



Prospect Aviation Group

Position on the proposed amendment to the EASA Basic Regulation



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INTRODUCTION

As part of the upcoming Aviation Package the European Commission has announced a proposal repealing the current Regulation (EC) No 216/2008 (known as the EASA Basic Regulation) and has announced a proposed text to replace this.¹

We, as Prospect's Aviation Group (representing 12,000 aviation professionals in Air Traffic Management, Airport Management, Licensed Aircraft Engineers and professional staff working within the UK regulator), have published the following document to express our agreement and concerns with the proposed amendment. Prospect is an affiliate of the European Transport Workers Federation (ETF) and works through them to represent aviation workers in Europe.

The UK as a general rule has experimented already with many concepts contained within these proposals, including a move to performance based regulation. The issues raised in this paper are born from experience and do not just reflect political positions.

EASA plays an increasingly crucial role in the field of aviation regulation and it is important that its construct and expertise are sufficient to enable effective regulation to be conducted. Prospect does not question the desires of the European Commission to continue to improve European aviation safety, yet in acknowledging the text statement '*aviation safety is the principal objective of this proposal*',² we have concerns that some of the articles detailed could in fact erode European aviation safety through their nature.

Conversely, Prospect Aviation Group notes that the proposed amendment lacks any dedicated mention of the regulation of Remote Tower operations. As an area of our industry that is growing rapidly, there is a genuine concern for safety in the application of proper and consolidated techniques of Remote Tower operations. Whilst it is noted that EASA has issued Guidance Material³ on the subject, it must be acknowledged that the contents of this are merely recommendations and not binding regulation, allowing individual member states / ANSPs the freedom to select some, if any of the elements of it.

The proposed amendment very firmly sets out the desire to move towards a '*risk and performance based approach to safety regulation*'.⁴ Prospect urges significant caution with regards to the concept of performance based regulation. Balancing the regulatory approach with operational needs is always difficult yet the performance based approach must be undertaken with proper care, diligence and training.

In addition to the above, the key areas with which we wish to express our concerns include:

¹ Commission Staff Working Document COM(2015) 613 final, 2015/0277 COD

² 2015/0277, page 2

³ 2015/014R - Annex

⁴ 2015/0277, page 2

- The proposals to alter the funding of EASA and the influence this will undoubtedly have on service provision and its subsequent potential impact on safe air traffic services (ATS)
- The need for inclusion of the social aspect in the proposed amendment as people who operate the system ensure its safety
- The proposals based on Joint Oversight and Enforcement System open the system up to abuse in some instances, jeopardising aviation safety

The UK has an excellent and experienced track record in regulating aviation safety and Prospect welcomes the opportunity to discuss our views with regulators and politicians so that proposed amendments affecting the operation of aviation in and over the UK and for UK citizens wherever they may be, continue to provide the highest levels of safety. The following outlines Prospect Aviation Group's in-depth position on the proposals.

SPECIFIC POLICY AREAS

Performance based regulation (PBR)

The concept of 'Performance based regulation'⁵ is one that must be treated with caution and proper diligence. Where appropriate the concept, with proper resources, competent organisations and personnel and crucially no conflicting interests, could offer some enhancement to a prescriptive approach. However we do not live in a perfect world and therefore prescriptive regulation (which has served well) should not be automatically discarded.

PBR is an advanced technique which places much more faith in data and organisations themselves and can remove front line inspections, favouring the auditing of process. In order for the safety benefits to be realised the organisations themselves need to be of sufficient maturity to be able to collect, interpret and respond to data, without allowing financial or commercial pressures to mask the situation that the data is describing. For the same financial and commercial reasons, PBR can seem attractive to organisations as it allows them to deviate from what might be more costly prescriptive rules. This is perfectly acceptable if the organisation is capable of enhancing its own safety, but there are too many examples of where this is not the case. Indeed it may be that some organisations are simply incapable of transforming themselves into one which can become truly performance based. Whilst being touted as a way of regulating to achieve specific safety outcomes (e.g. an accident rate per number of operations) it is in reality a way for commercial organisations to avoid the overly burdensome and costly prescriptive approach, which can force compliance and provides at least a minimum level of safety.

As so starkly put in the Columbia Space Shuttle Disaster Accident Investigation Board Statement, '*complex systems almost always fail in complex ways*'.⁶ Aviation is an incredibly complex system; it is a regulator's duty to ensure this system is properly overseen using the most appropriate techniques, and to not fall to pressure from business and economic interests in order to increase their commercial returns. As we have seen in events such as

⁵ A regulatory approach that focuses on desired, measurable outcomes, rather than prescriptive processes, techniques, or procedures. Performance-based regulation leads to defined results without specific direction regarding how those results are to be obtained. (United States Nuclear Regulatory Commission.)

