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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union on the review of limits of liability conducted by the ICAO under Article 24 of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the position to be taken on the Union's behalf in the International Civil Aviation Organization (ICAO) in respect of the review of the limits of liability conducted by the ICAO under Article 24 of the Convention for the Unification of Certain Rules for International Carriage by Air (the 'Montreal Convention').

2. CONTEXT OF THE PROPOSAL

2.1. The Montreal Convention

The Montreal Convention, agreed at Montreal on 28 May 1999, sets up rules on liability in respect of the international carriage by air of persons, baggage and cargo. It replaced those set out in the Warsaw Convention of 1929 and its subsequent amendments.

The European Union and all its Member States are parties to the Montreal Convention¹.

2.2. The International Civil Aviation Organization

The ICAO is a specialised agency of the United Nations. The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport.

2.3. The envisaged review of the liability limits under Article 24 of the Montreal Convention

The Montreal Convention establishes in its Articles 21 and 22 the liability limits of the air carrier for damages in relation to the carriage of passengers, baggage and cargo. The amounts so established are expressed in Special Drawing Rights (SDRs), a unit of account created by the International Monetary Fund (IMF).

At the Diplomatic Conference which adopted the Montreal Convention, States were mindful of the need to ensure that the limits of liability retain their economic value with the passage of time and that they would not erode due to inflation or other economic factors subsequent to the coming into force of the Convention.

To this end, the Montreal Convention provides in its Article 24 (Review of Limits) a built-in mechanism for a periodic review and revision as necessary of the aforementioned limits of liability. The review mechanism was deliberately designed along the lines of a tacit approval process, ensuring general application while involving all States Parties.

Article 24(1) provides that the limits of liability be reviewed by the Depositary (ICAO) at five-year intervals. The last review took place in 2019. Pursuant to Article 24(1), the limits shall be reviewed by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision. The measure of the rate of inflation to be used in determining the inflation factor is the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the SDR.

As detailed in the ICAO State Letter LE 3/38.1-IND/24/4 of 28 June 2024, for the current review it is necessary to consider the inflation factor since 2018. As a result of the review carried out by the ICAO, the inflation factor for the relevant review cycle has been

¹ Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) (OJ L 194, 18.7.2001, p. 38).

determined to exceed 10 per cent, which is the threshold stipulated in the Convention for triggering an adjustment of the limits of liability.

The determined inflation factor is 17.9 per cent. As a consequence, the limits of liability would need to be adjusted as follows:

<i>Montreal Convention 1999</i>	<i>Original limit (SDRs)</i>	<i>Revised limit (SDRs) as of 28 December 2019</i>	<i>Rounded Revised limit (SDRs)*</i>
Article 21	100 000	128 821	151 880
Article 22, paragraph 1	4 150	5 346	6 303
Article 22, paragraph 2	1 000	1 288	1 519
Article 22, paragraph 3	17	22	26

*For ease of reference, one SDR was valued on 12 June 2024 at U.S. \$ 1.32.

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

In line with the tacit approval mechanism spelled out in Article 24(2) of the Montreal Convention, a revision of the limits of liability notified to the States Parties shall become effective six months after this notification, unless within three months after this notification a majority of States Parties have registered their disapproval with the ICAO.

In the absence of notifications of disapproval received from a majority of States Parties to the Montreal Convention by no later than 30 September 2024, the ICAO will notify all signatories and States Parties in accordance with Article 53(8)(d) of the Montreal Convention, regarding the date of the coming into force of the revised limits of liability.

It is therefore necessary to adopt the Union's position on the review of the liability limits as detailed in section 2.3.

In view of the technical nature of the said review, which follows the clearly defined method of calculation laid down in the Montreal Convention, there is no reason for the Union to object to the review.

This position is well in line with the Union's policy on consumer protection and ensures a high level of protection for air passengers.

Therefore, the position to be taken on the Union's behalf should be to not register any disapproval to the proposed new liability limits as detailed in the ICAO State Letter LE 3/38.1-IND/24/4 of 28 June 2024.

The Union is a party to the Montreal Convention and the revision of the liability limits falls in an area of exclusive Union competence, in which the Member States can no longer act in their national capacity unless duly authorised to do so pursuant to Article 2(1) TFEU². Therefore, it is in principle for the Union, represented by the Commission, to decide whether to register or not register disapproval in the context of Article 24(2) of the Montreal Convention.

