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NOTE

from : General Secretariat of the Council
to : Delegations

Subject : ICAO – Preparation of the 194th session of the ICAO Council
– Information note on ETS

Following the Coreper meeting on 28 October 2011, delegations will find attached a further revised version of the above-mentioned information note. Changes with respect to the previous version are marked with **bold** and ~~strike through~~.

INFORMATION NOTE

Coordination in preparation for the 194th session of the ICAO Council

Further to Council Working Document AVIA W. Doc. 2011/97 of 19 October 2011, and in preparation of the 194th session of the ICAO Council, the services of the Commission recommend the adoption of an EU position on the items of EU interest indicated below, and on the basis of the currently available relevant information.

1. Items in the area of environmental protection

- European Emissions Trading Scheme (C-WP/13761 *Information Paper submitted by the Secretary General* and C-WP/13790 *Working Paper submitted by 26 countries represented on the Council*)

This item is scheduled for discussion in the ICAO Council on 2 November. On-the-spot European coordination meetings will be organised by the ICAO Council Member representing the rotating presidency of the Council together with the EU Representative to ICAO.

194th ICAO Council session

Consideration of agenda items of EU interest – suggested Union positions

1. ITEMS IN THE AREA OF ENVIRONMENTAL PROTECTION

- **European Emissions Trading Scheme (C-WP/13761 *Information Paper submitted by the Secretary General* and C-WP/13790 *Working Paper submitted by 26 countries represented on the Council*)**

Background

On 2 November the ICAO Council will discuss the EU's inclusion of aviation in the EU Emissions Trading System (EU ETS). The issue was put on the ICAO Council agenda following a request made in June by South Africa, supported by many other members of the Council. The Secretary General has submitted a factual information paper describing the EU ETS and summarising ICAO's work on market-based measures (MBMs) (see C-WP/13761, as attached to Council Working Document AVIA W. Doc 2011/95). However, discussion will focus on the Working Paper submitted jointly by 26 states, which *inter alia* urges the EU and its Member States to refrain from including flights by non-EU carriers to/from an airport in the territory of an EU Member State in its emissions trading system (see C-WP/13790, as attached to Council Working Document AVIA W. Doc 2011/96).

This information note summarises the background to this issue, and proposes an EU position for the discussion that will take place in the ICAO Council. It also includes in Annex 1 a draft paper for possible submission to the ICAO Council by the eight EU Member States represented on the Council, and in Annex 2 a draft statement to be made in the event that the Council should adopt conclusions to which the EU needs to record its formal objections.

As a prelude to the discussion on 2 November the ICAO Council held an information session on 29 September. The Commission gave a comprehensive presentation on the inclusion of aviation in the EU ETS. This provided information to the Council on the EU ETS, including on its likely economic impacts and addressed some of the main concerns that have been expressed by third countries.

In addition, the presentation made clear that the EU is committed to working within ICAO for a global agreement, which could either be achieved through agreement for a harmonised global approach, or through interacting national and regional systems. It also highlighted the need for ICAO's follow-up work on market based measures to accelerate, in relation to further developing the framework for market based measures, performing the feasibility study on a global MBM system, and carrying out more work on medium and long term goals. Finally, it was emphasised that the EU is open to discussions concerning the exclusion from the EU ETS of incoming flights on the basis of the provisions in the Directive on third country measures. The legislation gives the Commission implementing powers for this purpose.

At the same time, on 29-30 September, a meeting was taking place in Delhi to which India had invited all non-EU members of the ICAO Council, as well as a number of other states. This resulted in the adoption of the Joint Declaration, signed by 21 States, which is now appended to C-WP/13790.

Prospects for the ICAO Council discussion

Given that 26 of the 36 States on the ICAO Council are supporting the positions set out in C-WP/13790, it seems inevitable that these positions will be agreed by the Council. We are in relatively untested legal territory here, but we do not believe that a decision by the ICAO Council has legally binding effect, as distinct from the specific procedure under Article 84 of the Chicago Convention for the settlement of disputes with a right of appeal. It is clear however that a decision adopted by the ICAO Council would constitute an important political statement. If it calls on states to take certain action, or to refrain from certain action, on the grounds of an incompatibility with the Chicago Convention, then failure to comply could be used as an element in any subsequent dispute settlement procedure under Article 84 of the Convention.

For this reason, it will be extremely important that the EU position, including all the arguments against the line set out in C-WP/13790, is fully articulated during the discussion and thereby recorded in the minutes.

