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Commission staff working paper

Transitional period stemming from the Proposal on Air Operations/Commercial Air Transport

The EASA Committee reached agreement, during the October 2011 meeting, on the content of the future Commission Regulation on **Air Operations/Commercial Air Transport** (OPS-CAT Regulation). On 14 December 2011 Member States voted on the Commission proposal reflecting such agreement by means of written procedure. This Regulation will contain Cover Regulation and Annexes I, II, III, IV and V.

The OPS-CAT Regulation should be **complemented later** in 2012 with amending Regulation(s) covering non-commercial operations (NCC and NCO), specialised operations (SPO), sailplanes and balloons (CAT S and B), A-A operations (CAT A-A) and rules concerning flight time limitations (FTL).

Adoption of OPS-CAT by the Commission and its publication into the Official Journal of the EU (OJ) is expected in the 2nd semester of 2012. The associated **Acceptable Means of Compliance and Guidance Material** will be published by EASA at the same time or shortly after publication of the OPS-CAT Regulation into the OJ.

Several issues related to the OPS-CAT Regulation were identified by the Member States as creating potential problems of **interpretation** such as transitional period, application and actions by Member States during transition and conversion processes.

Therefore, the objective of this paper is to provide answers to those questions raised by Member States and a guidance concerning the way to interpret the OPS-CAT Regulation.

1. Date of entry into force and date of application

Following the mandate enshrined in Article 70 of Regulation (EC) No 216/2008, the Regulation on OPS-CAT shall enter into force and shall apply as from the date specified therein.

In accordance with Article 10(1) of the OPS-CAT Regulation, the latter shall enter into force and apply as of the third day following that of its publication in the OJ. This date applies to the Cover Regulation as well as to all its Annexes (Definitions, Parts-ARO, ORO, CAT and SPA).

From a legal point of view, the **date of "application" is the relevant one** for Member States and industry, as the one from which they shall start complying with the new rules. The "entry into force" just means that EU rules exist but without implying that those rules are mandatory.

However, it has been recognised that it is not possible for NAAs and AOC holders to become fully compliant with the new rules immediately after entry into force. Accordingly, the OPS-CAT Regulation includes an **opt-out** provision (Article 10(2)) which allows Member States to delay the application of the Regulation for a maximum of two years after the date of its entry into force.

For a Member State that chooses not to benefit from the opt-out, the date of entry into force and application will be one and the same.

On the contrary, dates of entry into force and application will differ for a **Member State that** needs a transitional period and decides to make **use of the opt-out** provision. In such case, the **date of application shall be deferred until the transitional period chosen by that Member State elapses**. Precisely in this sense all the provisions of the Cover Regulation which use the expression "*[this Regulation/implementing rules] apply*" need to be understood. In other words, taking the example of Article 7(1) of the Cover Regulation, this provision means that AOCs issued by a Member State to CAT operators of aeroplanes before the end of the opt-out period are grandfathered if they were issued in accordance with Regulation (EC) No 3922/1991.

The opt-out means that after its end date only the new Implementing Rules (IRs) apply and any action on certificates shall be performed in accordance with the IRs.

Finally, following the discussions in the EASA Committee, the Commission assumes that all Member States will use the whole or part of the opt-out period just mentioned.

2. When will Member States and industry have a stable version of the Regulation and certainty of the date of adoption?

An English version of the draft Regulation will be distributed to the Members of the EASA Committee after the vote via written procedure. This version might need minor linguistic adaptations if so identified during the translation phase; the Members of the EASA Committee will be informed of this if happening.

As soon as the draft Regulation is sent to the European Parliament and Council for scrutiny, Member States and stakeholders will obtain access to all linguistic versions. It can be assumed that adoption should intervene, if the European Parliament and Council do not object to it, within the 4-5 months following the beginning of such scrutiny period.

3. General principles governing the transition

In line with Article 10(2) of the OPS-CAT Regulation, if a Member State decides to make use of an opt-out, it **shall notify the Commission and the Agency** (see p. 7 for further guidance). The notification shall be made as soon as possible (not later than 2 months) after the entry into force of the Regulation and shall describe the **reasons for transition and its overall duration as well as the programme for implementation** containing actions envisaged and related timing.

Such notifications from Member States to the Commission should provide authorities and industry with a **legal certainty** during the transition as to which particular provisions (or whole sections, subparts, parts) become applicable in each and every Member State and when. Every Member State shall, on the basis of its administrative capacity and level of compliance, decide which provisions, sections etc. would need to be covered by an opt-out in its territory and how much time it needs to opt-out for a particular issue. It is recommended that such decision is taken in consultation with the certificate holders, so that they are fully aware of the planned actions.

