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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2020) 577 final
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) 2018/1139 as regards the capacity of the European Union Aviation Safety Agency to act as Performance Review Body of the Single European Sky

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Delegations will find attached document COM(2020) 577 final.

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Encl.: COM(2020) 577 final



EUROPEAN  
COMMISSION

Brussels, 22.9.2020  
COM(2020) 577 final

2020/0264 (COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Regulation (EU) 2018/1139 as regards the capacity of the European Union  
Aviation Safety Agency to act as Performance Review Body of the Single European Sky**

(Text with EEA relevance)

## EXPLANATORY MEMORANDUM

### **1. CONTEXT OF THE PROPOSAL**

#### **• Reasons for and objectives of the proposal**

The Single European Sky (SES) initiative aims to improve the overall efficiency of the way in which European airspace is organised and managed through a reform of the industry providing air navigation services (ANS).

The amended proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky [COM(2020) 579] is aimed at updating, in light of experience, and recasting the current legislation regarding the Single European Sky. While the original objectives and principles of the proposal adopted by the Commission in 2013 [COM(2013) 410] remain the same, the amended proposal specifically focuses on accelerating the adaptation of the air navigation services in light of those principles and objectives.

One important element of the amendments proposed in this context consists in establishing a permanent Performance Review Body (PRB) function, to be exercised by the European Union Aviation Safety Agency (hereafter referred to as “the Agency”). The arrangements necessary for these purposes require that several amendments be made to Regulation (EU) 2018/1139, with a view to ensuring that the PRB functions are carried out with the necessary independence and expertise and with the required resources. Those amendments are set out in the present proposal.

The amended recast proposal referred to above and the present proposal should be considered as a single and consistent package.

#### **• Consistency with existing policy provisions in the policy area**

The Commission’s Aviation Strategy for Europe of 2015<sup>1</sup> called for the immediate adoption of the SES2+ proposal by the co-legislators. Together with the amendment to the SES2+ proposal [COM(2020) 579], the present proposal is fully in line with the overall strategy for this policy area and, in particular, is expected to enable progress on this legislative file.

#### **• Consistency with other Union policies**

This proposal represents the necessary complement to the amended proposal on SES2+. As such, it participates in the improvement of the performance of air navigation services which in turn contributes to the reduction of CO<sub>2</sub> emissions in the aviation sector to digitalisation and more generally to the smooth functioning of the internal market, all of which are Commission priorities.

### **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

#### **• Legal basis**

The legal basis for the proposed amendment is Article 100(2) of the Treaty on the Functioning of the European Union.

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<sup>1</sup> [https://ec.europa.eu/transport/modes/air/aviation-strategy\\_en](https://ec.europa.eu/transport/modes/air/aviation-strategy_en)

- **Subsidiarity (for non-exclusive competence)**

Article 100(2) of the Treaty on the Functioning of the European Union gives the Union the right to act in this area, which is one of shared competence.

Air traffic management, more specifically, has been covered since 2004 by Union law, which cannot be amended by Member States acting in their own right. On substance, and by nature, air traffic management affects the airspace of the entire European Union, and cross-border movements of persons, goods, services and capital are inherent to aviation.

As regards more specifically the amendments to Regulation (EU) 2018/1139, proposed herewith as a necessary component part of the package, such amendments can only be brought about by the Union and not by its Member States.

- **Proportionality**

The proposal does not go beyond what is necessary to achieve its objectives, namely to ensure that PRB functions are exercised with the necessary independence and expertise and with the necessary resources. Its main elements are supported by the various inputs listed in Annex IV of the accompanying Staff Working Document.

- **Choice of the instrument**

The amendments proposed concern Regulation (EU) 2018/1139 and should therefore equally take the form of a Regulation, to be adopted by the European Parliament and of the Council under the ordinary legislative procedure. It should be presented separately from the amended recast proposal [COM(2020) 579] since Regulation (EU) 2018/1139 is not among the acts to be recast.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

This proposal forms part and parcel of a package whose main element is the amended recast proposal figuring in document COM(2020) 579.

For the entirety of the package, reference is made, first, to the impact assessment already carried out by the Commission for the 2013 SES2+ proposal: SWD(2013) 206 final.

Second, the additional elements related to the PRB function have been assessed at present in SWD(2020) 187. Background are recommendations made in 2017 by the European Court of Auditors in the Special Report on the Single European Sky, and in the Report of the Wise Persons Group on the future of the Single European Sky in 2019. SWD(2020) 187 also takes into account the calls for action contained in the joint stakeholder declaration signed during the high-level conference on the future of the Single European Sky in September 2019.

### **4. BUDGETARY IMPLICATIONS**

The proposal has no implications on the Union budget. The proposed new “PRB” function is to be financed by fees and charges and administratively integrated into the Agency. A reserve fund covering one year of operational expenditure is proposed, in order to ensure the continuity of its operations and of the execution of its tasks. In addition, it is proposed to provide for annual

contributions to be made by designated air traffic service providers concerned by the Agency's tasks and powers as PRB, for the built up of the new function. Such annual contributions are proposed to be collected for five financial years following the entry into force of the amending Regulation, in order to cover the costs of setting up the new functions within the Agency.

All in all, the Union's budget will not be affected.

## **5. OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The amended recast proposal for an SES2+ Regulation [COM(2020) 579] provides in its draft Article 43 for an evaluation of the terms of that Regulation, to be conducted in 2030. That evaluation should cover in particular the performance of the PRB function, having regard to the underlying objectives. Logically, it should encompass the amendments proposed herewith.

- **Detailed explanation of the specific provisions of the proposal**

The rules proposed provide for a permanent structure dedicated to performance review, in order to ensure the necessary independence and expertise. In order to allow for a timely legal review, without prejudice to the competences of the Court of justice, it is proposed that decisions taken by the Agency acting as PRB be subject to appeal before a dedicated body of the Agency, i.e. the Appeal Board for Performance Review.

The solution whereby the PRB functions are exercised by the Agency, albeit through dedicated bodies and function holders, appears adequate also from a cost-efficiency point of view.

The Regulation proposed lays down the composition of and relevant requirements regarding the bodies and function holders provided for with a view to enabling the Agency to act as PRB. The tasks and powers to be conferred upon the Agency for these purposes are those laid down in the amended recast proposal [COM(2020) 579]. They include the assessment and approval of performance plans of designated air traffic service providers, the provision of advice to the Commission regarding the Network Performance Plan, the monitoring of performance, and the verification of unit rates of air traffic service providers.

In order to optimise the functioning of the Agency as a Performance Review Body, it would be desirable for the Union to convene with Eurocontrol the transfer of technical expertise and relevant performance-related data, possibly by amending the existing High-Level Agreement between the two parties.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Regulation (EU) 2018/1139 as regards the capacity of the European Union Aviation Safety Agency to act as Performance Review Body of the Single European Sky**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) In order to optimise the application of the rules regarding the Single European Sky, Regulation [amended SES2+] establishes the competence, for various tasks notably in respect of the performance and charging schemes, of a specialised Union body, the European Union Aviation Safety Agency acting as Performance Review Body (hereafter the “Agency acting as PRB”).
- (2) In line with this objective, it is necessary to establish, within the Agency, a corresponding, permanent structure, guaranteeing that the tasks conferred upon the Agency acting as PRB be carried out with the required expertise as well as independence from public or private interests and that, in this context, the Agency can rely on dedicated resources.
- (3) Regulation (EU) 2018/1139 of the European Parliament and of the Council<sup>2</sup>, should therefore be amended, in a manner that separates the discharge of the tasks regarding the performance and charging schemes of the Single European Sky, functionally and hierarchically, from the Agency’s activity as a safety authority.
- (4) For these purposes, a Regulatory Board for Performance Review should be established and a Director for Performance Review should be appointed in order to carry out specifically the functions of the Agency acting as PRB.