While it seems clear that the eight EU Member States (quite possibly together with Australia) will be in a minority in the discussion, there may be different possibilities for how the outcome is presented. The most benign outcome foreseeable at this stage would be one, perhaps without a vote, where the President of the Council is able to conclude that there is broad agreement on a number of points, but that there remains disagreement on certain other issues, with a large majority of the Council taking one view and a minority taking a contrary view. The prospects for such an outcome are likely to be stronger if the EU Member States were to submit a paper of their own to the meeting. Any such paper should be as constructive, and supportive of ICAO's role, as possible in order for the President to identify substantial common ground. At the same time it would need to highlight the main areas where the EU Member States take issue with C-WP/13790. A draft paper is attached at Annex 1 for consideration.

Alternatively, it seems likely that the 26 States submitting C-WP/13790 will simply push for the Council to adopt its recommendations. In this case the EU Member States would have to make clear that they do not support the outcome, or to make clear which parts of the outcome are unacceptable. In this case, and in any event if a vote is called for, it will be important that a clear statement is made that can subsequently be included in the minutes of the meeting. For this purpose, a draft statement is attached at Annex 2.

Observations on C-WP/13790

It should be noted from the outset that there are *some* elements of C-WP/13790 that can be supported, as set out in paragraph 7 below, such as its call for action in ICAO on CO₂ emissions.

On the other hand, there are a number of critical observations that are worth making, and which could be usefully deployed during the discussion. These include challenging some of the unsubstantiated assertions made relating to legal aspects or the interpretation of Resolution A37-19. The most important such points are the following.

Paragraph 2.2 asserts that the EU ETS violates the principle of state sovereignty laid down in Article 1 of the Chicago Convention. This assertion must be rejected. Article 1 of the Chicago Convention recognises that every State has complete and exclusive sovereignty over the airspace above its territory.

A State may not therefore perform any act in the territory of another State without the latter's consent. But the EU ETS has no regulatory effect whatsoever concerning how aircraft fly over the territory of other states or the high seas. The EU ETS is not extraterritorial since it applies to take offs and landings in the EU and does not regulate conduct outside the EU. In particular no enforcement occurs outside the EU. The fact that emissions over entire flights landing at or departing from the EU are taken into consideration in order to determine aircraft operators' obligations under the EU ETS is not tantamount to the exercise of sovereignty or regulatory powers over third countries' airspace. This was the line taken by the Commission, the Council and the European Parliament together with Member States in the ECJ proceedings, and this was supported by the Advocate's General opinion on 6 October 2011.

Paragraph 1.5 states that the EU ETS also applies to parts of the flight outside EU airspace. To respond to this statement it should be recalled that an airspace approach was rejected by the UNFCCC as early as 1996 and described by ICAO as "impracticable" in 2007. In 1996 the UNFCCC's Subsidiary Body for Scientific and Technological Advice ("SBSTA") considered eight options for allocating emissions from international aviation to states and specifically rejected the airspace based approach. In ICAO, the 2004 Assembly Resolution (A35-5) requested the Council to provide guidance for use by Contracting States to incorporate emissions from international aviation into existing emission trading systems. The subsequent guidance on emissions trading (ICAO Doc 9885¹) considered the airspace based approach "impracticable".

Paragraph 2.3 asserts that the EU ETS violates the United Nations Framework Convention on Climate Change (UNFCCC), but contains no further explanation. It can be expected that the proponents will state that the grounds for this assertion are that the ETS is incompatible with the UNFCCC's principle of "common but differentiated responsibilities and respective capabilities" (CBDR) because it does not distinguish between airlines or routes from developing as compared to developed countries. The basic response to this is that the principle of CBDR applies to the measures that States should take in relation to their markets, and does not apply to companies active in a particular market. Under the Chicago Convention, the basic principle is non-discrimination, and the EU ETS is fully consistent with this.

¹ Guidance on the Use of Emissions Trading for Aviation, ICAO Doc 9885, First edition 2008.

It is also worth pointing out that the US, in its statement of reservation with regard to Resolution A37-19, stated that: "in particular we object to paragraph 6(c), which would ... unduly differentiate among ICAO Member States in a manner inconsistent with the Chicago Convention".

Paragraph 2.4 notes that the EU ETS has been implemented without any concurrence of ICAO or of non-EU Member States. However, as the European States have stated in their reservation against Resolution A37-19, the Chicago Convention contains no provision which might be construed as imposing upon the Contracting Parties the obligation to obtain the consent of other Contracting Parties before applying the market-based measures referred to in Resolution A37-19 to operators of other States in respect of air services to, from or within their territory. On the contrary, the Chicago Convention recognises expressly the right of each Contracting Party to apply on a non-discriminatory basis its own laws and regulations to aircraft of all States.

