) Hence, the Commission considers that Belgium has not adequately explained, despite being requested to do so, how the planned ATCO training activities and the planned intake of ATCO students of skeyes in respect of *en route* services were adapted between the draft performance plan and the revised draft performance plan. In addition, Belgium did not substantiate, in respect of *en route* services, the estimated costs incurred by skeyes per ATCO student and did not provide explanations for the high variability of those costs from one year to another. In light of those considerations, it was not possible for the Commission to quantify how the planned increase in the number of ATCO students at skeyes, mentioned in recital (77), contributes to the change in the costs of Measure 1 observed in recital (76) with regard to *en route* services.
- (81) Even assuming that skeyes would indeed have higher training costs incurred in respect of *en route* services and due to an increased number of ATCO students from 2022 to 2024, the Commission considers that those higher training costs are at least to a significant extent mitigated by the reduced staff costs deriving from the lower number of planned ATCOs in operations over the same time period, as observed in recital (78).
- (82) The Commission notes that the costs incurred for Measure 1 *de facto* result to a significant extent from the DISPO scheme which Belgium itself has chosen to adopt and apply in respect of the ATCOs working at skeyes. It is clear that the DISPO scheme leads, during RP3, to a high number of early retirements of ATCOs, whose simultaneous replacement by new ATCOs constitutes a considerable operational and financial burden for skeyes. However, having regard to the evaluation made by the PRB and the imperative need for skeyes to ensure the safe and continuous provision of the required capacity in RP3, the Commission considers, on balance, that Measure 1 is necessary to achieve the local capacity performance targets. However, the Commission considers that Belgium has failed to justify that the significant increase of the costs presented in the revised draft performance plan for Measure 1, as compared to the draft performance plan, is justified and proportionate, except as regards the effect of the higher inflation forecast on those costs. Therefore, as regards the additional costs deemed necessary and proportionate for the achievement of capacity targets, the Commission concludes that the costs to be taken into account in respect of Measure 1 are those presented in the draft performance plan, as converted in real terms.

Measure 2

- (83) The second capacity-related measure ('Measure 2') consists of the replacement by skeyes of its air traffic management ('ATM') system with a single, integrated and harmonized airspace management system to be developed with MUAC and the Belgian Defence as part of the 'Shared Air Traffic Services System 3' project ('SAS 3 project'). That new ATM system of skeyes is however only planned to enter into operation after the end of RP3, possibly not before 2030, and thus only preparatory activities are planned for RP3.
- (84) Measure 2 also includes the mid-life upgrade of the current ATM system of skeyes, which should become operational during a transitional phase before the roll-out of the new ATM system deriving from the SAS 3 project. Belgium has clarified, during the detailed examination, that the mid-life upgrade includes both a technical upgrade and a functional upgrade, which is expected to enable additional capacity in RP4.

- (85) The total costs of Measure 2 were lowered in the revised draft performance plan and amount to approximately 7,4 million EUR (in EUR 2017) over RP3. In comparison with the draft performance plan, the costs of Measure 2 are lower, in nominal terms, by 1,9 % for 2022, by 9,5 % for 2023 and by 11,9 % for 2024. Belgium has clarified that those changes reflect better the actual value of the contract signed by skeyes in December 2021 for the midlife upgrade of its current ATM system.
- (86) Belgium has clarified during the detailed examination that no depreciation costs will be incurred in RP3 with regard to the new ATM system stemming from the SAS 3 project. However, it is apparent from the information provided by Belgium that a cost of capital on a 'new ATM system' is planned to be charged already in RP3, despite the fact that the deployment of that system would only take place several years after the end of RP3.
- (87) The Commission considers that the planned upgrade and the subsequent replacement of the current ATM system of skeyes are as such justified from an operational standpoint and can be deemed necessary for the purpose of achieving the capacity targets.
- (88) However, the Commission notes that there are serious doubts about the timely implementation of Measure 2. Indeed, during the detailed examination, the Commission was informed by third parties that skeyes was considering to withdraw from the SAS 3 project, which underpins the planned development of the new ATM system. The Belgian authorities did not contest this information, but emphasised that discussions were still ongoing between the involved parties on the future of the project. In light of those observations, the Commission considers that Belgium has not provided adequate assurance on the implementation of the SAS 3 project or on any alternative solutions to be put in place in the event that the project does not materialize.
- (89) Furthermore, the Commission notes that the costs of Measure 2 comprise a large share of other operating costs, in particular project costs related to the preparation of the midlife upgrade of the existing ATM system and in relation to the new system. The Commission considers that such operating costs are related to the normal operation of an ANSP and, contrary to the ATM systems themselves and their components, cannot be considered directly incurred for the achievement of the capacity targets.
- (90) Therefore, as regards the additional costs deemed necessary and proportionate for the achievement of capacity targets, the Commission concludes that the costs to be taken into account in respect of Measure 2 should be limited to the depreciation costs and the cost of capital incurred for the mid-life upgrade of the ATM system of skeyes.