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<sup>2</sup> Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 (OJ L 212, 22.8.2018, p. 1)

- (5) In line with the principles set out above, the Regulatory Board for Performance Review should act independently and should not seek or follow instructions or accept recommendations from a government of a Member State, from the Commission or any other public or private entity.
- (6) The Management Board of the Agency should have the necessary powers in particular to appoint the Director for Performance Review.
- (7) The Director for Performance Review should in particular be the legal representative of the Agency in matters of performance review and be in charge of the day-to-day administration in respect of this matter, as well as of various preparatory tasks. The Director for Performance Review should also draft and submit the section on performance review of the programming document, the annual work programme and the annual activity report of the Agency. The Regulatory Board for Performance Review as an independent body should be involved in those activities as necessary.
- (8) Cooperation between national supervisory authorities in the area of performance review is important to ensure smooth application of Union law in this area and should thus be facilitated, namely through the establishment of an Advisory Board for Performance Review.
- (9) Where the Agency acting as PRB has decision-making powers, interested parties should, for reasons of procedural economy, be granted a right of appeal to an Appeal Board for Performance Review, which should be part of the Agency acting as PRB, but independent from its administrative and regulatory structure.
- (10) The Agency acting as PRB should carry out any necessary consultations and act transparently.
- (11) The Agency shall account the revenue and expenditure for performance review separately from other revenue and expenditure. In line with the principle of independence of the Agency acting as PRB, the draft statement of estimates of the revenue and expenditure on performance review to be presented to the Executive Director should be prepared by the Director for Performance Review. Within this draft statement of estimates, changes to the revenue and expenditure on performance review should require the approval of the Director for Performance Review. In the event of disagreement between the Director for Performance Review and the Executive Director, the Director for Performance Review should be put in a position to state his or her views in an effective manner to the attention of the Management Board, before the latter adopts the provisional draft estimate of revenue and expenditure of the Agency.
- (12) It is appropriate that designated air traffic service providers contribute to the setting up of the operation of the Agency acting as PRB and its continuous functioning. Designated air traffic service providers hold natural monopolies in respect of the services concerned, and those services are remunerated by airspace users. Because of this specific feature, it is necessary that the performance and charging schemes be applied to them, so as to optimise the provision of the services concerned on a number of points. The principal role of the Agency acting as PRB consists in the application of those schemes, and the funds necessary for its setting up can therefore be considered as necessary for reasons linked to the peculiar features and the peculiar position of the providers of the services concerned.
- (13) Costs related to the supervision of designated air traffic service providers by the Agency acting as PRB can be divided into costs for its setting up and running costs.

- (14) The costs for the setting up of the Agency acting as PRB are short-term and limited to a few activities, such as recruitment, training and necessary IT equipment, and are necessary to initiate the supervision required for the reasons described.
- (15) Those costs should be paid during five financial years by designated air traffic service providers in the form of annual contributions, calculated in a fair and non-discriminatory manner. Individual contributions by designated air traffic service providers should be determined by reference to their size in order to reflect their importance in the provision of air traffic services in Europe and hence the relative benefits they draw from the supervised activity. Concretely, such contributions should be calculated based on the amount of actual revenues produced by the provision of air navigation services over the reference period preceding the reference period during which this Regulation enters into force.
- (16) In order to establish uniform rules regarding the calculation of annual contributions, in particular the methodology to allocate the estimated expenditure to categories of designated air traffic service providers and the criteria to determine the level of individual contributions based on size, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>3</sup>.
- (17) Running costs relate to the cost of the activities conducted by the Agency acting as PRB, in respect of the performance and charging schemes, once the operation of this activity has been set up. Running costs of the Agency acting as PRB should equally be financed by designated air traffic services providers. However, the funding should be based on fees and charges, on account of interventions necessary for the application of the performance and charging schemes. This form of funding can also be expected to enhance the autonomy and independence of the Agency acting as PRB.
- (18) No revenue received by the Agency, of whatever source, should compromise its independence and impartiality.
- (19) The Agency acting as PRB should also provide for a reserve fund covering one year of its operational expenditure to ensure the continuity of its operations and the execution of its tasks.
- (20) The Agency acting as PRB should be open to the participation of third countries which have concluded agreements with the Union and which have adopted and are applying the relevant rules of Union law.
- (21) Regulation (EU) 2018/1139 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

#### *Article 1*

Regulation (EU) 2018/1139 is amended as follows:

- (1) in Article 3, point 5 is replaced by the following:

‘(5) ‘ATM/ANS’ means air traffic management and air navigation services and covers all of the following: the air traffic management functions and services as defined in point (9) of Article 2 of [amended SES2+]; the air navigation services as defined in point (4) of Article 2 of that Regulation, including the network functions referred to in Article 26 of that

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<sup>3</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

Regulation, as well as services which augment signals emitted by satellites of core constellations of GNSS for the purpose of air navigation; flight procedures design; services consisting in the origination and processing of data and the formatting and delivering of data to general air traffic for the purpose of air navigation; and air traffic data services which are the services consisting in the collection, aggregation and integration of operational data from providers of surveillance services, from providers of meteorological services (MET) and aeronautical information services (AIS) and network functions and from other relevant entities, and/or the provision of processed data for air traffic control and air traffic management purposes;’;

(2) Article 93 is replaced by the following:

*‘Article 93*

### **Implementation of Single European Sky**

1. The Agency acting as Performance Review Body (PRB) shall have the tasks and exercise the powers set out in [Amended SES2+].

2. Where it has the relevant expertise, whether or not in its capacity as PRB, the Agency shall, upon request, provide technical assistance to the Commission, in the implementation of the Single European Sky, including on the performance and charging scheme, in particular by:

(a) conducting technical inspections, technical investigations, reviews of compliance, studies and projects;

(b) contributing to the implementation of the ATM Master Plan, including the development and deployment of the SESAR programme.’;

(3) in Article 94, paragraph 5 is replaced by the following:

‘5. The Agency shall be legally represented by its Executive Director. For matters related to the Agency acting as PRB, the Agency shall be legally represented by the Director for Performance Review.’;

(4) Article 98 is amended as follows:

(a) paragraph 2 is amended as follows:

(i) point (f) is replaced by the following:

‘(f) carry out its functions relating to the Agency’s budget pursuant to Articles 120, 120a, 121 and 125;’,

(ii) point (l) is replaced by the following:

‘(l) take decisions on the establishment of the internal structures of the Agency at directors’ level and, where necessary, their modifications, subject, in the case of internal structures concerning performance review, to a corresponding request by the Director for Performance Review and a positive opinion of the Regulatory Board for Performance Review. Any such decisions shall not affect the separation between the Regulatory Board for Performance Review, the Director for Performance Review, the Advisory Board for Performance Review, the Appeal Board for Performance Review and the staff working for the Agency acting as PRB on the one hand, and the other bodies and function holders of the Agency on the other hand;’,

(iii) point (o) is replaced by the following:

