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O F T H E E F T A S T A T E S

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SUBCOMMITTEE II ON FREE MOVEMENT OF SERVICES

EEA EFTA Comment

on the proposal for a regulation of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and repealing Regulation (EC) No 216/2008 of the European Parliament and of the Council

1. INTRODUCTION

1. The EFTA States welcome the proposal for an improved European aviation regulatory framework which will enable future challenges in aviation in the European Union (EU) and in the European Economic Area (EEA) to be better met. The EFTA States also support the introduction of a more risk and performance-based approach to safety regulation.

2. OVERSIGHT OF SCANDINAVIAN AIRLINES

2. While the European Commission's proposal, notably Article 54, recognises the emergence of multinational organisations, the proposed framework does not, in the opinion of the EFTA States, allow for Member States to be jointly responsible for safety oversight and the certification of multinational organisations. As a consequence, the proposal does not appear to allow for the continuation of the Scandinavian Airlines System (SAS) governance model in its present form. The three Scandinavian States responsible for the oversight of SAS have an ongoing dialogue with the Commission regarding this subject, and it will not be commented on any further in this paper.

3. AMENDMENTS TO ARTICLE 53 – TRANSFER OF RESPONSIBILITY

3.1. Rationale

3. Article 53 of the proposed regulation allows for the transfer of responsibilities from a Member State to the European Aviation Safety Agency (EASA) for all types of activities

covered by the regulation. The article also allows for the transfer of responsibilities from one Member State to another.

4. The EFTA States do support the reasoning behind this article, as it allows for a national authority to be relieved of the responsibility and burden of certification and oversight. It also enables the oversight of an organisation to be transferred to the most appropriate authority in terms of capacity and competence to undertake the transferred tasks.

5. The EFTA States also support that such transfer is voluntary, as it limits possible constitutional challenges for the Member States.

6. It is not clear whether this article covers the transfer of the overall responsibility of the authority with regard to the organisations concerned, or if it is foreseen that this article could be used as grounds to transfer only certain areas of oversight/certification, i.e. responsibility for certain specialised air operations, technical oversight, etc. Will it typically be possible to transfer the responsibility for operations requiring Specific Approval (SPA) to another Member State? An example: A helicopter operator is under general oversight in Member State A, but is performing particularly challenging operations requiring specific approval in Member State B. If the authorities in Member State B have specialised competence or experience in this area of operations, it is the EFTA States' opinion that such restricted transfer may be rational and should be allowed. The EFTA States suggest that this be clarified in the proposed text.

3.2. Proposal for amendment

7. Article 53 (2) first sub-paragraph should be amended as follows:

"Member States may, subject to mutual consent, transfer to another Member State the responsibility for the certification, oversight and enforcement with respect to any or all organisations, operators, personnel, aircraft, flight simulation training devices or aerodromes, or for clearly defined areas of operations performed by an organisation, for which they are responsible under this Regulation."

The same amendment could be made to Article 53 (1) first paragraph, if the fullest possible correlation of these provisions is to be maintained.

4. AMENDMENTS TO ARTICLE 54 – ORGANISATIONS OPERATING MULTINATIONALLY

4.1. Rationale

8. Article 54 of the proposed regulation introduces the possibility for organisations operating multinationally to opt to have EASA as their competent authority. The article implies that this option is open to the operator without the consent of the national competent authorities. Hence, national oversight in highly important areas could potentially be transferred to a supranational body (EASA).

9. To the EFTA States, this transfer of sovereignty gives rise to challenging constitutional questions. We are aware that the transfer of competence has already been completed in areas such as type certification and the certification of providers with their principal place of business in third countries. For the EFTA parliaments, the transfers already conducted have been considered acceptable because they are in areas of relatively limited practical importance to our countries. The transfer of competence contained in the proposed Article 54 is potentially of a different scale, both substantially and politically. It affects carriers with considerable national importance.

10. If such carriers opt to subject their activities to EASA's oversight, it is likely that competent national authorities will face challenges with maintaining the professional competence of their staff and sufficient capacity to be able to resume the same responsibilities at a later stage. We are concerned about the need to avoid the erosion of professional cultures in the Member States, and the subsequent weakening of national preparedness in the long term.

11. Further, as countries with challenging topography and weather conditions, we believe that knowledge of local circumstances is vital for both safety and regularity of operations. To maintain this knowledge, the relevant authorities should have a level of closeness to the day-to-day operations.

12. Finally, the EFTA States are not convinced that a transfer of responsibility is financially recommendable when looking at the total productivity of EASA and the national competent authorities.

13. We therefore consider that the authority/ies in the Member State(s) where the organisation(s) applying for the transfer of responsibility has/have its/their principal place of business should consent to the transfer to EASA in addition to maintaining its/their own oversight (i.e. co-decision). Such division of competence, supplemented by the procedural provisions for a transition plan already contained in the Commission's proposal, would make it possible to cater for all of the considerations mentioned above with the weight that they have in each individual case. This would create the necessary predictability for the national authorities and hopefully remedy the constitutional challenges that would otherwise arise.

14. Consequently, it is the opinion of the EFTA States that Article 54 should be amended to take due notice of the aforementioned concerns.