² Opinion 2/91, Convention N° 170 of the International Labour Organization, EU:C:1993:106, paragraph 26.

However, Article 53(2) of the Montreal Convention, last sentence, provides that “*For the purpose of Article 24, the references to "a majority of the States Parties" and "one-third of the States Parties" shall not apply to a Regional Economic Integration Organisation*”. It is therefore unclear whether a disapproval submitted by Regional Economic Integration Organisations like the Union would be counted for the coming into effect of the revision of the limits of liability under Article 24(2) of the Montreal Convention. These considerations are not immediately relevant for the present case, where the Union position is not to register disapproval in the context of the review, and therefore no submission to the Depository of the Montreal Convention is to be made. However, in light of the rules of the Montreal Convention and pending a clarification thereof, this decision is addressed also to the Member States, which are therefore required not to register disapproval of the review.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing ‘*the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement*’.

The concept of ‘*acts having legal effects*’ includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are ‘*capable of decisively influencing the content of the legislation adopted by the EU legislature*’³.

4.1.2. Application to the present case

The envisaged review of the liability limits has legal effects for the purposes of Article 218(9) TFEU.

In accordance with Article 24(1) of the Montreal Convention, the Depository (ICAO) reviews the limits of liability at five-year intervals. In line with the tacit approval mechanism spelled out in Article 24(2), the said revisions shall become effective for all States Parties six months following the notification of the limits of liability. The revised liability limits will be binding under international law in accordance with Articles 21 and 22(1), (2) and (3) of the Montreal Convention, unless within three months after the notification, a majority of States Parties have registered their disapproval with the ICAO. The envisaged review of the liability limits will be capable of decisively influencing the content of EU legislation. Indeed, the Montreal Convention, which entered into force, so far as the Union is concerned, on 28 June 2004, has, as from that date, been an integral part of the Union legal order⁴.

The review at hand does not supplement or amend the institutional framework of the Montreal Convention.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

³ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

⁴ Judgment of the Court of Justice of 19 December 2019, Niki Luftfahrt, Case C-532/18, ECLI:EU:C:2019:1127, paragraph 30, and the case-law cited.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the revision of the reviewed liability limits relate to the common transport policy.

Therefore, the substantive legal basis of the proposed decision is Article 100(2) TFEU.

4.3. Conclusion

The legal basis of the proposed decision Article 100(2) TFEU, in conjunction with Article 218(9) TFEU.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 100(2), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Convention for the Unification of Certain Rules for International Carriage by Air (the ‘Montreal Convention’) agreed at Montreal on 28 May 1999 was approved by the Union by Council Decision 2001/539/EC of 5 April 2001⁵.
- (2) Pursuant to Article 24(1) of the Montreal Convention, the International Civil Aviation Organization (ICAO), as the Depositary to the convention, is to review the limits of liability prescribed in Articles 21, 22 and 23 at five-year intervals.
- (3) As a result of the latest review carried out by the ICAO, the limits of liability prescribed in Articles 21 and 22(1), (2) and (3) of the Montreal Convention need to be adjusted, as detailed in the ICAO State Letter LE 3/38.1-IND/24/4 of 28 June 2024. According to that letter, the said revisions are to become effective for all States Parties six months following their notification, unless within three months after this notification a majority of States Parties register their disapproval with the ICAO.
- (4) It is appropriate to establish the position to be taken on the Union’s behalf in the ICAO, as the revised limits of liability will be binding under international law, in accordance with Articles 21 and 22(1), (2) and (3) of the Montreal Convention, and as the Montreal Convention forms an integral part of the Union legal order.
- (5) In view of the technical nature of the said review, which follows the clearly defined method of calculation laid down in the Montreal Convention, there is no reason for the Union to object to the review.
- (6) Therefore, the position to be taken on the Union’s behalf should be to not register any disapproval to the proposed new liability limits as detailed in the ICAO State Letter LE 3/38.1-IND/24/4 of 28 June 2024.

⁵ Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) (OJ L 194, 18.7.2001, p. 38).

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in respect of the ICAO State Letter LE 3/38.1-IND/24/4 of 28 June 2024 shall be to not register any disapproval to the proposed new liability limits detailed in that State Letter.

Article 2

This Decision is addressed to the Commission and to the Member States.

Done at Brussels,

*For the Council
The President*