- ‘(o) adopt rules for the prevention and management of conflicts of interest in respect of its members, as well as of the members of the Board of Appeal, the members of the Regulatory Board for Performance Review, the members of the Advisory Board for Performance Review and the members of the Appeal Board for Performance Review;’;
- (b) the following paragraph 2a is inserted:
- ‘2a. In respect of matters regarding performance review, the Management Board shall:
- (a) after consulting the Regulatory Board for Performance Review and obtaining its favourable opinion, appoint the Director for Performance Review in accordance with Article 114g and where relevant extend his or her term of office or remove him or her from office;
  - (b) appoint the members of the Regulatory Board for Performance Review in accordance with Article 114c;
  - (c) after consulting the Regulatory Board for Performance Review, appoint the members of the Appeal Board for Performance Review in accordance with Article 114l;
  - (d) decide, after obtaining the agreement of the Commission, and as regards the revenue and expenditure in respect of performance review, whether to accept any legacies, donations or grants from other Union sources or any voluntary contribution from the Member States or from the national supervisory authorities referred to in Article 3 of [Amended SES2+];
  - (e) after consulting the Regulatory Board for Performance Review, exercise disciplinary authority over the Director for Performance Review;
  - (f) after consultation of the Regulatory Board for Performance Review, establish procedures for issuing opinions, recommendations and decisions by the Agency acting as PRB as referred to in Article 119a(4);
  - (g) subject to the favourable opinion of the Regulatory Board for Performance Review, and on the basis of a proposal by the Director for Performance Review, adopt and regularly update the communication and dissemination plans on performance review referred to Article 119a(5);
  - (h) subject to the favourable opinion of the Regulatory Board for Performance Review, authorise the conclusion of working arrangements in accordance with Article 129a(4);
  - (i) subject to the favourable opinion of the Regulatory Board for Performance Review, and on the basis of a proposal by the Director for Performance Review, establish mechanisms and procedures for consultation of stakeholders referred to in Article 38 of [Amended SES2+] and Article 119a of this Regulation.’;
- (c) paragraphs 3 and 4 are replaced by the following:
- ‘3. The Management Board may advise the Executive Director on any matter related to areas covered by this Regulation, except on matters of performance review.
4. The Management Board shall establish an advisory body representing the full range of interested parties affected by the work of the Agency, which it shall consult prior to making decisions in the fields referred to in paragraph 2, points (c), (e), (f) and (i). The Management Board shall fully integrate the contribution provided by the Director for Performance Review in accordance with Article 114h when making decisions in the fields referred to in paragraph 2, points (c) and (f). The Management Board may also decide to consult the advisory body on other issues referred to in paragraphs 2 and 3, except the areas related to the function of the

Agency acting as PRB. The Management Board shall not, in any case, be bound by the opinion of the advisory body.’;

(d) paragraph 6 is replaced by the following:

‘6. The Management Board shall adopt, in accordance with Article 110 of the Staff Regulations, a decision based on Article 2(1) of the Staff Regulations and on Article 6 of the Conditions of Employment of Other Servants, delegating relevant appointing authority powers to the Executive Director and defining the conditions under which that delegation of powers can be suspended. The Executive Director shall be authorised to sub-delegate those powers.

Where exceptional circumstances so require, the Management Board may decide to temporarily suspend the delegation of the appointing authority powers to the Executive Director and those sub-delegated by the latter and exercise them itself or delegate them to one of its members or to a staff member other than the Executive Director.

The first and second subparagraphs shall not apply to members of staff whose posts are attributed to the function of the Agency acting as PRB.’;

(e) the following paragraph 7 is added:

‘7. The Management Board shall adopt, in accordance with Article 110 of the Staff Regulations, a decision based on Article 2(1) of the Staff Regulations and on Article 6 of the Conditions of Employment of Other Servants, delegating relevant appointing authority powers to the Director for Performance Review as regards members of staff whose posts are attributed to the function of the Agency acting as PRB, and defining the conditions under which that delegation of powers can be suspended. The Director for Performance Review shall be authorised to sub-delegate those powers.

Where exceptional circumstances so require, the Management Board may decide to temporarily suspend the delegation of the appointing authority powers to the Director for Performance Review and those sub-delegated by the latter and exercise them itself or delegate them to one of its members or to a staff member other than the Director for Performance Review. A decision to this effect shall require a positive vote on the part of the representative of the Commission in the Management board. The exceptional circumstances shall be strictly limited to administrative, budgetary or managerial matters, without prejudice to the Director for Performance Review’s full independence concerning his or her tasks pursuant to point (d) of Article 114h(3).’;

(5) in Article 99, paragraph 5 is replaced by the following:

‘5. The advisory body referred to in Article 98(4) shall appoint four of its members to participate with observer status in the Management Board, except for matters related to performance review, in particular areas referred to in Article 98(2a). They shall represent, as broadly as possible, the different views represented in the advisory body. The initial term of office shall be 48 months and shall be extendable.’;

(6) Article 101 is amended as follows:

(a) paragraph 3 is replaced by the following:

‘3. The Executive Director of the Agency shall take part in the deliberations, without the right to vote. Upon invitation of the Director for Performance Review, the Executive Director of the Agency may be invited to take part in the deliberations on matters related to the the function of the Agency acting as PRB, without the right to vote.’;

(b) the following paragraph 3a is inserted:

‘3a. The Director for Performance Review shall take part in the deliberations on areas directly or indirectly related to the function of the Agency acting as PRB, without the right to vote.’;

(7) in Article 102, paragraphs 2, 3 and 4 are replaced by the following:

‘2. Each member appointed pursuant to Article 99(1) shall have one vote. In the absence of a member, his or her alternate shall be entitled to exercise his or her right to vote. Neither observers nor the Executive Director of the Agency nor the Director for Performance Review shall have the right to vote.

3. The Rules of Procedure of the Management Board shall establish more detailed voting arrangements, in particular the procedure for voting on urgent matters, the conditions under which a member may act on behalf of another member, as well as any quorum requirements, where appropriate.

4. In order for them to be adopted, decisions on budgetary, human resources or administrative matters, in particular matters referred to in Article 98(2), points (d), (f), (h), (m), (n), (o) and (q), Article 98(2a), points (a), (b), (c), (e) and (f), and Article 98(7) require a positive vote from the representative of Commission in the Management Board.’;

(8) Article 104 is amended as follows:

(a) paragraph 1 is replaced by the following:

‘1. The Executive Director shall manage the Agency. The Executive Director shall be accountable to the Management Board. Without prejudice to the powers of the Commission and of the Management Board, the Executive Director shall be independent in the performance of his or her duties and shall neither seek nor take instructions from any government or from any other body. The Executive Director shall not give instructions to the Director for Performance Review nor to staff dedicated to the function of the Agency acting as PRB.’,

(b) paragraph 3 is amended as follows:

(i) the introductory wording is replaced by the following:

‘3. The Executive Director shall be responsible for the implementation of the tasks assigned to the Agency by this Regulation or other Union acts, except for matters related to the function of the Agency acting as PRB. In particular, the Executive Director shall be responsible for:’.

(ii) point (h) is replaced by the following:

‘(h)preparing the Agency’s draft statement of estimates of revenue and expenditure pursuant to Article 120, integrating the draft estimate of the revenue and expenditure of the Agency for its functions as PRB prepared by the Director for Performance Review in accordance with Articles 114h and 120a, and implementing its budget pursuant to Article 121, except the budget of the Agency for its functions as PRB;’,

(iii) point (j) is replaced by the following:

‘(j) preparing the programming document referred to in Article 117(1) and, after having integrated the PRB’s section submitted by the Director for Performance Review in accordance with point (g) of Article 114h(3)and Article 117a, submitting it to the Management Board for adoption, after having obtained the opinion of the Commission. Any change to the PRB’s section shall only be made upon approval of the Director for Performance Review;’,

(iv) point (l) is replaced by the following:

‘(l) preparing an action plan following up conclusions of internal or external audit reports and evaluations, as well as investigations by OLAF, and reporting on progress twice a year to the Commission and regularly to the Management Board. The Executive Director shall coordinate with the Director for Performance Review to ensure coherence with the action plan prepared by the Director for Performance Review as regards activities related to the function of the Agency acting as PRB;’,

(v) point (u) is replaced by the following:

‘(u) taking all decisions on the establishment of the internal structures of the Agency and, where necessary, on any changes to them, except for those at directors’ level, which will be approved by the Management Board, and except decisions related to the internal structures concerning performance review. Decisions taken by the Executive Director shall not affect the separation between the Regulatory Board for Performance Review, the Director for Performance Review, the Advisory Board for Performance Review, the Appeal Board for Performance Review and the staff working for the Agency acting as PRB on the one hand, and the other bodies and function holders of the Agency on the other hand;’,

(c) paragraph 4 is replaced by the following:

‘4. The Executive Director shall also be responsible for deciding whether it is necessary for the purpose of carrying out the Agency’s tasks in an efficient and effective manner to establish one or more local offices in one or more Member States or to co-locate staff in Union delegations in third countries subject to the appropriate agreements with the European External Action Service.