Measure 3

- (91) The third capacity-related measure ('Measure 3') relates to the amendment of the General Conditions of Employment applicable to ATCOs working at MUAC ('the GCE package'), following a collective agreement concluded in 2019 before the outbreak of the COVID-19 pandemic. Measure 3 consists of an increase in the remuneration of ATCOs working at MUAC by 10,75 %, in exchange for a more flexible work organization.
- (92) Based on the information contained in the revised draft performance plan, the flexibility provisions introduced as part of Measure 3 include an increase in the annual working time for newly recruited ATCO staff, new rules on the organization of shifts, the possibility to contract additional working days from ATCOs, more flexible annual working time and leave planning, as well as the possibility to agree with already employed ATCOs a possible extension of the retirement age to 60 years.
- (93) The Commission notes that the purpose of Measure 3 is, in essence, to increase the availability of ATCOs and the flexibility of rostering in order to accommodate traffic demand. Belgium emphasised that Measure 3 was expected, in the pre-COVID traffic conditions, to reduce air traffic flow management delays and thus avoid the resulting costs for airspace users. Belgium further clarified that Measure 3 was initially estimated to allow MUAC to set up additional shifts for ATCOs, with a gain of 1 050 additional shifts in 2019 and of 3 150 additional shifts in 2024.
- (94) In its analysis provided to the Commission, the PRB concluded that Measure 3 indeed enables MUAC to offer additional capacity to airspace users during calendar years 2023 and 2024, and thus contributes to the achievement of capacity targets in RP3 in circumstances where traffic volumes are comparable to their pre-pandemic level.

- (95) The total costs of Measure 3 increased in the revised draft performance plan and amount to approximately 13,2 million EUR (in EUR 2017) over RP3. In comparison with the draft performance plan, the costs of Measure 3 are higher, in nominal terms, by 7,4 % for 2022, by 9,0 % for 2023 and by 9,2 % for 2024. According to the information provided by Belgium during the detailed examination, those cost increases are due to the higher than expected inflation, which leads to the indexation of the salaries of ATCOs working at MUAC.
- (96) Belgium indicates that, at the time of its approval, the costs of Measure 3 were estimated to be equivalent to hiring additional ATCOs in order to address the ATCO staff shortages experienced by MUAC. That claim has however not been supported by any figures or evidence on the overall impact of Measure 3 on the RP3 cost base. The Commission has thus not been able to verify that the cost of Measure 3 in RP3 would be equivalent to the cost that MUAC would have incurred for hiring additional ATCOs in order to deliver the same capacity benefits.
- (97) The Commission notes that the PRB found that the costs presented by Belgium and Luxembourg under Measure 3 are justified and commensurate with the resulting benefits for airspace users, including the avoidance of ATFM delays and of the resulting adverse operational and financial impacts for airspace users including passengers and the environment.
- (98) In particular, the PRB points out that there is evidence that the GCE package comprised under Measure 3 enabled MUAC to deliver significantly improved capacity performance in its first year of implementation, namely 2019, which avoided an estimated 30 million EUR of indirect costs from ATM delays for airspace users. The PRB further notes that, in 2020 and 2021, the heavy downturn in traffic due to the COVID-19 pandemic created exceptional circumstances in which the additional flexibility provisions set up under Measure 3 were not necessary. However, the PRB considers that MUAC has adequately mitigated the impact of Measure 3 in respect of 2020 and 2021, given that the revised draft performance plan specifies that “some of the surplus shifts from 2020 and the first quarter of 2021” were deferred in order to be used in the rest of RP3 at no additional cost. The PRB concludes that Measure 3 is overall justified for capacity reasons in RP3, as it is conducive to an improved availability of resources and a maximization of the capacity made available at times of high traffic demand.
- (99) Therefore, the Commission concludes that Measure 3 is necessary for the achievement of capacity targets and its costs are proportionate in light of their beneficial operational impact on capacity provision.

