

OPINION NO [...] / 2003

OF THE EUROPEAN AVIATION SAFETY AGENCY,

for a Commission Regulation on the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations

I. General

1. Regulation (EC) No 1592/2002 of the European Parliament and of the Council (the “Basic Regulation”) requires the Commission, as part of the legislative process leading to Agency establishment, to adopt a comprehensive framework of rules for the implementation of the essential airworthiness and environmental protection requirements. Whilst taking into account the worldwide aircraft experience, and scientific and technical progress, these implementing rules must reflect the state of the art and the best practices in the field of airworthiness and allow for rapid reactions.
2. The Agency is directly involved in the rule-shaping process. It assists the Commission in preparing drafts in accordance with Regulation procedures, which will be submitted to the Commission as ‘Opinions’ (see Articles 12, 13 and 14 of the Basic Regulation).
3. The Agency herewith submits its Opinion to the Commission which purports to fulfil the requirements of the Articles 5, 6 and 12, paragraph 2(b) of the Basic Regulation to permit its full implementation in the field of certification of aeronautical products, parts and appliances. This Opinion consists of a draft Commission Regulation on the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as on the certification of design and production organisations. This draft Regulation contains an Annex called “Part 21”.
4. The structure and scope of the Opinion is outlined further below. For the development of that text the Agency gratefully relied on the voluntary contributions of so-called ‘Core Groups’. These are groups of experts who, dwelling on their expertise and technical knowledge, facilitated the drafting of implementing rules in the light of existing international, JAA and industry practices. The text, in particular its technical provisions, present a pragmatic approach, JARs and changes thereto, as well as available JAA regulatory material having been used extensively to provide with maximum continuity with the current requirements widely used by Member States.
5. The Agency has also developed drafts of certification specifications (CS), acceptable means of compliance (AMC) and guidance material (GM). These drafts have been published for consultation of the interested parties. The associated material however fall outside the remit of the implementing rules and will therefore be subject to separate adoption by the Agency’s Executive Director.

II. Consultation and review of comments

6. The draft Opinion for a Commission Regulation on the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations, was circulated the 6th of June 2003 among the interested parties, after the consistency of the draft with Community law and the European policies had been verified.
7. By the closing date of 18 July 2003, some 844 comments were received. The breakdown of comments per subject-matter is as follows:
 - 11 comments relating to the explanatory memoranda (“Opinion”);
 - 153 comments relating to the enacting terms (“Regulation”);
 - 680 comments relating to the Annex to the draft Regulation (“Part 21”).
8. The review of all comments has been made by a group composed of the focal points of the Core Groups that had prepared the building elements of the draft Commission Regulation and of the legal revisers involved in the preparation of the draft Opinion. The results of the review of all received comments are incorporated in a Comment/Response Documents (CRD), divided into two parts. As required by the Basic Regulation, this Opinion, including the CRD, will be widely available, in particular via the web site of the JAA and the Agency.
9. Several comments have stressed the need for Certification Specifications (CS), Acceptable Means of Compliance (AMC) and Guidance Material (GM) to be published in the same time as the implementing rules, but with regard to the time restraints it is not possible to publish the Opinion and the revised CS, AMC and GM simultaneously. While such simultaneity is not a legal requirement, the Agency recognises the benefit of their early availability and will do its utmost to finalise and publish them at the same time the adopted Commission Regulation is published.
10. The Agency would like to express its satisfaction with the quality of comments received and the level of participation shown by interested parties. In submitting the final version of its Opinion, the Agency has gratefully relied on the opinions expressed by a representative sample of individuals, worldwide organisations, companies and authorities. Although it is acknowledged that the Agency will need to explore further areas, this process has proved invaluable in shaping safety rules more consistent with the needs of the whole aviation sector.
11. The present consolidated Opinion consists of three parts:
 - A detailed CRD, divided into two parts, of all comments received and responses provided by the Agency in support of the amended draft implementing rules and Opinion, mirroring the consultation process; and
 - An amended draft Commission Regulation, including those changes carried following the consultation process.

- Explanatory notes on the consultation process (note 1), transitions (note 2), international aspects (note 3) and ICAO compatibility (note 4).