⁶ <http://spaceflightnow.com/columbia/report/006boardstatement.html>

the Deep Water Horizon accident, the consequences of inadequate regulation are catastrophic.

Furthermore, the proposed amendment text states that '*[w]ith the transition to a risk and performance based approach to regulation and oversight, Member States and the European Union Aviation Safety Agency (EASA) will need to develop new skills and competences, as well as to be continuously abreast with the latest technologies developed by the industry*'.⁷

However we must question the capability of EASA and national competency authorities to instantly achieve this with no negative impact on European aviation safety.

One of the key tenets behind the move towards PBR is ostensibly found in the statement:

*The vast majority of the organisations which contributed to the Commission's on-line survey (82%), and in particular the SMEs, argue that existing rules are too detailed and prescriptive, and that the current safety levels could be maintained with lower compliance cost (83%).*⁸

The strength of sentiment behind such a statement from member states may very well be understood (i.e. the desire to move away from prescriptive regulation), yet there is an imperative for actual evidence to support such a shift in safety management practice. The proposed amendment actually refers to situations where member states may require assistance in the performance of certain competencies with regards to regulation/oversight and the pooling of such resources (discussed later in this position paper), and yet it is these same member states who would presumably be managing their own safety performance in a world that has shifted from that of prescriptive regulation to PBR. We feel that this is cause for serious concern.

Prospect advocates a performance based approach not only in circumstances where all players have demonstrated a suitable level of maturity and ability in safety management (including Just Culture), but where they also have a common understanding of the concept of performance based regulation (this is not always the case). Front-line staff also needs to be trained and to be aware of the concept, demonstrating a thorough reporting culture so that meaningful data can be collected and properly fed in to the safety management system for performance based regulation to be effective. PBR should be seen as a compliment to prescriptive based regulation and not as a replacement. Until the concept is sufficiently mature with a demonstrable track record it should be considered experimental, with the resultant protections and checks and balances.

Funding of EASA⁹

Prospect absolutely rejects the provision to include elements of EASA funding in the performance scheme. It is unclear how through regulation the Commission can mandate the transfer of funding from the Eurocontrol budget (as an intergovernmental organisation) to EASA. The En Route charges governed by the performance scheme have enough entities vying for funding from this mechanism, and by adding an additional benefactor it will increase the pressure further. Prospect rejects the position from the Commission that any transfer would be cost neutral to users. It is inevitable that the two entities (EASA and Eurocontrol) would ultimately compete for funds and the loser will be the service providers

⁷ 2015/0277, Page 2

⁸ 2015/0277, page 6

⁹ 2015/0277, Article 109(f)

who will very likely be required to make even more stringent cost savings on top of those already envisaged. Cost savings to air traffic services provision have the potential to impact on its safety (through staff reductions or lack of investment etc.). EASA should ideally be funded by a grant from the Commission, with some contribution from 3rd party states as appropriate.

Prospect also rejects the charging of fees for the processing of appeals.¹⁰ The provision for appeal is a fundamental part of basic justice and to levy a fee in order to process an appeal is a barrier to proper justice and is by its very nature unethical.

Safety and Social conditions

There are very limited provisions to take in to account the social aspect of the regulatory framework. Traditionally EASA has refused to recognise any social consequence of its regulatory actions and this cannot continue. A significant amount of rulemaking which will become oversight in the future has innumerable social consequences and it is unacceptable that these are not considered by EASA. The whole aviation system relies on people so that it may operate safely, and it is an anomaly that they are not considered. We propose that the Regulatory Impact Assessment (RIA) process is expanded to include a 'social impact assessment' as part of the RIA so that social effects are properly considered.

Additionally, EASA should be given powers to regulate and if required, prohibit 'atypical' forms of employment in aviation that are suspected of being a barrier to effective aviation safety.¹¹

Stakeholder Involvement¹²

Stakeholder involvement has been a constant in the operations and rulemaking activities of EASA and is very much welcome. The consultation procedures are generally to be praised and the access and willingness for the agency's staff to engage is to be commended. Prospect would expect this to continue and feels that in the issuance of various rulemaking vehicles, experts and representatives of stakeholders are always involved; a small rewording of Article 104 (1b) to reflect this is desirable.

Delegated Acts¹³

There exists the concern that through these articles there is the potential for the reduction of the level of consultation of experts, thus limiting the consideration of local factors, in contrast to the previous paragraph. Although it remains unclear how the process may be developed, Prospect reiterates that it is imperative that industry experts and local stakeholders be consulted to maintain a proper functioning of the regulatory system.