Paragraph 2.4 also assert that implementation of EU ETS would pre-empt and negate Resolution A37-19, which requests the ICAO Council to develop a framework for market-based measures for consideration at the 38th Assembly. However, on the contrary, the Resolution explicitly foresees, in paragraphs 14 and 17, the possibility that existing market-based measures may be implemented.

Union position

It is important to bear in mind that this ICAO Council meeting will not be decisive, and we should not therefore over-react to the draft Resolution presented by the opponents of ETS. It is one step in a process which can be expected to evolve. For example, in the event that an Article 84 procedure were to be launched subsequently, this would lead to a further process likely involving mediation and further negotiation. The EU's position at this ICAO Council should be to defend the EU legislation robustly and calmly, while making clear the EU's commitment to strongly support making progress in ICAO (this will be a critical element also in the eyes of the leadership of the ICAO, such as President Kobeh) and our willingness to continue to engage in constructive discussions with all international partners.

It is proposed that the position taken by the EU Member State representatives on the Council should include the following elements:

1. The critical importance of addressing aviation's climate impacts effectively should be stressed. This is fundamental to securing for the aviation industry globally its ability to continue growing.
2. Full support should be expressed for the role of ICAO in addressing the climate impacts of international aviation, and for the implementation of Resolution A37-19.
3. It should be stressed that the EU has acted wholly consistently with ICAO policy, notably in the following respects:
 - a. ICAO decided in 2004 not to pursue any further the development of an aviation-specific emissions trading system based on a new legal instrument under ICAO auspices. Instead, it endorsed open emissions trading and the possibility for States to incorporate emissions from international aviation into their emissions trading schemes. This is what the EU has subsequently done.
 - b. The EU ETS legislation is fully compatible both with the ICAO guidance on emissions trading (notwithstanding the evident differences of view over geographical scope), and with ICAO Assembly Resolution A37-19. The assertion made in C-WP/13790 that the EU ETS would "pre-empt and negate" Resolution A37-19 should be firmly rejected. In particular Resolution A37-19 contains:
 - i. In paragraph 6(c), explicit recognition that some states may take more ambitious action prior to 2020, in support of ICAO's collective medium term goal.
 - ii. In paragraph 14, explicit recognition that States may implement existing MBMs.
 - iii. In the Annex, a set of fifteen guiding principles for the design and implementation of MBMs, with which the EU ETS is fully consistent.

4. It should be recognised that other States and industry have raised legal concerns. The legal issues are properly matters to be decided ultimately by the courts, and the EU will of course respect the rule of law. There is an ongoing legal case before the European Court of Justice. It should be pointed out that the Opinion issued by the Advocate General on 6 October contains a thorough analysis of all legal issues raised by the claimants, and has concluded that the EU legislation does not infringe the sovereignty of other States or the freedom of the high seas guaranteed under international law, and is compatible with the relevant international agreements. At the same time it should be noted that this is not the Court's judgement, which is still awaited.
5. The assertion that the inclusion of international aviation in the EU ETS violates the relevant provisions of the UNFCCC should be rejected. It is incorrect. The EU is taking action as a group of industrialised countries who recognise their responsibility to act. In any case this claim relates to the UNFCCC, but not to ICAO.
6. It must be made absolutely clear that the EU and its Member States are open to discussions with all third countries on how the flexibility provisions in the Directive can best be exploited. Specifically, where a third country takes measures to reduce the climate impact of flights to the EU, the legislation gives the European Commission implementing powers that enable it to exclude these incoming flights from the scope of the ETS. It should be stressed that these powers apply only to incoming flights. Any other changes to the Directive, including suspension of its operation by even a very short period, would require the full legislative process, involving negotiations between and approval by the 27 Member States and the European Parliament, a process which normally takes two years or more. The Directive as implemented nationally by all Member States and EEA countries would apply in full in its current form in the meantime.