The first subparagraph shall not apply to the Agency in its function as PRB. In respect of those functions, the Director for Performance Review shall be responsible for deciding whether it is necessary for the purpose of carrying out the work of the Agency in an efficient and effective manner to establish one or more local offices in one or more Member States.

The decisions referred to in the first and second subparagraphs require the prior consent of the Commission, the Management Board and, where applicable, the Member State where the local office is to be established. Those decisions shall specify the scope of the activities to be carried out at that local office or by that co-located staff in a manner that avoids unnecessary costs and duplication of administrative functions of the Agency.’;

(9) the following section IIa is inserted:

‘SECTION IIa

*Specific rules on the internal structure related to performance review*

*Article 114a*

### **Structure of the Agency acting as PRB**

For carrying out its tasks on performance review, the Agency acting as PRB shall have:

- (a) A Regulatory Board for Performance Review;
- (b) A Director for Performance Review;
- (c) An Advisory Board for Performance Review;
- (d) Appeal Board for Performance Review.

*Article 114b*

## **Functions of the Regulatory Board for Performance Review**

1. The Regulatory Board for Performance Review shall:
  - (a) provide opinions and, where appropriate, comments on and amendments to the text of the Director for Performance Review's proposals for draft opinions, recommendations and decisions related to the tasks listed in [amended SES2+], as well as those referred to in Article 129a of this Regulation which are considered for adoption;
  - (b) within its field of competence, provide guidance to the Director for Performance Review in the execution of his or her tasks;
  - (c) provide an opinion to the Management Board on the candidate to be appointed as Director for Performance Review in accordance with point (a) of Article 98(2a) and Article 114g(2), and where applicable his or her removal from office in accordance with Article 114g(6);
  - (d) approve the section on performance review activities of the programming document to be submitted by the Director for Performance Review to the Executive Director in accordance with point (g) of Article 114h(3) and Article 117a;
  - (e) approve the independent section on regulatory activities of the section on performance review of the consolidated annual activity report to be submitted by the Director for Performance Review to the Executive Director in accordance with point (i) of Article 114h(3) and Article 118a;
  - (f) provide an opinion to the Management Board on the procedures for issuing opinions, recommendations and decisions by the Agency acting as PRB in accordance with point (f) of Article 98(2a);
  - (g) provide an opinion to the Director for Performance Review on its proposal for the communication and dissemination plans on performance review referred to in Article 119a(5), in accordance with point (g) of Article 98(2a);
  - (h) provide an opinion to the Director for Performance Review on the establishment or modification of the internal structures concerning performance review;
  - (i) provide an opinion to the Management Board as regards potential actions to be taken pursuant to point (e) of Article 98(2a);
  - (j) provide an opinion to the Management Board on the conclusion of working arrangements in accordance with Article 129a(4);
  - (k) provide an opinion to the Director for Performance Review on its proposal for mechanisms and procedures for consultation of stakeholders referred to in Article 38 of [Amended SES2+] and in Article 119a of this Regulation;
  - (l) provide an opinion to the Management Board on the candidates to be appointed as members of the Appeal Board for Performance Review in accordance with article 114l. That opinion shall not be binding.

### *Article 114c*

## **Composition and independence of the Regulatory Board for Performance Review**

1. The Regulatory Board for Performance Review shall be composed of 9 voting members and one non-voting representative of the Commission. Each member shall have an

alternate. One of the members shall be the Chairperson of the Advisory Board for Performance Review. A member of the Management Board shall not be a member of the Regulatory Board for Performance Review. The term of office for members and their alternates shall be five years, and that term shall be extendable.

2. The members of the Regulatory Board for Performance Review and their alternates shall be formally appointed by the Management Board, on a proposal from the Commission, after consultation of Eurocontrol, following a public call for expression of interest. The members of the Regulatory Board for Performance Review shall be appointed on the basis of merit as well as skills and experience relevant to the air traffic management or economic regulation of network industries. In order for it to be adopted, the decision on the appointment of the members of the Regulatory Board for Performance Review requires a positive vote from the Commission representative in the Management Board.
3. When carrying out the tasks conferred upon it by this Regulation, the Regulatory Board for Performance Review shall act independently and shall not seek or follow instructions from any government of a Member State, from the Commission, or from another public or private entity.

#### *Article 114d*

##### **Chairperson of the Regulatory Board for Performance Review**

1. The Regulatory Board for Performance Review shall elect a Chairperson and a Deputy Chairperson from among its members with voting rights by a two-thirds majority. The Deputy Chairperson shall replace the Chairperson if the latter is not in a position to perform his or her duties.
2. The term of office of the Chairperson and of the Deputy Chairperson shall be two-and-a-half years and shall be renewable. If their membership of the Regulatory Board for Performance Review ceases at any time during their term of office, their term of office shall automatically expire on that date.

#### *Article 114e*

##### **Meetings of the Regulatory Board for Performance Review**

1. Meetings of the Regulatory Board for Performance Review shall be convened by its Chairperson.
2. The Regulatory Board for Performance Review shall hold at least two ordinary meetings a year. In addition it shall meet at the request of the Chairperson, of the Commission or of at least one third of its members.
3. The Director for Performance Review shall take part in the deliberations, without the right to vote.
4. The Regulatory Board for Performance Review may invite any person whose opinion might be of interest to attend its meetings with observer status.
5. The Agency shall provide the secretariat for the Regulatory Board for Performance Review.

#### *Article 114f*

##### **Voting rules of the Regulatory Board for Performance Review**

1. Unless otherwise specified in this Regulation, the Regulatory Board for Performance Review shall take decisions by a simple majority of the members with voting rights.

2. Each member with voting rights appointed pursuant to Article 114c(2) shall have one vote. In the absence of a member, his or her alternate shall be entitled to exercise his or her right to vote. Neither observers nor the Director for Performance Review shall have the right to vote.
3. The Regulatory Board for Performance Review shall adopt its rules of procedure, which shall set out in greater detail the arrangements governing voting, in particular the conditions on the basis of which one member may act on behalf of another and also, where appropriate, the rules governing quorums.

#### *Article 114g*

#### **Director for Performance Review**

1. The Director for Performance Review shall be engaged as a temporary agent of the Agency under Article 2, point (a) of the Conditions of Employment of Other Servants.
2. The Director for Performance Review shall be appointed by the Management Board following a favourable opinion of the Regulatory Board for Performance Review, on the basis of merit as well as skills and experience relevant to the air traffic management or economic regulation of network industries, from a list of at least three candidates proposed by the Commission and following an open and transparent selection procedure. In order for it to be adopted, the decision on the appointment of the Director for Performance Review requires a positive vote from the representative of the Commission in the Management Board. For the purpose of concluding the contract with the Director for Performance Review, the Agency shall be represented by the Chairperson of the Management Board.
3. The Director for Performance Review's term of office shall be five years. In the course of the nine months preceding the end of that period, the Commission shall undertake an assessment. In the assessment, the Commission shall examine in particular:
  - (a) the performance of the Director for Performance Review;
  - (b) the duties and requirements concerning performance review in the following years.
4. The Management Board, acting on a proposal from the Commission and giving the utmost consideration to the assessment referred to in paragraph 3 and following a favourable opinion of the Regulatory Board for Performance Review, may extend the term of office of the Director for Performance Review once by no more than five years. A Director for Performance Review whose term of office has been extended shall not participate in another selection procedure for the same post at the end of the extended period.
5. If his or her term of office is not extended, the Director for Performance Review shall remain in office until the appointment of his or her successor.
6. The Director for Performance Review may be removed from office only upon a decision of the Management Board, acting on a proposal from the Commission, after having obtained a favourable opinion of the Regulatory Board for Performance Review.
7. The Management Board shall reach decisions on appointment, extension of the term of office or removal from office of the Director for Performance Review on the basis of a two-thirds majority of its members with voting rights. The Director for Performance Review shall not hold any professional position or responsibility with any air navigation service provider after his or her term as Director for Performance Review, for at least a period of two years.