Joint Oversight and Enforcement System¹⁴

¹⁰ 2015/0277, Article 115 (4c)

¹¹ Executive summary: 'Atypical employment in aviation – University of Ghent.
http://www.europarl.europa.eu/meetdocs/2014_2019/documents/tran/dv/report_atypicalemploymentinaviation_/Report_AtypicalEmploymentInAviation_en.pdf

¹² 2015/0277, Article 104 (1b)

¹³ 2015/0277, Articles 39 and 44

¹⁴ 2015/0277, Articles 51-53

Prospect welcomes the initiative to enhance cooperation between member states and their national regulators. Prospect supports the creation of a pooling and sharing of inspectors and of other personnel to distribute information and expertise.¹⁵ This should also allow a greater level of knowledge throughout the EU, particularly with respect to multi-state and multi-base operators.

Prospect urges extreme caution in the provisions that allow for the transfer of responsibility to other member states or EASA itself for three reasons.¹⁶ Firstly, whilst cooperation and assistance is a useful tool, the full transfer of oversight to another state may well make oversight less thorough and could allow safety to diminish. Whilst performance auditing would no doubt be complied with, there is no substitute for proper oversight ‘in the field’ and if responsibilities are transferred, this would probably be non-existent in states that had transferred responsibility. Secondly, we question why it should even be the case that a member state finds itself in the position to need to access such a clause. It must be agreed that those in the best position to achieve and maintain a thorough oversight of the industry in each member state are member states themselves and that they should not be permitted to get themselves into a position where their resources are lacking in a particular area. Finally, there is a question over how national law (and associated penalties) in these circumstances, particularly with respect to enforcement would be applied.

Finally, Prospect absolutely rejects the ability of organisations to request that the agency acts as the competent authority.¹⁷ Organisations must not be able to self-determine their own regulator. It is foreseeable that should one or more organisations feel a member state is being overly burdensome in its oversight or its fees are more expensive than EASA, then the organisation would go ‘regulator shopping’. It may also arise that with the threat of a large organisation choosing to request EASA as its regulatory authority, a national regulator may change its behaviour in order to keep that organisation. In states where the ‘user pays’ principle is applied to national regulation, the choice of an organisation (particularly of significant size) to elect to have EASA as its competent authority may adversely impact that national regulator to the detriment of oversight for other organisations in that member state.

Fines and periodic penalty payments¹⁸

Prospect understands the need for enforcement to ensure that the regulation is complied with. However in conjunction with the article outlining the fines and periodic payments, there should be a reference connecting it to Article 62 and/or a separate article or paragraph connecting this article with the principles of Just Culture as outlined in Commission Regulation 376/2014. Furthermore, detailed provisions should be stipulated coordinating the imposition of fines under this regulation with the penalties that maybe imposed by an individual member state under national law.

Flexibility Provisions¹⁹

Article 14 (6) of 216/2008 allows for Member States to apply derogations to that regulation where an equivalent level of protection is proven to exist. This current amendment eradicates this power whereby Member States must submit a request for an amendment to

¹⁵ 2015/0277, Article 52, page 45

¹⁶ 2015/0277, Article 53 (1,2)

¹⁷ 2015/0277, Article 54

¹⁸ 2015/0277, Article 72

¹⁹ 2015/0277, Article 60

the Implementing Rules. Prospect has concerns that this does not allow sufficient flexibility in the spirit of better regulation laid out once again in this text in Article 4, 1. (e).

CONCLUSION

Prospect Aviation Group welcomes all endeavours by the European Commission to modernise the EASA Basic Regulation; there are merits in many of the proposals. However, even though we support the concept of some proposals, there is a serious concern that the application of these could result in an undue negative impact on the safety of European aviation.

In brief, our position is as follows:

- A wholesale move from prescriptive regulation to a performance based approach may not be sufficiently mature and so presents a serious cause for concern for aviation safety
- Funding for EASA as an agency of the EU must not come from En Route charges
- A social impact assessment must be included as part of the RIA
- Stakeholder involvement continues to be essential to rulemaking process and therefore changes to Delegated Acts must not diminish this input
- A pooling of expert knowledge is welcomed
- The transfer of oversight presents concerns for the continuity of safety
- Individual entities must not be permitted to go 'regulator shopping'
- Fines and periodic payments must be associated with Just Culture regulation and it must also be clearly delineated how they would interact with national law
- Eradication of flexibility provisions is not in the spirit of better regulation

Finally, we urge the European Commission to readdress what it is they state they have set out to achieve with these proposed amendments (namely preparation of '*the EU aviation safety regulatory framework for the challenges of the next ten to fifteen years*'²⁰). The proposals contained in some articles fail to ensure that the process and outcome will be truly sufficiently robust to achieve their mission statement, and thus have the potential to unduly harm the progress or even the maintenance of EU aviation safety.

²⁰ 2015/0277, page 2