The implementation programme should ensure that the new rules are fully complied with by the end of the opt-out. It is also of great importance to assess the progress of implementation of the new rules for the purpose of standardisation visits. Such programmes do not need to include all details when being notified and may be amended during the opt-out period, if necessary. Substantial amendments to those programmes shall also be communicated to the Commission and the Agency.

Member States have the duty to respect **the principle of sincere cooperation** as enshrined in Article 4(3) of the Treaty on European Union. This principle implies that all appropriate measures to ensure fulfilment of obligations arising from the Treaties are taken by the Member States. In the context of OPS-CAT Regulation, while implementing opt-outs, Member States should abstain from any action which could endanger the full implementation of the new rules by the end of the transitional period. For example, Member States and organisations should not leave to the last day the actions necessary for complying with the IRs. Member States should as well refrain from regulating at national level in areas covered by the implementing rules after an agreement in the EASA Committee has been reached on a certain topic.

It is possible, under a general principle of EU law, that *EU acquis* applies during a transition period in parallel to national law, in order to avoid unintended legal vacuums. In this sense, **EU-OPS/national rules implementing JAR-OPS 3 and JIPS shall remain applicable until the end of the opt-out** periods chosen by the Member States, and that despite the wording of Article 69(3) of Regulation (EC) No 216/2008. The intention that EU-OPS remains in place beyond the date of entry into force of the IRs is already visible in the grandfathering provisions already included in OPS-CAT Regulation, as well as in Recital (6). Following the same logic, it would be possible for a MS to continue applying EU-OPS or national law implementing JAR-OPS 3 during the opt-out periods for some operators which have not already fully migrated to the new system until such migration is finalised, at the latest by the end date of the opt out.

As a result of the above, it is still possible during the transition period to consider applicable **Article 8 of the EU-OPS Regulation**, including the **derogations and exemptions** granted by the Commission and Member States respectively, based thereon. It would also be possible to decide new measures based on such Article providing that these are limited in time until the end of the transitional period.

Except if otherwise provided under Article 6 of the OPS-CAT Regulation, those derogations and exemptions granted before or during the transitional period shall not, however, be valid any more after the IRs are fully applicable. Accordingly, any operator or Member State wishing to benefit from such measures beyond the end of the opt-out would need to make the necessary arrangements following the procedures prescribed under Article 14 of Regulation (EC) No 216/2008. To that extent,

it shall be reminded that most of the derogations and exemptions granted under EU-OPS have been integrated in the new IRs and would not require a separate decision.

4. Actions during transition

The Commission's understanding is that during the transition a Member State should start implementing OPS-CAT Regulation taking a step by step approach, while at the same time continuing with the routine implementation of EU-OPS or JAR-OPS 3.

As explained for the Aircrew Regulation, the Commission wishes to provide Member States with all the flexibility necessary to address difficulties encountered during the transition in an appropriate manner depending on the circumstances of every case; accordingly, no particular order or rigid transition rules are imposed to implementing the new provisions during the opt-out.

However, the following principles should be retained:

- Competent authorities should start adapting their management procedures, inspector's handbooks, certification software etc. as from the date of entry into force, so that when the transitional period elapses, the authority is ready to shift to the new rules;
- Operators shall begin to adapt their management systems, operational procedures, training programmes and manuals as from the date of entry into force, so that by the end of transition at the latest they are fully compliant with the new IRs.
- Competent authorities should be allowed to continue issuing **new** certificates and associated operations specifications in accordance with EU-OPS/JAR-OPS 3 until the end of transition. The same is valid for granting **national exemptions or requesting derogations** under Article 8(2) or 8(3) respectively of Regulation (EEC) No 3922/91.
- Renewal or amendment of the certificates and operations specifications should be permitted in accordance with EU-OPS/JAR-OPS 3 until the transition elapses. For example: inclusion or removal of aircraft; modifications to the areas of operations, modifications to the special limitations (VFR only/day only) or special approvals (such as dangerous goods, LVO, RVSM, ETOPS, PBN, MNPS) etc.

- A person undergoing initial certification in a Member State in accordance with the old rules prior to the entry into force of OPS-CAT Regulation, may continue to be certified on the basis of the old rules irrespective whether the certification is due to be completed after the date on which the Regulation enters into force. The same applies to the renewal of an AOC started prior to the entry into force and completed during the transition. **However, around six months before the transition elapses procedures for initial certification of operators or renewal of AOCs should already be launched in accordance with the new rules if they are not likely to be completed before the end of the opt-out.**
- Competent authorities should also be able to grant new certificates with a new format and associated operations specifications **under the new rules** to applicants which have made good progress in their adaptation to and meet the requirements of OPS-CAT Regulation. This equally applies to EU-OPS compliant AOCs which are due for renewal during transition. In this context 'good progress' means closure of all inconsistencies after a gap analysis. However, this option shall heavily depend on the progress achieved by the authorities themselves in implementation of the programme for transition. This does not mean that certification cannot be performed under the new rules until the competent authorities are fully compliant with the new regime but every case should be assessed depending on the particular circumstances.