#### *Article 114h*

#### **Responsibilities of the Director for Performance Review**

1. The Director for Performance Review shall be accountable to the Management Board with respect to administrative, budgetary and managerial matters, but shall remain fully independent concerning his or her tasks under paragraph 3, point (d). Without prejudice to the respective roles of the Management Board and the Regulatory Board for Performance Review in relation to the tasks of the Director for Performance Review, the Director for Performance Review shall neither seek nor follow any instruction from any government, from the Union institutions, or from any other public or private entity or person.
2. The Director for Performance Review may attend the meetings of the Regulatory Board for Performance Review as an observer.
3. The Director for Performance Review shall be responsible for the implementation of the tasks regarding performance review carried out in accordance with [Amended SES2+]. The Director for Performance Review shall take account of the guidance referred to in Article 114b(1), point (b) and, where provided for in this Regulation, the opinions of the Regulatory Board for Performance Review. In particular, the Director for Performance Review shall be responsible for:
  - (a) ensuring the legal representation of the Agency in matters of performance review;
  - (b) carrying out the day-to-day administration of the work on performance review;
  - (c) with respect to areas directly or indirectly linked to the work on performance review, preparing the work of the Management Board, participating, without having the right to vote, in the work of the Management Board and implementing the decisions adopted by the Management Board on areas related to the function of the Agency acting as PRB;
  - (d) drafting, consulting, adopting and publishing opinions, recommendations and decisions in respect of the tasks laid out in [Amended SES2+] and in respect of the tasks referred to in Article 129a;
  - (e) implementing the section on performance review activities of the programming document referred to in Article 117a;
  - (f) taking the necessary measures, in particular as regards adopting internal administrative instructions and publishing notices, to ensure the functioning of Agency's work on performance review in accordance with [amended SES2+];
  - (g) each year, preparing the section on performance review activities of the programming document referred to in Article 117a, which shall be submitted to the Executive Director and integrated in the Agency's draft programming document for the purpose of point (j) of Article 104(3). Any change to the input related to performance review shall only be made upon approval of the Director for Performance Review;
  - (h) drawing up a provisional draft estimate of the revenue and expenditure in respect of performance review in accordance with Article 120a(7) and submitting it to the Executive Director for the purpose of Article 104(3), point (h) and implement the revenue and expenditure in respect of performance review in accordance with Article 121. Any change to the input related to performance review shall only be made upon approval of the Director for Performance Review;
  - (i) preparing annually the draft section on performance review of the consolidated annual activity report including an independent section on the regulatory activities related to performance review and a section on financial and administrative matters, and submitting it to the Executive Director for its integration in the consolidated

annual activity report. Any change to the input on performance review shall only be made upon approval of the Director for Performance Review;

- (j) where activities of the Agency acting as PRB are concerned, preparing, in coordination with the Executive Director, an action plan following up on the conclusions of internal or external audit reports and evaluations, as well as on investigations by OLAF, and reporting on progress twice a year to the Commission and report regularly on progress to the Management Board;
- (k) preparing a proposal for mechanisms and procedures for consultation of stakeholders referred to in Article 38 of [amended SES2+], to be submitted to the Management Board for adoption following a favourable opinion of the Regulatory Board for Performance Review;
- (l) following a favourable opinion of the Regulatory Board for Performance Review, requesting the Management Board to establish or modify the internal structures concerning performance review;
- (m) preparing the draft communication and dissemination plans concerning performance review referred to Article 119a(5), to be submitted to the Management Board for adoption following the favourable opinion of the Regulatory Board for Performance Review.

4. For the purposes paragraph 3, point (d), opinions, recommendations and decisions of the Agency acting as PRB referred to in [Amended SES2+] and in Article 129a of this Regulation shall be adopted only after having obtained the favourable opinion of the Regulatory Board for Performance Review.

Before submitting draft opinions, recommendations or decisions to a vote by the Regulatory Board for Performance Review, the Director for Performance Review shall submit proposals for the draft opinions, recommendations or decisions to the relevant working group for consultation sufficiently in advance.

The Director for Performance Review shall take the comments and amendments of the Regulatory Board for Performance Review into account and shall resubmit the revised draft opinion, recommendation or decision to the Regulatory Board for Performance Review for a favourable opinion. Where the Director for Performance Review deviates from or rejects the comments and amendments received from the Regulatory Board for Performance Review, the Director for Performance Review shall also provide a duly justified written explanation.

The Director for Performance Review may withdraw submitted draft opinions, recommendations or decisions provided that he/she submits a duly justified written explanation where he/she disagrees with the amendments submitted by the Regulatory Board for Performance Review. In the case of a withdrawal of a draft opinion, recommendation or decision, the Director for Performance Review may issue a new draft opinion, recommendation or decision following the procedure set out in Article 114b(1), point (a) and in the second subparagraph of this paragraph.

If the Regulatory Board for Performance Review does not give a favourable opinion on the resubmitted text of the draft opinion, recommendation or decision because its comments and amendments were not adequately reflected in the resubmitted text, the Director for Performance Review may revise the text of the draft opinion, recommendation or decision further in accordance with the amendments and comments proposed by the Regulatory Board for Performance Review in order to obtain its favourable opinion, without having to provide additional written reasons.

## *Article 114i*

### **Functions and operations of the Advisory Board for Performance Review**

1. The Advisory Board for Performance Review shall:
  - (a) exchange information about the work of national supervisory authorities and decision-making principles, best practices and procedures as well as with regard to the application of [Amended SES2+];
  - (b) provide opinions and recommendations on guidance material to be issued by the Agency acting as PRB. The opinions and recommendations of the Advisory Board for Performance Review shall not be binding.
2. The Advisory Board for Performance Review shall meet at regular intervals, in order to ensure that national supervisory authorities consult and work together in a network.
3. The Chairperson of the Regulatory Board for Performance Review and the Director for Performance Review may participate in meetings of the Advisory Board for Performance Review and may make recommendations to national supervisory authorities convened as the Advisory Board for Performance Review, as appropriate, on matters related to their expertise on the performance and charging scheme referred to in [Amended SES2+].
4. Subject to the rules on data provided for in Article 31 of [Amended SES2+] and in Regulation (EU) 2018/1725 of the European Parliament and of the Council<sup>4</sup>, the Agency shall provide the secretariat to the Advisory Board for Performance Review and shall support the exchange of the information referred to in paragraph 1 among the members of the Advisory Board for Performance Review, respecting the confidentiality of commercially sensitive information of air navigation service providers.

## *Article 114j*

### **Composition of the Advisory Board for Performance Review**

1. The Advisory Board for Performance Review shall be composed of:
  - (a) one senior representative per Member State from the national supervisory authorities referred to in Article 3 of [Amended SES2+], and one alternate per Member State from the current senior staff of those authorities, both nominated by the national supervisory authority.
  - (b) one non-voting representative of the Commission, and one alternate.
2. The Advisory Board for Performance Review shall elect a Chairperson and a Deputy-Chairperson from among its members. The Deputy-Chairperson shall replace the Chairperson if the latter is not in a position to perform his or her duties. The term of office of the Chairperson and of the Deputy-Chairperson shall be two-and-a-half years and shall be renewable. If their membership of the Advisory Board for Performance Review ceases at any time during their term of office, their term of office shall automatically expire on that date.

## *Article 114k*

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<sup>4</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39)

## **Powers of the Appeal Board for Performance Review**

1. The Appeal Board for Performance Review shall be responsible for deciding on appeals against the decisions referred to in [Amended SES2+]. The Appeal Board for Performance Review shall be convened as necessary.
2. The decisions of the Appeal Board for Performance Review shall be adopted by a majority of at least four of its six members.

