

FABEC States (Belgium, Germany, France, Luxemburg, The Netherlands and Switzerland) proposals to the EC draft legal text on RP3 exceptional measures (ad-hoc SSC 15 September 2020)

To: Christine Berg, Rolf Tuchhardt (EC DG MOVE, Unit Single European Sky)
CC: SSC members and observers

Date: 11 September 2020



EUROPEAN
COMMISSION

Brussels, XXX
[...](2020) XXX draft

COMMISSION IMPLEMENTING REGULATION (EU) .../...

of XXX

on exceptional measures for the third reference period (2020-2024) of the single European sky performance and charging scheme due to the COVID-19 pandemic

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COMMISSION IMPLEMENTING REGULATION (EU) .../...

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on exceptional measures for the third reference period (2020-2024) of the single European sky performance and charging scheme due to the COVID-19 pandemic

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 (the framework Regulation)¹ and in particular Article 11(6) thereof,

Having regard to 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 (the service provision Regulation)², and in particular Article 15(4) thereof,

Whereas:

- (1) Commission Implementing Regulation (EU) 2019/317³ sets out the detailed rules and procedures for the implementation of the performance and charging scheme, including the performance of air navigation services and network functions as well as the determination, imposition and enforcement of air navigation charges to airspace users.
- (2) The COVID-19 pandemic has led to a sharp drop in air traffic as a result of a significant fall in demand and direct measures taken by the Member States as well as third countries to contain the outbreak of the pandemic. The extraordinary circumstances caused by the COVID-19 pandemic have a significant impact on the current processes and measures for the implementation of the performance and charging scheme in the third reference period 2020-2024 ('RP3'), including the setting of performance targets and unit rates as well as the application of incentive schemes and risk sharing mechanisms. That has created an exceptional situation which needs to be addressed with specific temporary measures.
- (3) Member States have submitted to the Commission their draft performance plans for RP3 by 1 October 2019, as well as subsequent updated draft performance plans by 21 November 2019. Pursuant to Article 11(3) of Regulation (EC) No 549/2004, the Commission carried out an assessment of the consistency of those draft performance plans with the Union-wide performance targets set out in Commission Implementing Decision 2019/903⁴. However, both the draft performance plans and the Union-wide performance targets were drawn up before the outbreak of the COVID-19 pandemic

¹ OJ L 96, 31.3.2004, p. 1.

² OJ L 96, 31.3.2004, p. 10.

³ Commission Implementing Regulation (EU) 2019/317 of 11 February 2019 laying down a performance and charging scheme in the single European sky and repealing Implementing Regulations (EU) No 390/2013 and (EU) No 391/2013 (OJ L 56, 25.2.2019, p. 1).

⁴ Commission Implementing Decision (EU) 2019/903 of 29 May 2019 setting the Union-wide performance targets for the air traffic management network for the third reference period starting on 1 January 2020 and ending on 31 December 2024 (OJ L 144, 3.6.2019, p. 49).

and hence do not take account of the resulting significantly changed circumstances for air transport.