III. Main points

12. In the received comments, a number of legal, policy and technical issues have been identified which the Agency considers being of major interest. These sometimes controversial issues are summarised below in a synthetic form with observations from the Agency to justify or clarify its views on the particular matter. Ultimately, individual responses to all comments may be found in the corresponding CRD.
13. Several comments called into question the length of the consultation period (6 weeks). Suffice is to say that Article 15 of the decision taken by the Management Board concerning the “rulemaking process” (Article 43 of the Basic Regulation) permits recourse to a shortened consultation process where the rules to be adopted derive from existing JAA material. Such is clearly the case as Part 21 is directly derived from JAR 21 and several changes thereto. Note n°1 on the consultation process is herewith attached.
14. Many comments highlighted the need to provide more time for the industry to adapt to the changeover from the JAA system of national rules to the EASA system of common rules, thereby strongly requesting an extension of so-called “transition periods” and/or to defer the entry into force of the implementing rules beyond 28 September 2003. It is felt that the items in question command further clarification on the interpretation of Article 56 of the Basic Regulation. This is done in the attached note n° 2.
15. A significant number of foreign organisations and authorities voiced their concern as to the regulatory implications deriving from the introduction of the implementing rules in the realm of bilateral relations. The consequences of the entry into force of the Commission Regulation on foreign organisations are analysed in the attached note n° 3.
16. Some comments questioned the compatibility of the draft Community measures for the certification of products with the obligations of Member States under the Chicago Convention. This question is addressed in the attached note n° 4.

A. Articles of the draft implementing Regulation

a) Automatic recognition of certificates

17. Article 2, paragraph 3(a) of the draft Commission Regulation related to the certification of products, part and appliances lays down the conditions for product type-certificates (TCs) that have been issued before 28 September 2003 and in paragraph 4 for products for which a type-certification process is ongoing on 28 September and in paragraph 6 with regard to supplemental type-certificates (STCs) for which a certification process is ongoing on 28 September.

18. Some comments take the view that Article 2 provides for “automatic recognition”. The question was raised whether the “automatic recognition” of certificates as envisaged in Article 2 is in conflict with Article 57 of the Basic Regulation (“It might run the risk to be constitutionally illegal”). In addition, other comments have stated that Article 8 is an exhaustive provision and as a consequence it would not allow the introduction of additional provisions concerning automatic recognition.
19. Article 5, paragraph 4 of the Basic Regulation states that “the Commission shall adopt [...] the rules for the implementation of this Article (5), specifying *in particular*: [...]”; It follows that Article 5, paragraph 4 provides a clear legal basis to determine further conditions under which certain (national) TCs are given the status of “EASA TCs”. Such is the objective of a draft Commission Regulation and in particular of its Article 2.
20. Article 8 requires Member States to recognise without further technical requirements or evaluations the certificates issued in accordance with the Basic Regulation. That implies as well certificates validated by the implementing rules.
21. Article 57 requires that certificates issued in accordance with Directive 80/51 (EEC) and Regulation (EEC) N° 3922/91 shall be recognised in accordance with the provisions of Article 8; that is without further technical requirements.
22. As a consequence, the Agency takes the view that Article 2 of the draft Regulation is not “constitutionally illegal”, as it is not in conflict with the Basic Regulation, in particular Article 57, paragraph 2 and Article 8.

b) Transfer of TCs

23. In the light of comments received, Article 2(3) has been revised and further clarified to be commensurate with the transfer policy. On the one hand, products fulfilling the criteria for type-certification will be deemed to have an EASA TC after 28 September 2003. On the other hand, products not fulfilling the criteria for type-certification must have the EASA type-certification basis identified and the TC issued by the Agency before 28 March 2007.

c) Additions to the rules

24. The need to avoid unnecessary repetitions in the draft Regulation and to foster a common understanding on the meaning of terms used was highlighted. Thus, for the purpose of the draft Regulation, “JAA”, “JAR”, “Part 21” and the associated “Part M” are now defined under Article 1.

B. Annex – Part 21

a) The competent authority

25. Clarification was sought as to the sharing of certification tasks in the context of production organisations between the Agency and national administrations. As laid down in the Basic Regulation, the Agency could be in charge with the approval of production organisations whose principle place of business is inside the Community territory when so requested by a Member State. Such possibility has not been expanded in the draft Commission Regulation. It is indeed recognised under 21.1 of Part 21 that the Agency can potentially exercise the oversight of Community production organisations but it has been felt that such option was not realistic during the starting phase of operations. It has to be underlined also that the related tasks would be anyhow subcontracted to the national authorities territorially competent. It is recognised however that this point needs to be reviewed when the Agency is fully operational.

b) Validity of approvals/ Conditions for suspension/revocation

26. The Basic Regulation requires the Commission to specify in its implementing rules the conditions for issuing certificates, including conditions for their validity and suspension/revocation. That in turn implies that clear conditions are set for the suspension/revocation so as to ensure uniform application of Community law across all Member States and avoid discrimination.

27. Various comments identified a missing provision in respect of letters of agreement. One comment proposed to have invalidated certificates returned automatically to the issuing authority for administrative reasons, as privileges attached to the certificates cease to exist. Many others tabled editorial improvements for the sake of internal consistency and requested to cut down related obligations on Member States and, where applicable, the Agency.