### *Article 114l*

## **Members of the Appeal Board for Performance Review**

1. The Appeal Board for Performance Review shall be composed of six members and six alternates selected from among current or former senior staff of the national supervisory authorities referred to in Article 3 of [Amended SES2+], competition authorities or other Union or national institutions with relevant experience in the aviation sector. The Appeal Board for Performance Review shall designate its Chairperson.
2. The members of the Appeal Board for Performance Review shall be formally appointed by the Management Board, on a proposal from the Commission, following a public call for expression of interest, after consulting the Regulatory Board for Performance Review.
3. The members of the Appeal Board for Performance Review shall undertake to act independently and in the public interest. For that purpose, they shall make a written declaration of commitments and a written declaration of interests indicating either the absence of any interest which might be considered prejudicial to their independence or indicating any direct or indirect interest which might be considered prejudicial to their independence. Those declarations shall be made public annually.
4. The term of office of the members of the Appeal Board for Performance Review shall be five years. That term shall be renewable once.
5. The members of the Appeal Board for Performance Review shall be independent in making their decisions. They shall not be bound by any instructions. They shall not perform any other duties in the Agency, in its Management Board or in the Advisory Board for Performance Review. A member of the Appeal Board for Performance Review shall not be removed during his or her term of office, unless he or she has been found guilty of serious misconduct, and the Commission, after receiving the opinion of the Management Board, has taken a decision to that effect.
6. The Appeal Board for Performance Review shall adopt and publish its rules of procedure. Those rules shall set out in detail the arrangements governing the organisation and functioning of the Appeal Board for Performance Review and the rules applicable to appeals before the Appeal Board for Performance Review pursuant to Articles 114k to 114s. The Appeal Board for Performance Review shall notify the Commission of its draft rules of procedure as well as any significant change to those rules. The Commission may provide an opinion on those rules within three months of the date of receipt of the notification.

### *Article 114m*

## **Exclusion and objection in the Appeal Board for Performance Review**

1. The members of the Appeal Board for Performance Review shall not take part in any appeal proceedings if they have any personal interest therein, if they have previously been

involved as representatives of one of the parties to the proceedings or if they participated in the adoption of the decision under appeal.

2. If, for one of the reasons listed in paragraph 1 or for any other reason, a member of the Appeal Board for Performance Review considers that he or she should not take part in any appeal proceeding, he or she shall inform the Appeal Board for Performance Review accordingly.
3. Any party to the appeal proceedings may object to any member of the Appeal Board for Performance Review on any of the grounds given in paragraph 1, or if the member is suspected of partiality. Any such objection shall not be admissible if, while being aware of a reason for objecting, the party to the appeal proceedings has taken a procedural step. No objection may be based on the nationality of members.
4. The Appeal Board for Performance Review shall decide as to the action to be taken in the cases specified in paragraphs 2 and 3 without the participation of the member concerned. For the purposes of taking this decision, the member concerned shall be replaced on the Appeal Board for Performance Review by his or her alternate. If the alternate finds him or herself in a similar situation to that of the member, the Chairperson shall designate a replacement from among the available alternates.

#### *Article 114n*

#### **Decisions issued by the Agency acting as PRB subject to appeal**

1. An appeal may be brought against decisions of the Agency acting as PRB taken pursuant to [Amended SES2+].
2. An appeal lodged pursuant to paragraph 1 shall not have suspensory effect. The Appeal Board for Performance Review may, however, if it considers that circumstances so require, suspend the application of the contested decision.
3. The Agency acting as PRB shall publish the decisions taken by the Appeal Board for Performance Review.

#### *Article 114o*

#### **Persons entitled to appeal**

Any natural or legal person may appeal against a decision issued by the Agency acting as PRB addressed to that person, or against a decision issued by the Agency acting as PRB which, although in the form of a decision addressed to another person, is of direct and individual concern to the former. The parties to proceedings may be party to the appeal proceedings.

#### *Article 114p*

#### **Time limit and form**

The appeal shall include a statement of the grounds for appeal and shall be filed in writing to the Agency acting as PRB within two months of the notification of the decision to the person concerned, or, in the absence thereof, within two months of the date on which the Agency acting as PRB published its decision. The Appeal Board for Performance Review shall decide upon the appeal within four months of the lodging of the appeal.

#### *Article 114q*

#### **Interlocutory revision**

1. Before examining the appeal, the Appeal Board for Performance Review shall give the Agency acting as PRB the opportunity to review its decision. If the Director for Performance Review considers the appeal to be well founded, he or she shall rectify the decision within two months from being notified by the Appeal Board for Performance Review. That shall not apply where the appellant is opposed to another party to the appeal proceedings.
2. If the decision is not rectified, the Appeal Board for Performance Review shall forthwith decide whether or not to suspend the application of the decision pursuant to Article 114n(2).

#### *Article 114r*

#### **Examination of appeals**

1. The Appeal Board for Performance Review shall assess whether the appeal is admissible and well founded.
2. When examining the appeal pursuant to paragraph 1, the Appeal Board for Performance Review shall act expeditiously.

It shall as often as necessary invite the parties to the appeal proceedings to file, within specified time limits, written observations on notifications issued by itself or on communications from other parties to the appeal proceedings. The Appeal Board for Performance Review may decide to hold an oral hearing, either of its own motion or at the substantiated request of one of the parties to the appeal.

#### *Article 114s*

#### **Decisions on appeal**

Where the Appeal Board for Performance Review finds that the appeal is not admissible or that the grounds for appeal are not founded, it shall reject the appeal. Where the Appeal Board for Performance Review finds that the appeal is admissible and that the grounds for appeal are founded, it shall remit the case to the Agency. The Agency shall take a new reasoned decision taking into account the decision by the Appeal Board for Performance Review.

#### *Article 114t*

#### **Actions before the Court of Justice**

1. Actions for the annulment of a decision issued by the Agency acting as PRB pursuant to [Amended SES2+] and actions for failure to act within the applicable time limits may be brought before the Court of Justice only after the exhaustion of the appeal procedure referred to in Articles 114k to 114s.
  2. The Agency acting as PRB shall take the necessary measures to comply with the judgments of the Court of Justice.’;
- (10) the following Article 117a is inserted:

‘*Article 117a*

#### **Section on performance review activities in the annual and multi-annual programming**

1. Each year, the Director for Performance Review shall draft the section related to performance review activities of the programming document referred to in Article 117(1). After the draft being approved by the Regulatory Board for Performance Review, the

Director for Performance Review shall submit it to the Executive Director in order to be integrated in the Agency's draft programming document in accordance with Article 114h(3), point (g). Any change to the section on performance review shall only be made upon approval of the Director for Performance Review.

2. The section of the annual work programme on performance review in the programming document shall comprise detailed objectives and expected results, including performance indicators. It shall also contain a description of the actions to be financed and an indication of the financial and human resources allocated to each action, in accordance with the principles of activity-based budgeting and management. The section on performance review of the annual work programme shall be coherent with the section on performance review of the multi-annual work programme referred to in paragraph 4. It shall clearly indicate the tasks that have been added, changed or deleted in comparison with the previous financial year.
3. The Management Board shall amend the adopted section on performance review of the annual work programme where a new task is assigned to the Agency acting as PRB. Any substantial amendment to the section on performance review of the annual work programme shall be adopted by the same procedure set out for the initial annual work programme. The Management Board may delegate the power to make non-substantial amendments to the section on performance review of the annual work programme document to the Director for Performance Review.
4. The section on performance review of the multi-annual work programme in the programming document shall set out the overall strategic programming, including objectives, expected results and performance indicators. It shall also set out resource programming, including the multi-annual budget and staff.