- (4) Because of the significant, unprecedented impact of the COVID-19 pandemic on the aviation sector, and in particular on the provision of air navigation services, certain rules derogating from Implementing Regulation (EU) 2019/317 should apply for the purpose of RP3. Implementing Regulation (EU) 2019/317 should apply to that reference period unless the present Regulation specifically provides for otherwise. Likewise, this Regulation should not affect adjustments to unit rates originating from the second reference period and based on Implementing Regulation (EU) 391/2013.
- (5) Given the uncertainties about traffic evolution subsequent to the outbreak of the COVID-19 pandemic, sufficiently robust traffic forecasts for the years until 2024 are not so far available. It is therefore necessary to provide for special rules for the setting of revised Union-wide performance targets for RP3 to ensure the continued implementation of this reference period. Reassurances have been received as to the publication of an updated STATFOR traffic forecast for RP3 in early November 2020. This traffic forecast will provide the basis for initiating the revision of the Union-wide performance targets for RP3. Considering the time constraints, the setting of those revised targets should exceptionally not be subject to all the processes and time limits set out in Article 9(1), (2) and (3a) of Implementing Regulation (EU) 2019/317. In order to enable the Commission to set the revised targets, national supervisory authorities should provide the Commission with initial cost data and information about traffic forecasts for the relevant calendar years by 15 December 2020, as inputs for the setting of the revised Union-wide performance targets for RP3. The Commission should adopt the revised Union-wide performance targets for RP3 not later than 1 May 2021.
- (6) Upon the setting of revised Union-wide performance targets by the Commission for RP3, Member States should establish performance plans containing revised performance targets for RP3. The process for performance target setting at national or functional airspace block level should be completed only after the revised Union-wide performance targets have been adopted. A new time limit for submission of draft performance plans should be set accordingly.
- (7) Since the circumstances caused by the COVID-19 pandemic have led to an unavoidable delay in the procedures related to the development, assessment and adoption of performance plans, having regard to the criteria set out in Article 11 of Regulation (EC) No 549/2004 the cost-efficiency performance targets contained in the final version of the performance plans should have a retroactive effect from the beginning of the reference period, in accordance with Article 17(2) of Implementing Regulation (EU) 2019/317. They should however only produce effects through unit rate adjustments in subsequent calendar years.
- (8) The Network Manager submitted to the Commission, in September 2019, a draft Network Performance Plan for RP3 in accordance with Article 19 of Implementing Regulation (EU) 2019/317. The Commission assessed the Network Performance Plan in accordance with Article 19(2) of that Regulation. Because of the material change of circumstances caused by the impact of the COVID-19 pandemic, which occurred after the submission of the draft Network Performance Plan, the Network Manager should draw up and submit for assessment by the Commission a new draft Network Performance Plan. The time deadline for submission of this plan should be set accordingly.

Met opmerkingen [VEd(-D1): The IR also proposes deviations from article 9(1) and 9(3). Art. 2(1) of this draft text foresees a deviation from 9(3).

- (9) It is expected that the revised determined costs for the combined calendar years 2020 and 2021 take due account of the fact that lower traffic volumes entailed by the circumstances of the COVID-19 pandemic ~~should have entail~~ measures ~~to reduce~~ the cost of providing air navigation services, compared to the ~~recorded actual~~ determined costs of air navigation service provision initially planned ~~in the year preceding the outbreak of the COVID-19 pandemic.~~
- (10) In order to alleviate the severe impact of the COVID-19 pandemic on both airspace users and ANSPs during RP3, while ensuring that ANSP costs remain financed through route charges, it is necessary to apply specific provisions for the purposes of calendar years 2020 and 2021 as regards the revision of performance targets in the key performance area of cost-efficiency at Union-wide and local levels, the implementation of incentive schemes and risk sharing mechanisms, as well as unit rate adjustments stemming from those two calendar years.
- (11) For the purpose of ensuring the proper application of the performance and charging scheme in RP3, and considering the forward-looking nature of performance target setting, the revision of cost-efficiency performance targets at Union-wide and local level should cover the ~~determined costs of calendar years 2020 and 2021 as a single period~~. In setting those revised cost-efficiency targets at Union-wide and local level, due account should be taken of the actual costs incurred by air navigation service providers and Member States, in particular in respect of calendar year 2020 and partially 2021.
- (12) The rules governing the consequences of a late adoption of performance plans set out in Implementing Regulation (EU) 2019/317 should be adapted so as to mitigate the severe adverse financial impact those mechanisms would otherwise have on airspace users as well as to avoid excessive volatility of unit rates during RP3. To this end, the corresponding unit rate adjustments should be exceptionally spread over a time period of five calendar years. National supervisory authorities should be allowed to extend the time period to seven calendar years, where this is necessary in order to avoid a disproportionate effect of the carry-overs on the unit rates charged to airspace users.
- (13) Member States may take additional measures to offset the impact of the COVID-19 pandemic on the level of air navigation charges during RP3, through the application of Article 29(6) of Implementing Regulation (EU) 2019/317.
- (14) In order to facilitate the discharge by national supervisory authorities and the Commission of their monitoring tasks, air navigation service providers should be obliged to submit a report to those authorities by 15 December 2020 regarding measures put in place in order to address the financial and operational impact of the COVID-19 pandemic on their activities.
- (15) The exceptional provisions should be immediately applied in order to enable the Commission and Member States to swiftly undertake the appropriate measures in respect of the performance target setting process for RP3 and the mitigation of the financial impact of the COVID-19 crisis both on airspace users and ANSPs. This Regulation should enter into force as a matter of urgency on the day following that of its publication in the Official Journal of the European Union
- (16) The measures provided for in this Regulation are in accordance with the opinion of the Single Sky Committee,