28. As a consequence, a new provision (21A.125C) on the duration and validity of letters of agreement has been incorporated in Part 21. Moreover it has to be underlined that all certificates and approvals, with the sole exception of letters of agreement, are issued for an unlimited duration and that continued validity of certificates is subject to compliance with the requirements on the basis of which the certificate is issued, i.e., Part 21.

29. Procedures for the suspension and revocation by the Agency of TCs, restricted TCs, STCs and organisation approvals must be established by the Agency.

30. As to the margin of discretion left to Member States in applying the invalidity clauses of Part 21, the intent is to prevent the borderline between validity and invalidity from being too blurred. Therefore conditions for invalidating a certificate are clearly set out by the objective safety-motivated criteria of Part 21.

31. In that context it has to be underlined that when a certificate is suspended, its privileges are temporarily withdrawn, but it remains valid unless it is

revoked by the issuing authority or surrendered by the holder. Upon surrender or revocation, the certificate must be returned to the issuing authority.

c) Findings

32. Several comments underscored the safety shortcomings left by the initial provisions on findings in the context of organisation approvals. As a result the wording on findings has now been standardised, in particular, to bridge the gap with Section B. Section A defines level findings for the area concerned in a scale of gravity from level one to three. Section B requires Member States to notify findings under a common procedure, defines administrative sanctions for non-compliance under Section A and affords due process.

d) Subpart JB

33. JAR-21 Subpart JB concept of design organisation approval for parts and appliances has not been retained for Part 21, because it is not immediately related to design approval certificates and therefore it has been considered outside of the scope of the Basic Regulation, Article 5(2)(d). Additionally JAR-21 design activities have been difficult to expand, under the JAA process, due partially to the presence of two, rather than one, Subparts.
34. Some existing organizations that currently have a JAR-21 Subpart JB design organisation approval will lose it. This can be considered as an effect of the proposed Regulation. Subpart JB was an optional design organisation approval, to certify that a company, having been subcontracted to design elements of a complete product, had a design assurance system based on the same principles as the system of the contracting company, under Subpart JA. It does not contain specific privileges. Consequently, it can be seen as a “label”, facilitating relationship between subcontractors and main design organisations in charge of the certification of complete products. Although the independency of such Authority assessment could be seen as a positive factor, such activity is not considered as a prime responsibility of an Aviation Authority. The Agency considers that the same objective can be achieved by Industry supplier/subcontractor qualification and overview systems, under Industry direct control.
35. Some comments proposed adaptations of the draft Regulation circulated for comments. These proposals have not been retained because they were introducing new concepts deserving careful consideration. Any evolution of the current system, where the holders of design approvals like TCs, STCs, changes or repairs have a key safety responsibility, needs to be prepared carefully and largely debated with all interested parties.
36. It is fully recognized that the trend in Industry towards international cooperation and risk-sharing partnership constitutes a strong argument to review the existing concept of approved organisations, especially to expand the privileges to subcontractors that retain the specific expertise and knowledge for the parts or systems that they are designing. Therefore, rather

than maintain a JB kind of approval with limited effects for the sake of continuity, it is proposed to keep for the first issue of Part 21 only design organisation approvals directly related to certificates and recommend for further Agency activity the evaluation of possible new privileges taking into account the actual Industry environment. This will allow a complete assessment of the situation and the development of appropriate solutions, fully in line with the functions to be exercised by an Aviation Safety Agency.

e) Terminology

37. Some inconsistencies were highlighted. Therefore, within Part 21, instances of “organisations” and “certification specifications” have been changed, where appropriate, to “natural or legal person” and “airworthiness codes” respectively, in line with basic Community law and Article 14 of the Basic Regulation.

f) Export airworthiness certificates

38. Several comments discussed at length the necessity to re-introduce Subpart L in Part 21 to deal adequately with export airworthiness certificates. However, it is in the context of international relations that Articles 9 and 18 of the Basic Regulation apply. In the absence of a legal basis for action under Articles 5 and 6 of the Basic Regulation, neither the Commission nor the Agency are empowered to issue export airworthiness certificates, let alone to prejudge the common commercial policy of the Community in this field.

g) Appendices – EASA Forms

39. It transpires from the overall consultation process on Part 21 and its AMC/GM that the Agency should further define its communication policy with regard to the general lay out and content of all EASA Forms. As a result, the Agency recognises the need to carry out, preferably in cooperation with an official EC standardisation or editorial body, the necessary harmonization exercise.
40. Updated Form 45 and 53 have been included in Part 21 to reflect international practice and ongoing consensus.
41. As a result of this and the subsequent AMC/GM consultation process, Forms within the appendices to Part 21 are no longer duplicated in AMC/GM. In the case of the EASA Forms One, 52 and 53, which are associated with privileges, the completion instructions are now mandated under the appendices to Part 21 to provide greater uniformity. All other completion instructions remain in AMC/GM.