The resource programming shall be updated annually. The strategic programming shall be updated where appropriate, in particular to address the outcome of the evaluation referred to in Article 124(4).';

- (11) the following Article 118a is inserted:

*'Article 118a*

#### **Section on performance review in the consolidated annual activity report**

1. The Director for Performance Review shall draft the section related on performance review of the annual activity report referred to in Article 118(1). After the draft being approved by the Regulatory Board for Performance Review, the Director for Performance Review shall submit it to the Executive Director in order to be integrated in the consolidated annual activity report in accordance with Article 114h(3), point (i). Any change to the section on performance review of the consolidated annual activity report shall only be made upon approval of the Director for Performance Review.
2. The section on performance review of the consolidated annual activity report shall include an independent section on regulatory activities and a section on financial and administrative matters. The Regulatory Board for Performance Review shall approve the independent section on regulatory activities prior to the submission to the Executive Director, in accordance with Article 114b(1), point (e).';

- (12) the following Article 119a is inserted:

*'Article 119a*

## **Transparency, communication and procedures for issuing opinions, recommendations and decisions by the Agency acting as PRB**

1. In carrying out its tasks, the Agency acting as PRB shall extensively consult at an early stage the stakeholders listed in Article 38(3) of [Amended SES2+] and, where relevant, competition authorities, without prejudice to their respective competence, in an open and transparent manner. In accordance with Article 38 of [Amended SES2+], the Agency acting as PRB shall establish consultation mechanisms for appropriate involvement of those stakeholders.

For this purpose, the Director for Performance Review shall draft a proposal for those mechanisms and, after having obtained the favourable opinion of the Regulatory Board for Performance Review on the draft, shall submit it to the Management Board for adoption.

2. The Agency acting as PRB shall ensure that the public and any interested parties are, where appropriate, given objective, reliable and easily accessible information, in particular with regard to the results of its work.

All documents and minutes of consultation meetings shall be made public.

3. The Agency acting as PRB shall make public, on its website, at least the agenda, the background documents and, where appropriate, the minutes of the meetings of the Regulatory Board for Performance Review and of the Appeal Board for Performance Review.

4. The Agency acting as PRB shall adopt and publish adequate and proportionate procedures for issuing opinions, recommendations and decisions by the Agency acting as PRB, in accordance with the procedure set out in Article 98(2a), point (f). Those procedures shall:

- (a) ensure that the Agency acting as PRB publishes documents and widely consults interested parties, in accordance with a timetable and a procedure which includes an obligation on the Agency acting as PRB to give a written response to the consultation process;
- (b) ensure that before taking any individual decision as provided for in this Regulation and in [Amended SES2+], the Agency acting as PRB informs any party concerned of its intention to adopt that decision, and shall set a time limit within which the party concerned may express its views on the matter, taking full account of the urgency, complexity and potential consequences of the matter;
- (c) ensure that individual decisions of the Agency acting as PRB states the reasons on which they are based for the purpose of allowing an appeal on the merits;
- (d) where the Agency acting as PRB issues a decision, provide for the natural or legal person to whom the decision is addressed, and any other parties to proceedings, to be informed of the legal remedies available to them under this Regulation;
- (e) specify the conditions under which decisions are notified to the persons concerned, including information on the available appeal procedures as provided for in this Regulation.

5. The Agency acting as PRB may engage in communication activities on its own initiative within its field of competence on performance review, and in doing so shall be represented by the Director for Performance Review. The allocation of resources to communication activities shall not be detrimental to the effective exercise of the tasks and powers referred to in [Amended SES2+]. Communication activities shall be carried out in accordance with

relevant communication and dissemination plans adopted by the Management Board in accordance with point (g) of Article 98(2a).’;

(13) Article 120 is amended as follows:

(a) in paragraph 1, the introductory wording is replaced by the following:

‘1. Without prejudice to other revenues, the revenues of the Agency, excluding those for its functions as PRB, shall comprise.’

(b) paragraph 3 is replaced by the following:

‘3. Revenue and expenditure for all activities not covered by Article 120a(1) shall be in balance.’,

(c) paragraph 5 is replaced by the following:

‘5. The Agency shall, during the financial year, adapt its staff planning and management of activities financed from resources related to fees and charges for certification activities in a manner that enables it to swiftly respond to work load and fluctuations of those revenues.’;

(d) in paragraph 6, the first subparagraph is replaced by the following:

‘Each year, the Executive Director shall draw up a draft statement of estimates of the Agency’s revenue and expenditure for the following financial year, including a draft establishment plan, and shall, after having integrated the draft estimate of the revenue and expenditure for performance review and the list of posts for performance review referred to in Article 120a(7), send it to the Management Board together with explanatory material on the budgetary situation. That draft establishment plan shall, in relation to posts financed from fees and charges referred to in paragraph 1, be based on a limited set of indicators approved by the Commission to measure the Agency’s workload and efficiency, and shall set out the resources required to meet demands for certification and other activities of the Agency in an efficient and timely manner, including those resulting from reallocations of responsibility in accordance with Articles 64 and 65.’;

(14) the following Article 120a is inserted:

*‘Article 120a*

### **Budget of the Agency for its functions as PRB**

1. The Agency shall account the revenue and expenditure for performance review separately from other revenue and expenditure. Such revenue and expenditure shall be in balance, in accordance with and subject to paragraph 2.
2. Surpluses shown in the account referred to in paragraph 1 shall be transferred to the reserve fund established in accordance with paragraph 6. Losses shown in the account referred to in Article paragraph 1 shall be covered through transfers from that reserve fund. Where a significant positive or negative budget result becomes recurrent, the level of fees and charges referred to in paragraph 3 points (a) and (d) and Article 126a shall be revised.
3. The revenues of the Agency for its functions as PRB shall comprise:
  - (a) fees levied by the Agency acting as PRB on designated air traffic service providers for services related to performance plan assessment, target-setting and monitoring;
  - (b) annual contributions from designated air traffic service providers, based on the annual estimated expenditure relating to the activities on performance review to be carried out by the Agency acting as PRB as required by [Amended SES2+] for each category of designated air traffic service providers;

- (c) any voluntary financial contribution from the Member States or the national supervisory authorities referred to in Article 3 of [Amended SES2+];
  - (d) charges for publications and any other service provided by the Agency acting as PRB;
  - (e) any contribution from third countries or other entities, provided that such a contribution does not compromise the independence and impartiality of the Agency acting as PRB.
4. All revenue and expenditure of the Agency for its functions as PRB shall be the subject of forecasts for each financial year, coinciding with the calendar year, and shall be entered in its budget.
  5. The revenue received by the Agency for its functions as PRB shall not compromise its neutrality, independence or objectivity.
  6. The Agency acting as PRB shall establish a reserve fund covering one year of its operational expenditure to ensure the continuity of its operations and the execution of its tasks. It shall be reviewed each year to ensure that it is limited to annual needs.
  7. The Director for Performance Review shall draw up each year a draft estimate of the revenue and expenditure for performance review for the following year together with the list of posts for performance review and shall submit them to the Executive Director for its integration in the draft statement of estimates of the Agency's revenue and expenditure referred to in Article 120(6).

The Executive Director or the Management Board may make changes to the draft estimate of the revenue and expenditure and the list of posts for performance review upon approval of the Director for Performance Review.

Where the Executive Director and the Director for Performance Review do not come to an agreement on the draft estimate of the revenue and expenditure for performance review, the Director for Performance Review shall draft an opinion which the Executive Director shall annex to the draft statement of estimates of the Agency's revenue and expenditure referred to in Article 120(6). The Director for Performance Review shall in that case also have the right to present its opinion to the Management Board before the Management Board adopts the provisional draft estimate of revenue and expenditure of the Agency in accordance with the second subparagraph of Article 120(6).

8. The annual contributions referred to in paragraph 3, point (b) shall be collected for five financial years. To this effect, they shall be due for the first time by 31 March [XXXX - year] – OP please insert the first financial year beginning after the entry into force of this Regulation)], in respect of that financial year, and on 31 March of each of the four subsequent financial years, for those financial years respectively.