Measure 4

- (100) The fourth capacity-related measure ('Measure 4') consists of an enhanced post-operations analysis process to be put in place by MUAC with the support of relevant tools and 'business intelligence facilities'. Belgium and Luxembourg indicate that the purpose of Measure 4, referred to in the revised performance plan as the 'PABI project', is to enable the further optimization of the planning of the daily operations of MUAC.
- (101) Based on the information contained in the revised draft performance plan, Measure 4 should contribute to accommodating future traffic demand and avoiding unnecessary operational restrictions for airspace users (referred to as 'over-regulation'), which lead to ATFM delays. The Commission notes that Measure 4 was indicated by Belgium to become operational in 2022, although that information was not expressly confirmed by Belgium during the detailed examination.
- (102) Having regard to the evaluation made by the PRB, the Commission agrees that the operational analytics capabilities presented under Measure 4 contribute to making the best use of available resources with a view to maximizing the capacity made available to airspace users, especially at times of high traffic demand.
- (103) The total costs of Measure 4 amount to approximately 0,9 million EUR (in EUR 2017) over RP3 and remain unchanged from the draft performance plan submitted in 2021. The Commission notes that the PRB has reviewed the costs of Measure 4 and considers them as justified.

- (104) Therefore, the Commission concludes that Measure 4 is necessary for supporting the continuous achievement of capacity targets and considers that the costs of Measure 4 are proportionate in light of the structural, operational gains which they are estimated to deliver.

Measure 5

- (105) The fifth capacity-related measure ('Measure 5') concerns the *ab initio* training of new ATCOs for the MUAC Brussels sector. According to the revised draft performance, the ATCO training activities comprised under Measure 5 have been outsourced to an external training organization based in France.
- (106) Belgium explains that the continued ATCO recruitment and *ab initio* training by MUAC is necessary in order to avoid capacity constraints in RP3 and in future reference periods. In light of the information provided by Belgium, the Commission agrees that the training of new ATCOs by MUAC is necessary in order to maintain and enhance ATCO staffing levels and to ensure that the number of ATCOs is adequate in light of the forecasted future traffic evolution.
- (107) The total costs of Measure 5 amount to approximately 14,2 million EUR (in EUR 2017) over RP3. During the detailed examination, Belgium provided a breakdown of the costs of Measure 5 under three categories, namely staff costs of the ATCO students, costs for simulator pilots, and costs charged by the training organization. The Commission notes that the PRB has reviewed the costs of Measure 5 and considers them to be justified.
- (108) Therefore, the Commission concludes that Measure 5 is necessary for the achievement of capacity targets and that its costs are proportionate in light of their operational impact on capacity provision.

Measure 6

- (109) The sixth capacity-related measure ('Measure 6') comprises the employment of additional ATCOs for the MUAC Brussels sector in order to accommodate traffic demand in RP3 and in the subsequent years.
- (110) According to the information contained in the revised draft performance plan, the number of those ATCOs is planned to rise substantially from 106 to 119 ATCOs over RP3. Belgium indicates that the additional ATCO staff will enable increased sector opening times and increased operational flexibility. In light of the information provided by Belgium, the Commission agrees that the recruitment of additional ATCOs by MUAC is necessary in order to support the achievement of capacity targets.
- (111) The total costs of Measure 6 amount to approximately 4,4 million EUR (in EUR 2017) over RP3. Those costs relate to the remuneration of the additional ATCOs who enter into service during RP3. The Commission notes that the PRB has reviewed the costs of Measure 6 and considers them to be justified.
- (112) Therefore, the Commission considers that Measure 6 is necessary for the achievement of capacity targets and that its costs are proportionate in light of their operational impact on capacity provision.

Measure 7

- (113) The seventh capacity-related measure ('Measure 7') covers the development of a new manpower planning system by MUAC for the purpose of supporting the implementation of new operational requirements. Measure 7 includes the development of a new framework for manpower planning, a modernised rostering tool and other manpower planning tools required to implement new operational requirements.
- (114) Having regard to the evaluation made by the PRB, the Commission agrees that the efficiency gains enabled by the new manpower planning system will contribute to improved operational performance and to a more efficient delivery of services.

