

OPINION No 05/2006

OF THE EUROPEAN AVIATION SAFETY AGENCY,

for amending Commission Regulation (EC) No 2042/2003, on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks

AND

for amending Commission Regulation (EC) No 1702/2003, laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations

Principal place of business

I. General

1. The purpose of this Opinion is to envisage an amendment to Annex I, II and III to Commission Regulation (EC) No 2042/2003¹ and to the Annex of Commission Regulation (EC) 1702/2003². The reason for this rulemaking activity is to clarify the concept of principal place of business.
2. The Agency is directly involved in the rule-shaping process. It assists the Commission in its executive tasks by preparing draft regulations, and amendments thereof, for the implementation of the Basic Regulation (EC) No 1592/2002³ which are adopted as “Opinions” (Article 14.1). It also adopts acceptable means of compliance and guidance material to be used in the certification process (Article 14.2).
3. This rulemaking activity was included in the Agency’s rulemaking programme for 2005. It implements the rulemaking task MDM-014 and is extended to Part 21.1(b) which uses the same terminology.
 - MDM-014: development of the concept of principal place of business through a decision to introduce acceptable means of compliance/guidance material (AMC/GM) to paragraph M.1, 145.1 and 147.1.
4. The Opinion has been adopted, following the procedure specified by the Agency’s Management Board⁴, in accordance with the provisions of Article 14 of Regulation (EC) No 1592/2002.

II. Content of the Opinion of the Agency

5. On 24 September 2003 and on 20 November 2003 the European Commission adopted Regulations (EC) No 1702/2003 and (EC) No 2042/2003 respectively. These regulations establish the concept of principal place of business without giving a definition.
6. National authorities as well as industry requested a definition of the concept of principal place of business when answering the consultation document for the adoption of Commission Regulation (EC) No 2042/2003, so as to avoid misunderstandings that could rise when the authority is not clearly defined. In Commission Regulation (EC) No 1702/2003 exactly the same concept of principal place of business is used as in Regulation 2042/2003 so for

¹ Commission Regulation (EC) No 2042/2003 of 20 November 2003 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks (OJ L 315, 28.11.2003, p. 1). Regulation as amended by Commission Regulation (EC) No 707/2006 of 8 May 2006 (OJ L 122, 9.5.2006, p. 17)

² Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (OJ L 240, 7.09.2002, p. 1.). Regulation as last amended by Commission Regulation (EC) 1701/2003 of 24 September 2003 (OJ L 243, 27.9.2003, p. 5).

³ Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (OJ L 240, 7.09.2002, p. 1.). Regulation as last amended by Commission Regulation (EC) 1701/2003 of 24 September 2003 (OJ L 243, 27.9.2003, p. 5).

⁴ Decision of the Management Board concerning the procedure to be applied by the Agency for the issuing of Opinions, Certifications Specifications and Guidance Material (“Rulemaking Procedure”). EASA MB/7/03 of 27.06.2003.

consistency the same definition should be valid for all cases. Therefore, the envisaged modification will also be applied to Part-21.

7. This rulemaking activity was included in the Agency's rulemaking programme of 2005, for a development of the concept of principal place of business through a decision to introduce AMC/GM material to paragraph M.1, 145.1 and 147.1. of Commission Regulation (EC) No 2042/2003. Nevertheless, the Agency considers that development of an AMC to clarify the concept of principal place of business will not provide sufficient legal certainty. In this particular case the legislator should give its own interpretation of the principle place of business in a given context, because policy reasons justify such level of details. Moreover, if the Agency adopts only an AMC stakeholders would have the possibility to diverge from that AMC when it is against their interest. The importance of the clarification of the concept of principal place of business to avoid misunderstandings that could rise when the authority is not clearly defined, justifies the clarification be developed through an amendment to Regulations EC No 2042/2003 and (EC) No 1702/2003 in order to lift doubts that exist in this field.
8. Although the European Court of Justice (ECJ) has not established a definition of the concept of principal place of business through its jurisprudence, there are several decisions where the ECJ has been asked to clarify this notion, especially with regard to matters concerning the freedom of establishment.
9. In the judgments of the ECJ of 18 July 1998 and 9 March 1999¹ the Court recognized that: *"companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person"*.
10. When Regulation (EC) No 2042/2003 was adopted, it was clearly the intention of the legislator to reflect what the ECJ established in its decisions, which is to create a connecting factor between the organisation and the authority in order to determine the authority responsible for oversight. The legislator chose as the connecting factor the organisation's principal place of business, which was indeed a widely accepted concept throughout the aviation sector.
11. It is a general understanding that the concept of principal place of business should be construed to mean a permanent and regular place of transacting of general business, and would not include a temporary place of sojourn during ad hoc negotiations. It should as well indicate where is the seat of the management of the interests of the organisation or its guiding activity.
12. To clarify the concept of principal place of business established by Regulations 2042/2003 and 1702/2003, the Agency has considered several options to be retained; nevertheless it has rejected them because they do not clearly reflect the intention of the said Regulations. First of all, for the purpose of Regulations 2042/2003 and 1702/2003 and in order to ensure safety oversight by the competent authority it is less relevant that the principal place of business be where the general administration or social services are located. Secondly it should be noted, that the principal place of business is not always situated in the state where the organisation

¹ ECJ C- 264/96 and C-212/97

is registered regarding fiscal duties. Thirdly for the purpose of both Regulations it is also less relevant that the principal place of business be where the production lines, maintenance or training facilities are. This last option is similar to the one established by the Joint Aviation Authorities (JAA). Under this system, when the organisation had facilities in more than one JAA state, the JAR-145 approval was granted by the JAA state in whose state the primary maintenance facility of the organisation was located.