The Commission shall adopt implementing acts setting out detailed rules determining how the annual contributions by designated air traffic service providers referred to in paragraph 2, point (b) are to be calculated, in accordance with Article 126b.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 127(3).';

- (15) Article 121 is amended as follows:
  - (a) paragraph 1 is replaced by the following:

‘1. The Executive Director shall implement the budget of the Agency. However, in respect of the revenues and expenditure related to the Agency’s function as PRB, it shall be implemented by the Director for Performance Review.’;

(b) paragraph 8 is replaced by the following:

‘8. The Executive Director shall send the Court of Auditors a reply to its observations by 30 September following each financial year. He or she shall also send that reply to the Management Board and the Commission. Where activities on performance review are concerned, that reply shall be prepared together with the Director for Performance Review.’;

(c) paragraph 10 is replaced by the following:

‘10. The European Parliament, on a recommendation from the Council acting by a qualified majority, shall, before 15 May of year n + 2, decide on the discharge to the Executive Director in respect of the implementation of the budget for year n and on the discharge to the Director for Performance Review in respect of the implementation of the budget of the Agency on performance review for year n.’;

(16) in Article 124, the following paragraphs 4, 5 and 6 are inserted:

‘4. Paragraphs 1, 2 and 3 shall not apply to the Agency acting as PRB. In conjunction with the evaluation referred to in Article 43 of [Amended SES2+], the Commission shall, by the deadline defined in that Regulation, carry out an evaluation to assess the Agency’s performance as PRB in relation to its objectives, tasks and powers. The evaluation shall in particular address the possible need to modify the tasks and powers of the Agency acting as PRB, and the financial implications of any such modification.

5. Where the Commission considers that the continued existence of the PRB function is no longer justified with regard to its assigned objectives, tasks and powers, it may propose that this Regulation and [Amended SES2+ ] be amended accordingly.

6. The Commission shall forward the evaluation findings related to the activity of the Agency acting as PRB, together with its conclusions, to the European Parliament, the Council and the Management Board. The findings of the evaluation and the recommendations shall be made public.’;

(17) in Article 126, the following paragraph 5 is added:

‘5. The provisions of this Article shall not apply to the activities of the Agency acting as PRB.’;

(18) the following Articles 126a and 126b are inserted:

*‘Article 126a*

#### **Fees and charges of the Agency acting as PRB**

1. Fees of the Agency acting as PRB shall be levied for:

(a) the assessment of the allocation of costs between *en route* and terminal air navigation services, in accordance with Article 13(6) of [amended SES2+];

(b) the assessment, for each initial or revised draft performance plan presented to the Agency acting as PRB, carried out in accordance with Article 13(7) to (9) of [amended SES2+];

(c) where the Agency acts as a supervisory authority in accordance with Article 3(8) of [amended SES2+], the assessment, for each initial or revised draft performance plan presented to the Agency acting as PRB, carried out in accordance with Article 14(6) to (8) of [amended SES2+];

- (d) the establishment of performance targets of designated air traffic service providers in accordance with Article 13(9) of [amended SES2+];
  - (e) where the Agency acts as a supervisory authority in accordance with Article 3(8) of [amended SES2+], the establishment of performance targets of designated air traffic service providers in accordance with Article 14(8) of [amended SES2+];
  - (f) the assessment of requests for permissions to revise targets and performance plans of air traffic service providers in accordance with Article 17(3) and (4) of [amended SES2+];
  - (g) the verification of unit rates in preparation of the setting of those rates by the national supervisory authorities, in accordance with Article 21 of [amended SES2+];
  - (h) the issuance of reports, in respect of individual air traffic service providers, on the monitoring of performance in accordance with Article 13(11) of [amended SES2+] and, where the Agency acts as a supervisory authority in accordance with Article 3(8) of [amended SES2+] in accordance with Article 14(10) of [amended SES2+];
  - (i) the adoption of corrective measures in accordance with Article 13(11) of [amended SES2+], and, where the Agency acts as a supervisory authority in accordance with Article 3(8) of [amended SES2+], in accordance with Article 14(10) of that Regulation;
  - (j) the processing of appeals.
2. The charges levied for publications and the provision of any other service by the Agency acting as PRB as referred to in Article 120a(3) shall reflect the actual cost of each individual service provided.
  3. The amount of the fees and charges shall be fixed by the Commission in accordance with paragraph 4. They shall be fixed at such a level as to ensure that the revenue in respect thereof covers the full cost of the activities related to the services delivered, and to avoid a significant accumulation of surplus. All expenditure regarding members of staff whose posts are dedicated to the function of the Agency acting as PRB, in particular the employer's pro-rata contribution to the pension scheme, shall be reflected in that cost. The fees and charges shall be assigned revenues for the Agency acting as PRB for activities related to services for which fees and charges are due.
  4. The Commission shall adopt implementing acts laying down detailed rules relating to fees and charges levied by the Agency for its function as PRB, specifying in particular the amount of the fees and charges and the way in which they are paid. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 127(3).

#### *Article 126b*

### **Implementing acts regarding the calculation of annual contributions by designated air traffic service providers**

The implementing acts referred to in Article 120a(8) , shall establish the following:

- (a) a methodology to allocate the estimated expenditure to categories of designated air traffic service providers, as a basis for determining the share of contributions to be made by designated air traffic service providers of each category;

- (b) appropriate and objective criteria to determine the annual contributions payable by individual designated air traffic service providers based on their size so as to approximately reflect their importance in the market.

The categories referred to in point (a) of the first paragraph shall be firstly *en route* air traffic service providers, secondly terminal air traffic service providers subject to the oversight of the Agency acting as PRB, and thirdly providers offering both types of services. The criteria to be established in accordance with point (b) shall in particular ensure equal treatment of the providers concerned, in respect of each type of service. The size of the air traffic service providers shall be calculated based on the amount of actual revenues produced by the provision of air navigation services over the reference period preceding the reference period during which this Regulation enters into force.’;

- (19) in Article 129, the following paragraph is added:

‘The provisions of this Article shall not apply to the activities of the Agency acting as PRB.’;

- (20) the following Article 129a is inserted:

‘*Article 129a*

### **Cooperation agreements on performance review**

1. Insofar as the activities of the Agency acting as PRB are concerned, the Agency shall be open to the participation of third countries which have concluded agreements with the Union and which have adopted and are applying the relevant rules of Union law in the field of air traffic management including, in particular, the rules on independent national supervisory authorities and on performance scheme and charging scheme.
2. Subject to the conclusion of an agreement to that effect between the Union and third countries as referred to in paragraph 2, the Agency acting as PRB may also exercise its tasks under [Amended SES2+] with regard to third countries, provided that those third countries have adopted and apply the relevant rules in accordance with paragraph 2 and have mandated the Agency acting as PRB to coordinate the activities of their national supervisory authorities with those of the national supervisory authorities of Member States.
3. The agreements referred to in paragraph 2 shall specify the nature, scope and procedural aspects of the involvement of those countries in the work of the Agency acting as PRB and shall include provisions relating to financial contributions and to staff. Those agreements may provide for the establishment of working arrangements.’;

- (21) in Annex VIII, the following point 2.3a is inserted:

‘2.3a. Air traffic data services

- 2.3a.1. The air traffic data collected shall be of sufficient quality, complete, current, from a legitimate source and provided in a timely manner.
- 2.3a.2. The air traffic data services shall achieve and maintain sufficient performance with regard to their availability, integrity, continuity and timeliness to meet the user’s needs.
- 2.3a.3 The systems and tools providing air traffic data services shall be properly designed, produced and maintained to ensure that they are fit for their intended purpose.

2.3a.4. The dissemination of such data shall be timely and use sufficiently reliable and expeditious means of communication protected from intentional and unintentional interference and corruption.’.

*Article 2*

This Regulation shall enter into force on the twentieth 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 European Parliament*  
*The President*

*For the Council*  
*The President*