4.2. Proposal for amendment

15. Article 54 (2) first sub-paragraph should be amended as follows:

"Where the Agency considers that it can effectively exercise the responsibilities for the certification, oversight and enforcement, as requested, in compliance with this Regulation and the delegated acts adopted on the basis thereof, and the Member State or Member States concerned consent(s) to a transfer of responsibilities, they shall jointly establish a transition plan that ensures an orderly transfer of those responsibilities. The organisations that requested the transfer shall be consulted on this transition plan before it is finalised."

5. ARTICLE 63 – REPOSITORY OF INFORMATION – HOW TO SECURE AVAILABILITY AND USE OF UPDATED INFORMATION CONCERNING MEDICAL FITNESS

16. The main cause of the Germanwings accident was the psychiatric illness of the pilot. Hence, the most important issue should be how to prevent medically unfit pilots from flying. An important aspect of such measures should be to ensure efficient communication of the fit/unfit status of the pilot to the operator with which the pilot has his/her engagement.

17. The proposed Article 63 (2) prescribes an enhanced exchange of medical information between national authorities and medical personnel playing a role in the licensing system based on Articles 20 and 51 of the proposal. This is very positive.

18. At the same time it is insufficient. It is our belief that lack of knowledge among air operators as employers of pilots or lessees/contractors of pilot services is a substantial impediment to informed choice and risk management. When outdated, paper-format licences are presented to operators, pilots may be able to fly without a valid licence or in violation of limitations introduced after their paper licence was issued or last renewed.

19. To the EFTA States this shows a weakness in the system which is close to being illogical. The purpose of the licence system is to help ensure a safe aviation industry. If the information collected and exchanged among those mentioned in the proposed Article 63 (2) is not applied (without consequence), an important aspect of the system is in reality defunct.

20. The EFTA States thus suggest that operators have access via the European Central Repository (ECR) to updated information on the validity of licences governed by the new regulation at any time. This information does not include medical data in a strict sense, only the legally binding decisions taken in accordance with Article 51 (the "conclusion").

21. We acknowledge that online access for all air operators to information mentioned in the latter paragraph has political implications, and that opinions vary among the Member States. In the political discussion we would like to mention two additional arguments:

    1. It follows from Regulation (EU) No 376/2015 Article 10 (2) that air operators are already entitled to request access to information from the ECR for reported information. This access is not online, but the provision is based on the assumption that private parties, like air operators, contribute to safety by gaining access to risk-relevant information stored in common European data repositories.

    2. To work as a pilot is in reality to govern a publicly trusted position. A pilot holds this position by virtue of law, and his/her status as a licensed pilot is derived from a public licensing system. Thus, weighty arguments can be given in favour of full transparency on the validity of licences.

6. ARTICLE 65 PARAGRAPH 6 AND ARTICLE 76(3) – URGENT SECURITY MEASURES

22. In COM(2015) 613 final, Article 65 is described as a merger of Articles 18 and 19 of Regulation (EC) No 216/2008. As a rather loose characterisation this may be adequate, but when it comes to Article 65 paragraph 6 it seems incomplete. And we believe that the reference in Article 76(3) to Article 65(6) is of particular relevance.

23. In Article 65(6) the word "determining" is used. The most natural understanding of this term is that it refers to legally binding measures having direct effect for national competent authorities and for legal and natural persons.

24. To the extent that such effects are related to subjects like type certificates (airworthiness) and Air Operator Certificates (AOCs), their application is contained within relatively clear thematic boundaries with a high level of political acceptance. When it comes to security, however, the thematic delineation is not that straightforward. The wording of Article 76(3) is itself without any further substantial limitation within the boundaries of the phrase "acts of unlawful interference". This is acceptable when combined with the airworthiness provision in Article 66(1)(i), but the reference to Article 65(6) could in principle be used in connection with politically challenging initiatives such as general body visitation of all passengers in the wake of a serious terrorist attack.

25. By prescribing the involvement of the Commission and the Member States, the wording of Article 76(3) seems to acknowledge the possible political and sovereignty aspects of this subject. At the same time, it seems inconsistent that the Member States are only to be consulted. We believe that the weighting of legal power between the Member States and the EU institutions (EASA/Commission) should be the same as when the emergency procedure in draft Article 116(4) and Regulation (EU) No 182/2011 Article 8(4) is prescribed. Here, the Commission (the supranational level) is obliged to repeal an implemented act when a committee of Member States delivers a negative opinion. This also seems more consistent with the reference to Article 116(4) in Article 55(4) last sentence.

26. Article 116(4) does not apply directly to measures to be adopted by EASA, so the question is whether the competence in Article 76(3) should be withdrawn from EASA and transferred to the Commission in cases where an emergency measure is of particular political concern. In such cases, the Member States could be competent, during the pre-adoption consultation foreseen in Article 76(3), to insist on the transfer of competence to the Commission and application of a procedure similar to the one prescribed in Article 8(4) of Regulation (EU) No 182/2011.

27. We leave it to the negotiations in the Council and the Parliament, with the help of the Commission, to find out how this intention can be followed up legally and technically.