Met opmerkingen [VED(-D2): The background is to find a balance between ANSPs and AUs.

Rationale: The concern should appear of balancing on the one hand measures reducing the unit rates and on the other hand the need to ensure that costs needed for preserving the level of service by the ANSPs over the next years can continue to be financed through charges

Met opmerkingen [VED(-D3): Not just the determined costs are relevant for the DUC, but also the traffic forecast → either include reference to the traffic figures or delete determined costs.

Met opmerkingen [VED(-D4): Rationale: this formulation covers the whole period preceding the submission of the performance plans.

HAS ADOPTED THIS REGULATION:

Article 1
Subject matter and scope

This Regulation establishes exceptional measures to be applied for the third reference period ('RP3') of the single European sky performance and charging scheme referred to in Article 7(1) of Implementing Regulation (EU) 2019/317. The rules set out in Implementing Regulation (EU) 2019/317 apply, unless this Regulation specifically provides for otherwise.

Article 2
Setting of revised Union-wide performance targets for RP3

1. By way of derogation from Article 9(3) of Implementing Regulation (EU) 2019/317, the Commission shall set revised Union-wide performance targets for RP3 by 1 May 2021.
2. For this purpose, the Commission shall use en route traffic forecasts, expressed in terms of IFR movements and in service units and based on the latest available Eurocontrol's Statistics and Forecast Service ('STATFOR') base forecast in accordance with Article 9(3) of Implementing Regulation (EU) 2019/317.
32. By way of derogation from Article 9(1) of Implementing Regulation (EU) 2019/317, national supervisory authorities shall provide the Commission, as inputs for the setting of revised Union-wide performance targets, with initial cost data and information about traffic forecasts covering RP3, by 15 December 2020.
43. The requirements set out in the first subparagraph of Article 9(2) of Implementing Regulation (EU) 2019/317 shall not apply to the preparation of the revised Union-wide performance targets for RP3 referred to in paragraph 1. The consultation referred to in the second subparagraph of Article 9(2) of Implementing Regulation (EU) 2019/317 shall, by derogation from this provision, cover draft revised Union-wide performance target values.
5. When setting the union-wide targets following paragraph 1, the Commission shall duly take into account that the cost-efficiency performance for 2020 and partially 2021 cannot be retroactively adapted and that the targets need to reflect the actual costs and traffic figures.
46. By way of derogation from Article 8(1) and Article 9(3) of Implementing Regulation (EU) 2019/317, the revised Union-wide performance targets for RP3 referred to in paragraph 1 shall, in addition to performance targets for the key performance indicators as defined in section 1 of Annex I of Implementing Regulation (EU) 2019/317, include performance targets for the key performance indicator as amended in Article 4(1) of this Regulation.

Met opmerkingen [VED(-D5): Compared to the normal situation of the economic regulation, where the target are set and the performance plans are drafted in advance of the reference period, the current situation is different. By looking at 2020 and 2021 together there is a minimum of forward looking planning; however it is a fact that at the time of target setting and the drafting of the performance plans more than half / three quarters of the relevant period has passed and in consequence the ability of states/ANSPs to adapt their performance is limited; costs have been incurred and the actual traffic figures are known.

This special circumstances have to be taken into account during the target setting and also the later assessment of the draft performance plans.

Met opmerkingen [VED(-D6): Proposal to delete: Since there is no additional KPI, the only deviation with regards to the KPIs is the combination of the cost-efficiency targets for the years 20 and 21. Therefore there is no deviation from Art 8 (1) nor from Art 9 (3). The derogation from the yearly cost-efficiency target is covered by Art. 4 of the proposal.