- (115) The total costs of Measure 7 amount to approximately 0,8 million EUR (in EUR 2017) over RP3. The Commission notes that the PRB has reviewed the costs of Measure 7 and considers them to be justified.
- (116) Therefore, the Commission considers that Measure 7 is necessary for the achievement of capacity targets and its costs are proportionate in light of their operational impact on the capacity provision.

Combined impact of the capacity-related measures presented by Belgium and Luxembourg

- (117) The Commission has further analysed the seven capacity-related measures presented by Belgium and Luxembourg in respect of their overall impact and in order to evaluate whether the simultaneous implementation of all of those measures is necessary for the achievement of the local capacity performance targets.
- (118) In this respect, the Commission takes note of the PRB findings according to which those seven capacity-related measures, considered together, are appropriate and justified in view of their overall expected operational outcome and the resulting combined impact on capacity provision. According to the PRB analysis, the combined implementation of those measures enables skeyes and MUAC to effectively manage the forecasted traffic levels at times of peak traffic demand, whilst strengthening the flexibility and resilience of service provision in the event of unforeseen or volatile circumstances. The PRB further confirms that the implementation of those capacity-related measures taken together does not lead to over-capacity in respect of the air navigation services provided in the airspace of Belgium and Luxembourg in the remaining months of RP3 ⁽²²⁾. Finally, the PRB points out that measures presented in the revised draft performance plan in relation to the training and employment of additional air traffic controllers are complementary with the organisational and technical measures enabling enhanced capacity provision.

Conclusions on the measures invoked by Belgium and Luxembourg to justify the observed deviations from the Union-wide cost-efficiency trends

- (119) In respect of the criterion set out in point 1.4(d)(i) of Annex IV to Implementing Regulation (EU) 2019/317, the Commission concludes on the basis of the findings set out in recitals (71) to (118) that the costs presented by Belgium and Luxembourg for Measures 1 and 2 are partially necessary and proportionate for the achievement of capacity performance targets, whilst in respect of Measures 3 to 7 the presented costs are fully necessary and proportionate for the achievement of those targets.
- (120) The table below shows the resulting contribution of the capacity-related measures to the gaps with Union-wide DUC trends observed in recital (70) with regard to the relevant year, namely 2024.

Capacity-related measures presented by Belgium and Luxembourg	Contribution to the gap with Union-wide DUC trends for the Belgium-Luxembourg charging zone, expressed in EUR 2017, taking into account the costs deemed by the Commission to be necessary and proportionate for the achievement of capacity targets
Measure 1	7,7M EUR ⁽²³⁾
Measure 2	0,3M EUR ⁽²⁴⁾
Measure 3	4,4M EUR
Measure 4	0,3M EUR
Measure 5	4,7M EUR

⁽²²⁾ Based on the traffic assumptions contained in the Eurocontrol STATFOR October 2021 base traffic forecast.

⁽²³⁾ Amount reflecting the share of the costs of Measure 1 which was found by the Commission to be necessary and proportionate for the achievement of the local capacity performance targets, in accordance with the findings set out in recital (82).

⁽²⁴⁾ Amount reflecting the share of the costs of Measure 2 which was found by the Commission to be necessary and proportionate for the achievement of the local capacity performance targets, in accordance with the findings set out in recital (90).

Measure 6	1,5M EUR
Measure 7	0,3M EUR
Total	19,2M EUR

- (121) As presented in the table set out in recital (120), the capacity-related measures justify an excess of 19,2 million EUR (in EUR 2017) against the Union-wide DUC trends. That excess is larger than the estimated deviation from the RP3 Union-wide DUC trend, amounting to 8,2 million EUR (in EUR 2017), but is smaller than the estimated deviation of 43,7 million EUR (in EUR 2017) from the long-term Union-wide DUC trend. Hence, Belgium and Luxembourg still have a remaining unjustified gap of 24,5 million EUR (in EUR 2017) against the long-term Union-wide DUC trend.
- (122) Therefore, the Commission concludes that the criterion set out in point 1.4(d)(i) of Annex IV to Implementing Regulation (EU) 2019/317 is not fulfilled in respect of Belgium and Luxembourg.
- (123) Furthermore, the Commission notes that Belgium and Luxembourg have not presented in the revised draft performance plan any restructuring measures which would justify a deviation from the Union-wide DUC trend or from the Union-wide long-term DUC trend pursuant to the criterion set out in point 1.4(d)(ii) of Annex IV to Implementing Regulation (EU) 2019/317.