7. Attention should also be drawn to the fact that the legislation foresees that, in the event of an international agreement on global measures, the Commission will consider adapting the EU system accordingly. In this context, it must be made clear that the EU and its Member States fully support the process of reaching agreement on global measures. At the same time, Resolution A37-19 clearly does not envisage a moratorium on national or regional measures pending agreement on global measures.
8. On the specific action points in C-WP/13790, the EU position should be as follows:
 - a) Take note of the implications of inclusion of aviation in the EU ETS with regard to provisions of the Chicago Convention
 - It should be made clear that, in the view of the EU and its Member States, there is no incompatibility with the Chicago Convention.
 - b) Continue working on the basis of paragraphs 13 and 18 of Resolution A37/19
 - This can be supported.
 - c) Re-affirm the importance of the role of ICAO in addressing aviation emissions
 - This can be supported.
 - d) Welcome and adopt the Joint Declaration adopted in New Delhi on 30 September 2011
 - It should be made clear that, while there are several parts of the Joint Declaration which can be agreed, there are others which are not acceptable. Notably, objections should be expressed to points 5, 6 and 8.
 - e) Urge the EU and its Member States to refrain from including flights by non-EU carriers to/from an airport in the territory of an EU Member State in its emissions trading system
 - It should be made clear that this is unacceptable. Taking this at face value would discriminate between operators on the grounds of nationality and leave only flights by EU carriers subject to the ETS. This would seem to be contrary to Article 11 of the Chicago Convention. It would also lead to significant market distortions.

- f) Urge EU and its Member States to work collaboratively with the rest of the international community to address aviation emissions
- It should be made clear that the EU and its Member States are fully committed to working collaboratively with all its international partners, and hopes that other states share this commitment.
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Draft Paper for consideration of the Council when discussing Item No. 25 of the Work Programme of the Council for the 194th Session ("European Emissions Trading Scheme (ETS)")

Introduced by the Council Members of Belgium, Denmark France, Germany, Italy, Slovenia, Spain, and the United Kingdom.

Referring to C-WP/13790 and its Appendix this room document sets out the areas where it is hoped that agreement between Council Members could be reached. On the other hand it indicates on which issues and for what reasons the European members of the Council are not in agreement with what is stated in C-WP/13790. It also underlines areas of flexibility of the EU ETS in respect of international aviation.

The Council is invited to note these areas of agreement as well as these areas of non-agreement.

1. Introduction

1.1 The need to address the climate impacts of international aviation is urgent. Not only is it essential to ensure that aviation contributes effectively to tackling climate change, it is also fundamental to securing for the aviation industry globally its ability to continue growing.

1.2 European States welcomed the adoption by the 37th Assembly of Resolution A37-19 as an important step forward. It established a comprehensive framework for limiting or reducing emissions from international aviation that contribute to global climate change, and defined a programme of further work to be developed within ICAO. This includes the submission of action plans to ICAO by States, and further work on global goals and measures, notably market-based measures.

The Resolution also importantly contains recognition that some States may take more ambitious actions prior to 2020, and that States are implementing existing market-based measures. This is important, as global aviation emissions are projected to be around 70% higher than 2005 levels by 2020. We must consider this significant emissions growth in the context of last year's Cancun agreement at the UNFCCC conference, where all parties agreed to an international commitment to "deep cuts in global greenhouse gas emissions" in order to limit the increase in global average temperature below 2° C. Aviation needs to play a role in delivering this globally agreed goal.

2. Areas of agreement

- 2.1** European States fully support ICAO continuing to undertake efforts to reduce aviation's contribution to climate change, and agree on the importance of States working collaboratively in support of that process. European States are taking ambitious and comprehensive actions in support of the sustainable development of aviation being pursued by Resolution A37-19.
- 2.2** C-WP/13790 proposes a number of actions to the Council. Some of these actions can be fully supported. In particular, re-affirming the importance of the role of ICAO in addressing aviation emissions is to be fully supported. Similarly, it is important to advance work in ICAO on the basis of paragraphs 13 and 18 of Resolution A37-19.
- 2.3** C-WP/13790 invites the Council to welcome and adopt the Joint Declaration that was adopted by a number of states in New Delhi on 30 September 2011. Many of the elements in this Joint Declaration can be supported: European States share the view that aviation plays an essential role in economic progress and market access for the world economy and its citizens, and recognise the importance of sustainable development. European States also welcome the intention to collaborate in support of operational changes and improvements to air traffic management and airport systems, and are actively working in this direction through the Single European Sky and SESAR initiatives.

Europe is also active in accelerating the development and implementation of low-carbon aircraft technologies, notably through the Clean Sky Joint Technology Initiative, and has initiated a process also to accelerate development of sustainable alternative fuels. And Europe is actively supporting the process of developing an aircraft CO₂ standard through participation in CAEP, including co-rapporteurship of this task.

2.4 It is notable that the Joint Declaration says nothing about progressing work on market based measures in ICAO. As long ago as 2001, the ICAO Assembly highlighted market-based measures as being "*policy tools that are designed to achieve environmental goals at a lower cost and in a more flexible manner than traditional regulatory measures*" (Resolution A33-7), and Resolution A37-19 contains many items of further work relating to market-based measures. European States would welcome this aspect being reflected in the Joint Declaration.