Met opmerkingen [VED(-D7): In subsidiary order, should this paragraph not be deleted, proposal to delete this sentence, as no KPI is added.

Article 3
Submission and assessment of draft performance plans

1. By way of derogation from Article 12 of Implementing Regulation (EU) 2019/317, Member States shall prepare and submit to the Commission, by 1 October September 2021, draft performance plans, drawn up in accordance with Article 10 of that Implementing Regulation and containing revised performance targets ~~ensuring consistency with the revised Union wide performance targets referred to in Article 2 of this Regulation~~.
2. By way of derogation from Article 8(2) and Article 10(2)(a) of Implementing Regulation (EU) 2019/317, the draft performance plans referred to in paragraph 1 shall, ~~in addition to the performance targets for the key performance indicators as defined in section 2 of Annex I of Implementing Regulation (EU) 2019/317~~, include performance targets for the key performance indicator as amended in Article 4(2) of this Regulation.
3. By way of derogation from Article 11(1)(b) and 11(3) of Implementing Regulation (EU) 2019/317, the incentive schemes regarding performance targets in the key performance area of capacity referred to in Article 11(3) of that Implementing Regulation shall be subject to the following requirements in respect of RP3:
 - (a) the incentive schemes shall cover only the calendar years 2022 to 2024. Member States shall reflect this reduced period of the incentive schemes in their draft performance plans referred to in paragraph 1;
 - (b) the incentive schemes shall produce financial effects in the form of carry-overs and subsequent unit rate adjustments only as from the first year following the adoption of the performance plan.
4. In respect of the key performance area of cost-efficiency, the performance targets contained in the final RP3 performance plans adopted by Member States pursuant to Article 16 of Implementing Regulation (EU) 2019/317 shall apply retroactively from the beginning of the reference period in accordance with Article 17(2) of Implementing Regulation (EU) 2019/317.
5. When assessing the draft performance plans, in particular the local cost-efficiency targets for 2020 and 2021, following Articles 14 (1), 15 (1) (3) and (7) of Implementing Regulation (EU) 2019/317, the Commission shall duly take into account that the cost-efficiency performance for 2020 and partially 2021 cannot be retroactively adapted and that the local cost-efficiency targets need to reflect the actual costs and traffic figures.
56. By way of derogation from Article 19(1) of Regulation (EU) 2019/317, the Network Manager shall submit not later than 1 September October 2021 a revised draft Network Performance Plan for RP3 to the Commission for assessment.

Met opmerkingen [VED(-D8): Rationale: Same date as for submitting the initial RP3 plans. There is a requirement to consult stakeholders and to ensure follow-ups of the consultation: reports and fine-tuning. Additionally, due to summer period there is a real risk of unavailability of the data and staff to finalize and adopt the PP.

Met opmerkingen [VED(-D9): Proposal to delete: It is the ECs role to assess the consistency of the draft PP with the union wide target after submission; At this stage MS cannot ensure consistency – that would mean to preempt the assessment of the EC.

Met opmerkingen [VED(-D10): Proposal to delete the whole para. Since there is no additional KPI, the only deviation with regards to the KPIs is the combination of the cost-efficiency targets for the years 20 and 21. Therefore there is no deviation from Art 8 (2) nor from Art 10 (2) a). The derogation from the yearly cost-efficiency target is covered by Art. 4 of the proposal.

Met opmerkingen [VED(-D11): In subsidiary order, should this paragraph not be deleted, proposal to delete this sentence.

Met opmerkingen [VED(-D12): See new art. 2(5).

Met opmerkingen [VED(-D13): See art. 3(1).