Conclusion on the assessment of the revised performance targets

- (124) In the light of the assessment set out in recitals (22) to (123), the Commission concludes that the cost-efficiency performance targets for the Belgium-Luxembourg charging zone are inconsistent with the Union-wide performance targets.

FINDINGS FROM THE REVIEW OF THE REVISED PERFORMANCE TARGETS CONDUCTED IN ACCORDANCE WITH POINT 2 OF ANNEX IV TO IMPLEMENTING REGULATION (EU) 2019/317

Revised terminal cost-efficiency performance targets – point 2.1(c) of Annex IV to Implementing Regulation (EU) 2019/317

- (125) In Implementing Decision (EU) 2022/728, the Commission raised concerns on the terminal cost-efficiency performance targets proposed by Belgium in the draft performance plan. Those cost-efficiency targets apply only in respect of terminal air navigation services provided at Brussels airport. The Commission considered in that Implementing Decision that Belgium should have further justified those targets or revised them downwards.
- (126) The Commission notes that the revised draft performance plan contains improved terminal cost-efficiency performance targets for Belgium in respect of calendar years 2022 to 2024, including a reduction of the determined costs in real terms for those calendar years. The Commission observes that the terminal DUC trend of +4,5 % over RP3 remains nonetheless higher than the *en route* DUC trend of +1,9 % over RP3 and higher than the actual terminal DUC trend of +0,5 % observed over RP2. Furthermore, the Commission observes that the DUC for terminal air navigation services at Brussels airport remains higher, by an estimated significant margin of 55 %, than the median terminal DUC of its relevant comparator group of airports.

- (127) In the light of assessment set out in recitals (125) and (126), the Commission concludes that the revised terminal cost-efficiency performance targets proposed by Belgium continue to give rise to concerns. The Commission therefore reiterates its view, as set out in Implementing Decision (EU) 2022/728, that Belgium should provide adequate justifications for those targets or revise them downwards.

Incentive schemes for the achievement of capacity performance targets – point 2.1(f) of Annex IV to Implementing Regulation (EU) 2019/317

- (128) In Implementing Decision (EU) 2022/728, the Commission concluded that Belgium and Luxembourg were to revise their incentive schemes for achieving *en route* and terminal capacity targets in such a way that the maximum financial disadvantage stemming from those incentive schemes is set at a level having a material impact on the revenue at risk. The Commission notes that Belgium and Luxembourg have not made any changes to those incentive schemes in the revised draft performance plan.
- (129) Therefore, the Commission concludes that the incentive schemes set out by Belgium and Luxembourg in the revised draft performance plan continue to give rise to concerns. The Commission therefore reiterates its view that Belgium and Luxembourg should revise their incentive schemes for achieving *en route* and terminal capacity targets so that the maximum financial disadvantages stemming from those incentive schemes are set at a level having a material impact on the revenue at risk, as required by Article 11(3), point (a) of Implementing Regulation (EU) 2019/317. In the Commission's view the revised incentive scheme should lead to a maximum financial disadvantage equal to or higher than 1 % of determined costs.