13. Nevertheless, the intention of these Regulations is that the principal place of business be situated where the organisation technical management is, in other words, in the case of Regulation (EC) No 2042/2003 where the organisation personnel specified in paragraphs M.A.606, 145.A.30 and 147.A.105 directs, controls or co-ordinates its activities, ensuring that the organisation complies with the requirements specified in their respective annexes.
14. Concerning Regulation 1702/2003 the principal place of business is situated where the personnel specified in 21.A125(b)3 perform their activities under Part 21 Subpart F, and where the organisation personnel specified in paragraph 21A.145(c) directs, controls or co-ordinates its technical activities, ensuring that the organisation complies with the requirements specified in Part 21 Subpart G.
15. The organisation technical management defines in particular the safety policy and procedures for the organisation and is responsible for quality assurance. It also has the corporate authority to finance it so that it remains in compliance with the requirements. These elements are the fundamentals of the safety of the company. Also enforcement actions may be easier because the key personnel is residing in the same country as the competent authority. Such choice may imply that the competent authority may have to make arrangements with the authority of the Member State where the production line, maintenance facility or training facility is located to ensure an appropriate oversight.

III. Consultation

16. To achieve optimal consultation, a Notice of Proposed Amendment – NPA-09-2005 – was published on the Agency website (www.easa.europa.eu) on 22 November 2005. The Agency also published this NPA together with the draft opinion of the European Aviation Safety Agency.
17. By the closing date of 22 February 2006, the Agency had received 28 comments from 14 national authorities, professional organisations and private persons
18. Most of the comments supported the rulemaking task, were asking for clerical changes (layout, renumbering etc.) and have been taken into consideration.
19. One class of comments led to the rewriting of the definition of “principle place of business” as it was not appropriate to consider that all the management personnel should be located at the principal place of business. It was felt that some flexibility should be given, especially when the Accountable Manager is not permanently present and could nominate a person running the organisation (deputy) or when the Accountable Manager may be the one for more than one organisation or for large organisation with different sites. Therefore the word “majority of” management personnel was preferred as a definition.

20. Some comments were asking for a lot more flexibility but it should be kept in mind that the key place is the location where most of the personnel performing the managerial activities are. In case of needs, the legal entity responsible for taking legal action will be the one at the location of the company where the majority of the management personnel act. Legally speaking, actions should be taken at the level of the management. More flexibility will leave too much room for interpretation.
21. All comments received have been acknowledged and incorporated into a Comment Response Document (CRD), which was published together on the Agency's web site on 02 August 2006. This CRD contains a list of all persons and organisations that have provided comments and the responses of the Agency.
22. By the closing date (1 October 2006), no reactions were received by the Agency.

IV. Regulatory Impact Assessment

23. Intent of the Opinion

The purpose of Opinion was to clarify of the concept of principal place of business to avoid misunderstandings and lift doubts that exist in this field that could rise when the authority is not clearly defined. The clarification is developed through an amendment to Commission Regulations (EC) No 2042/2003 and (EC) No1702/2003.

24. Options

The alternative option would have been to do nothing. As consequence the Agency would not take into account the demand of National authorities as well and industry that requested a definition of the concept of principal place of business in order to lift doubts that exist in this field.

25. Sectors affected

The sectors of the EC regulated civil aviation community affected by this activity are all approved organisations, mainly large organisations, and National authorities.

26. Impacts

From the safety point of view there could be loopholes in the oversight if the authority is not clearly defined and then the quality of the oversight is reduced. For that reasons, this rulemaking activity would clarify relations between the competent authority and organisations as it facilitates the determination of the authority for the issuance, investigation and continued oversight of an approval. As such therefore it has no direct economic or social impact on the industry as it only aims at facilitating the application of existing rules. It may have an indirect cost effect as the fees collected by competent authorities vary for one Member States to the other. This impact however is a natural consequence of the EASA system that does not attempt harmonising fees and charges in the Community and cannot therefore be seen as an obstacle to the sought clarification.

The impact of possible relocation due to the proposed definition of principle place of business has also been evaluated. Management personnel may be more easily relocated than

a maintenance facility, a training school or a production line. However there are several mitigating factors here:

- The management would have to do the required oversight from a distance and this may be costly
- EU competent Authorities are standardised by the Agency
- In case of relocation outside EU, the organisation would be approved by EASA.

27. Conclusion of the Regulatory impact assessment

Based on this RIA, the proposals of this Opinion are considered as having no safety, economical, social or environmental impact. Therefore the progress of the proposals is justified.

Cologne, 13 December 2006

P. GOUDOU
Executive Director