3. Areas of non-agreement – reasons - flexibility

3.1 The inclusion of aviation in the EU's Emissions Trading System (EU ETS) is a key element in Europe's comprehensive approach to addressing aviation's growing greenhouse gas emissions. It is fully consistent with international law and with ICAO policy.

3.2 It is important to recall that ICAO decided in 2004 not to pursue any further the development of an aviation-specific emissions trading system based on a new legal instrument under ICAO auspices. Instead, it endorsed open emissions trading and the possibility for States to incorporate emissions from international aviation into their emissions trading schemes. This is what the EU has subsequently done.

3.3 The EU ETS legislation is fully compatible with ICAO Assembly Resolution A37-19. In particular Resolution A37-19 contains:

- i. In paragraph 6(c), explicit recognition that some states may take more ambitious action prior to 2020, in support of ICAO's collective medium term goal.

- ii. In paragraph 14, explicit recognition that States may implement existing MBMs.
- iii. In the Annex, a set of fifteen guiding principles for the design and implementation of MBMs, with which the EU ETS is fully consistent.

3.4 European States cannot agree to the negative positions expressed in relation to the EU ETS. C-WP/13790 asserts that the EU ETS violates Article 1 of the Chicago Convention and the relevant provisions of the United Nations Framework Convention on Climate Change. European States believe these assertions to be unfounded. The EU's legislation to include aviation in the EU Emissions Trading System is fully compatible with the provisions and principles of international law, including the Chicago Convention. In particular it is important to note that the legislation does not contain any provision contrary to international law, nor does it infringe the sovereign rights of third countries.

3.5 It is also incorrect to say that the inclusion of international aviation in the EU ETS violates the relevant provisions of the UNFCCC. The EU is taking action as a group of industrialised countries who recognise their responsibility to act. In any case this claim relates to the UNFCCC, and not to ICAO. And the assertion in C-WP/13790 that the EU ETS would "pre-empt and negate" Resolution A37-19 is also incorrect. As explained in paragraph 6 above, Resolution A37-19 explicitly recognises that existing market-based measures may be implemented.

3.6 It must be made clear that EU ETS legislation contains provisions for flexibility. The EU and its Member States are open to discussions with all third countries on how these flexibility provisions can best be exploited. Specifically, where a third country takes measures to reduce the climate impact of flights to the EU, the legislation gives the European Commission implementing powers that enable it to exclude these incoming flights from the scope of the EU ETS. It should be stressed that these powers apply only to incoming flights.

Any other changes to the Directive, including suspension of its operation by even a very short period, would require the full legislative process, involving negotiations between and approval by the 27 Member States and the European Parliament, ~~a process which normally takes two years or more~~. The Directive as implemented nationally by all Member States and EEA countries would apply in full in its current form in the meantime.

- 3.7** The legislation also foresees that, in the event of an international agreement on global measures, the Commission will consider adapting the EU system accordingly. In this context, European States reiterate that they fully support the process of reaching agreement on global measures. Resolution A37-19 clearly does not envisage a moratorium on national or regional measures pending agreement on global measures.

Draft Statement

It is disappointing that the Council should adopt this decision against the views of all EU representatives in the Council. The need to address the climate impacts of international aviation is urgent. European States welcomed the adoption by the 37th Assembly of Resolution A37-19 as an important step forward. It established a comprehensive framework for limiting or reducing emissions from international aviation that contribute to global climate change, and defined a programme of further work to be developed within ICAO. This includes the submission of action plans to ICAO by States, and also further work on global goals and measures, notably market-based measures. The Resolution also importantly contains recognition that some States may take more ambitious actions prior to 2020, and that States are implementing existing market-based measures.

European States fully support ICAO continuing to undertake efforts to reduce aviation's contribution to climate change, and agree on the importance of States working collaboratively in support of that process. European States are taking ambitious actions in support of the sustainable development of aviation being pursued by Resolution A37-19, and it is disappointing that other States are seeking to discourage these actions from being implemented effectively.

We firmly believe that this Council decision is based on a fundamentally flawed and erroneous interpretation of the Chicago Convention. We are firmly of the view that the EU's legislation to include aviation in the EU Emissions Trading System is compatible with the provisions and principles of international law, including the Chicago Convention. In particular the legislation does not contain any provision contrary to international law, nor does it infringe any sovereign rights of third countries.

The European States make this statement in order to fully clarify their position and reserve their rights with regard to the matters addressed in the Council decision.