Abovementioned gradual measures would eliminate the risk of a pick backlog, non-compliance or deficiency which would inevitably occur if the implementation of the new rules was left for the last moment.

5. Grand-father of privileges under EU-OPS compliant AOC

The privileges of an AOC holder stem from the rights granted under the certificate and all approvals, conditions and limitations contained in the associated operations specifications for each aircraft model in the operator's fleet.

The privileges of an AOC holder shall be grandfathered ***without further evaluation or verification*** as of the moment from which the Regulation applies on the condition its certificate and associated operations specifications are EU-OPS compliant and have been issued before the transition elapses. The privileges shall be 'frozen' to their current levels. However, as the AOC holder must operate in accordance with the new rules, at some point he will meet a requirement exceeding its 'frozen' privileges, thus causing the need to update the operations specifications.

Without prejudice to the above paragraph, as from the date the OPS-CAT Regulation applies:

- new certificates, under the new format, and associated operations specifications can only be issued in accordance with the new rules;
- the privileges stemming from grandfathered AOCs can only be updated in accordance with the new rules.

6. Conversion of helicopter AOC

Since commercial helicopter operations have been conducted so far in accordance with national regulations of the Member States transposing JAR-OPS 3 with varying degrees of compliance, a conversion procedure is foreseen for CAT helicopter AOCs issued before the OPS-CAT Regulation applies. Accordingly, there is **no automatic grandfathering** of the related AOCs.

The **conversion process shall start from the date of entry into force** of the OPS-CAT Regulation until full compliance with the new rules is achieved by the end of opt-out period.

The competent authorities of a Member State shall prepare a conversion report indicating among other things how and when the holders of CAT helicopter AOCs under their regulatory control will be required to move to full compliance with of Parts ORO, CAT and, if applicable, SPA. The conversion report shall be established in consultation with the Agency. It may be modified and supplemented likewise.

As indicated above, the privileges of an AOC holder stem from the scope of the activities that this holder is approved to conduct. These activities and their scope are documented and specified in the operations specifications. During the conversion process the competent authority shall perform a comparison between the rules under which a specific privilege has been granted and the new rules. This may take the form of a **compliance checklist**. If compliance with the new requirements was established during the comparison, the respective privilege might be credited i.e. recognised for the purpose of issuance of AOC at a later stage. In the opposite case a plan should be established indicating the measures for achieving full compliance and related deadline.

Typically the privileges are linked to a particular type of helicopter on the AOC or even linked to an individual helicopter. There could be several helicopters of a single type listed on the AOC all with different privileges, depending on the equipment fit. In such a case it could be that regular CAT is credited, but special operations not, due to equipment/training being not compliant yet with the new requirements.

The following **examples** describe cases where some privileges are credited and others not:

A helicopter is allowed to fly VFR by day and VFR by night and to carry dangerous goods.

- Assuming that this helicopter would not meet the new requirements for flying VFR by night due to missing equipment this privilege cannot be granted under the new AOC **until** such equipment is fitted, but it can still be credited for VFR by day.

- Or similarly, assuming that the national DG training requirements for crew involved in carrying DG are not identical to the future rules, such approval should be granted for all types only **after** all crews are trained in the differences.

An operator has been given the privilege to perform single crew HEMS operations.

- Such privilege cannot be credited under the new requirements; only **after** closing the gap – i.e. implementing the required changes to the operational procedures and appointing/recruiting and training additional crew members – in order to ensure compliance with SPA.HEMS can such operation continue under a HEMS approval.

As a result of the conversion process of existing CAT helicopter AOCs, **the competent authorities should be able to grant certificates and associated operations specifications under the new rules** to the relevant helicopter operators.

7. Point of contact

A Member State shall use the established diplomatic channels (such as Permanent representation to the EU) in order to notify the Commission of its decision to opt-out, as well as to send an implementation plan. Correspondence should be addressed to DG MOVE, Directorate E - Aviation and international transport affairs and uploaded in the CIRCABC dedicated folder "Exchange of documents related to Implementing Rules of Regulation (EC) 216/2008"

EASA shall be notified at: S_Std-OPS-air_operations_regulation@easa.europa.eu