CONCLUSIONS

- (130) In light of the above, Belgium and Luxembourg should take corrective measures within the meaning of Article 11(3), point (c), third paragraph, of Regulation (EU) No 549/2004. Those corrective measures should enable Belgium and Luxembourg to achieve consistency with the Union-wide cost-efficiency performance targets for RP3 which corresponds, on the basis of the Commission's assessment set out in this Decision, to a reduction of the determined costs for the *en route* charging zone of Belgium and Luxembourg by 24,5 million EUR, expressed in real terms in 2017 prices.
- (131) The Commission notes that Belgium intends to carry out a compliance review of the performance of skewes and MUAC, in which it has invited Commission services to take part as observers. The Commission understands that the compliance review will support the preparation by Belgium of a draft final performance plan, which should take into account the corrective measures. Should this compliance review produce new evidence, the Commission intends to take account of that new evidence.
- (132) Certain corrective measures to be taken by Belgium and Luxembourg in accordance with this Decision might not, due to their nature, produce their full effects in RP3. However, Belgium and Luxembourg should still start implementing them in RP3, on the basis of binding commitments to be set out as part of their draft final performance plans, even if those measures generate cost-efficiency improvements in the next reference period.
- (133) The corrective measures should be put in place as part of draft final performance plans to be submitted to the Commission within three months from the date of adoption of this Decision, in accordance with Article 15(6) of Implementing Regulation (EU) 2019/317. Those draft final performance plans should be adopted individually, at national level, by Belgium and Luxembourg, given that performance target setting activities at FABEC level have been discontinued as a result of the withdrawal of France, Germany and the Netherlands from the revised draft FABEC performance plan, as explained in recital (6).
- (134) In the light of the findings set out in this Decision, Belgium and Luxembourg should, in particular, appropriately address the following issues:
- (a) Incorrect application of the respective legal provisions governing traffic risk sharing, cost risk sharing and incentive schemes in respect of MUAC, referred to in recitals (46) and (47);

- (b) Requested verification by the NSAs that the costs charged in RP2 for the cancelled and delayed investments in fixed assets are not double-charged to airspace users in the event that those investments materialize at later stage, as referred to in recitals (48) and (49);
 - (c) Incorrect financing arrangements for the costs incurred for services provided in cross-border areas, referred to in recitals (56) to (62);
 - (d) Incorrect allocation of the approach costs between *en route* and terminal air navigation services in respect of skeyes, referred to in recitals (63) to (67);
 - (e) Lack of adequate justifications for excessive terminal cost-efficiency targets of Belgium, referred to in recitals (125), (126) and (127);
 - (f) Incorrect level of the maximum financial disadvantages in the incentive schemes of Belgium and Luxembourg supporting the achievement of *en route* and terminal capacity targets, referred to in recitals (128) and (129).
- (135) The Single Sky Committee did not deliver an opinion. An implementing act was deemed to be necessary and the chair submitted the draft implementing act to the appeal committee for further deliberation. The appeal committee did not deliver an opinion,

HAS ADOPTED THIS DECISION:

Article 1

- (1) Belgium and Luxembourg shall define and communicate to the Commission corrective measures designed to achieve the consistency of national cost-efficiency performance targets with the Union-wide cost-efficiency performance targets for the third reference period within three months from the date of the adoption of this Decision.
- (2) Belgium and Luxembourg shall start applying those corrective measures in respect of skeyes and the Maastricht Upper Area Control Centre ('MUAC') in RP3. Those measures shall result in the reduction of the determined costs for the Belgium-Luxembourg *en route* charging zone by an amount leading to the consistency of the national cost-efficiency performance targets with the Union-wide cost-efficiency performance targets. That amount will be more precisely determined by Belgium and Luxembourg on the basis of the results of the compliance review referred to in recital (131) of this Decision and reviewed by the Commission as a part of its assessment under Article 15(7) of Commission Implementing Regulation (EU) 2019/317, taking account of the evidence resulting from that compliance review. The corrective measures shall lead to the reduction of the operating costs of both skeyes and MUAC.
- (3) In defining the corrective measures, Belgium and Luxembourg may also take account of the proposed additional measures set out in the Annex.
- (4) Belgium and Luxembourg shall include information in their respective performance plans demonstrating that skeyes and MUAC will effectively implement the corrective measures.

Article 2

This Decision is addressed to the Kingdom of Belgium and the Grand Duchy of Luxembourg.

Done at Brussels, 16 June 2023.

For the Commission
Adina-Ioana VĂLEAN
Member of the Commission

ANNEX

PROPOSED ADDITIONAL MEASURES

Belgium and Luxembourg may take the following measures in order to remedy the inconsistency of the cost-efficiency performance targets for the Belgium-Luxembourg charging zone with the Union-wide cost-efficiency performance targets:

- (1) amend the DISPO functional availability regime applied in Belgium, in view of reducing its impact on the cost base of the Belgium-Luxembourg charging zone;
 - (2) waive the return on equity of skeys which is planned to be charged as part of the cost of capital;
 - (3) reimburse to airspace users, through an exceptional cost reduction, any surplus from year 2022 resulting from the traffic risk sharing mechanism or from the difference between the determined and actual costs.
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