Article 4

Derogations concerning the key performance indicators for RP3

1. By way of derogation from points 4.1(a) and 4.1(b) of Section 1 of Annex I of Implementing Regulation (EU) 2019/317, the key performance indicator on the year-on-year change of the average Union-wide ‘determined unit cost’ (DUC) for *en route* air navigation services shall be defined, in respect of calendar years 2020 and 2021, as a combined value for those two years, expressed as a percentage change from the Union-wide baseline value referred to in point (a) of Article 9(4) of Implementing Regulation (EU) 2019/317. For this purpose, a single average Union-wide DUC for calendar years 2020 and 2021 shall be calculated as a ratio between the total *en route* determined costs at Union level for those two calendar years and the total *en route* service units at Union level for those two calendar years.
2. By way of derogation from points 4.1(a)(i) and 4.1(a)(iii) of Section 2 of Annex I of Implementing Regulation (EU) 2019/317, the key performance indicator on the DUC for *en route* air navigation services at local level shall be defined, in respect of calendar years 2020 and 2021, as a combined value for those two years. To this end, a single average DUC for calendar years 2020 and 2021 shall be calculated as a ratio between the total *en route* determined costs for those two calendar years and the total *en route* service units for those two calendar years, in respect of the charging zone concerned.

Article 5

Derogations concerning the calculation and setting of unit rates and related adjustments 1.

1. In respect of calendar years 2020 and 2021, adjustments to unit rates under Article 27(2) to (5) of Implementing Regulation (EU) 2019/317 shall be calculated on the basis of the relevant total determined costs for those two years and of the total revenue loss or total additional revenue resulting from the difference between the service units forecasted in the performance plan and the actually recorded service units for those two years. Those two years shall be referred to as a single period and replace the period referred to in those provisions as “year n”. Without prejudice to the last sentence of the second sub-paragraph of Article 29(5) of Implementing Regulation (EU) 2019/317, the adjustments to unit rates shall be made in calendar year 2023 and 2024.
2. In respect of calendar years 2020 and 2021, adjustments to unit rates under Article 27(8) of Implementing Regulation (EU) 2019/317 shall be calculated on the basis of the relevant total determined costs for those two years and of the total revenue loss or total additional revenue resulting from the difference between the service units forecasted in the performance plan and the actually recorded service units for those two years. Those two years shall be referred to as a single period and replace the period referred to in those provisions as “year n”. Without prejudice to the last sentence of the second sub-paragraph of Article 29(5) of Implementing Regulation (EU) 2019/317, the adjustments to unit rates shall be made in calendar year 2023 and 2024.
3. In respect of calendar years 2020 and 2021, reductions or increases of unit rates under Article 28(4) to (6) of Implementing Regulation (EU) 2019/317 shall be calculated on the basis of the relevant total determined costs and the relevant total actual costs for those two years. Those two years shall be referred to as a single

period and replace the calendar year period referred to in those provisions. Without prejudice to the last sentence of the second sub-paragraph of Article 29(5) of Implementing Regulation (EU) 2019/317, the reductions or increases of unit rates to be applied in year n+2 shall be made in calendar year 2023.

4. In respect of performance plans concerning RP3, Article 29(5) of Regulation (EU) 2019/317 shall be applied subject to the following derogations:
 - (a) draft performance plans submitted in October or November 2019 shall be regarded as draft performance plans for the purposes of this provision;
 - (b) adjustments shall be spread equally over five calendar years, starting in the year following the year in which the performance plan has been adopted.
5. The national supervisory authority may decide to extend the time period referred to in point (b) of paragraph 4 to a maximum of seven calendar years, where this is necessary in order to avoid a disproportionate effect of the carry-overs on the unit rates charged to airspace users.

Article 6
Additional reporting and monitoring

1. In addition to the obligations set out in Articles 4 and 36 of Implementing Regulation (EU) 2019/317, air navigation service providers shall submit, by 15 December 2020, a report to the national supervisory authority detailing the measures put in place in order to address the financial and operational impact of the COVID-19 pandemic on their activities. The report shall be transmitted to the Commission by the national supervisory authority ~~upon its receipt~~ without undue delay.
2. The national supervisory authorities and the Commission may use the information included in the report referred to in paragraph 1 for the purpose of the monitoring tasks specified in Article 37 of Implementing Regulation (EU) 2019/317.

Met opmerkingen [VEd(-D14): NSAs should be left the time to check that the content is sufficient, consistent, and without errors.

Article 7
Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Commission
The President
Ursula VON DER LEYEN*

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