



Council of the
European Union

Brussels, 14 November 2016
(OR. en)

13505/16

LIMITE

AVIATION 215
CODEC 1490
RELEX 867

Interinstitutional File:
2015/0277 (COD)

REPORT

From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 1)
No. Cion doc.:	14991/15 AVIATION 152 CODEC 1667 RELEX 1014 + ADD 1-5
Subject:	<i>Preparation of the Council meeting (Transport, Telecommunications and Energy) on 1st December 2016</i> 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 – General approach

1. Introduction

On 7 December 2015, the Commission adopted the above-mentioned proposal, part of European Commission's '*Aviation Strategy for Europe*'. Its objective is to prepare the EU aviation safety regulatory framework for the challenges of the next ten to fifteen years.

2. Content of the proposal

The main objective of the proposal is to maintain the current high European safety levels while allowing the EU aviation sector to continue to grow in the future. For this purpose, the proposal introduces a risk and performance based approach to safety regulation. It also proposes to close existing safety gaps and better take into account interdependencies between aviation safety and other technical domains of regulation, such as aviation security or environmental protection.

Another objective of the proposal is to create an effective regulatory framework for the integration of new business models and emerging technologies. In particular, this initiative proposes to create a Union framework for the safe integration of unmanned aircraft into the European airspace.

The proposal introduces a more proportionate and flexible approach to safety regulation and it eliminates rules which could stifle entrepreneurship with too prescriptive requirements. It notably proposes to introduce a scalable framework which recognises the differences existing between the various sectors of civil aviation and the risks involved therein.

In order to address the challenges faced by some national authorities in maintaining and providing the resources necessary for their oversight and certification responsibilities, the initiative also proposes a framework for pooling and sharing of technical resources between the national authorities and the European Aviation Safety Agency (hereinafter 'the Agency'), which includes the possibility of transferring responsibilities for implementation of Union legislation on a voluntary basis.

3. Work within the European Parliament

The European Parliament's Committee on Transport and Tourism has appointed Mr Marian-Jean MARINESCU (EPP) as rapporteur. On 3 May 2016, the rapporteur published his draft report, which contained 242 amendments. The draft report was presented in the TRAN Committee on 24 May 2016 and on 10 November 2016, the Committee adopted the amended draft report with 32 votes in favour, 11 against and 1 abstention. On the same day the legislative resolution was also carried with 32 in favour, 11 against and 1 abstention, as well as the decision to start inter-institutional negotiations with 32 votes in favour, 10 votes against and 2 abstentions.

4. Work within the Council bodies

The Commission made a first general presentation of the proposal to the Aviation Working Party (hereinafter the 'Working Party') on 7 December 2015, during the Luxembourg Presidency. The Commission also presented the 'Aviation Strategy' to the TTE Council on 10 December 2015. The Working Party began the detailed examination of the Commission proposal, together with its impact assessment, during the Dutch Presidency, in early January 2016.

On 8 January 2016, the Commission presented the impact assessment to the Working Party, which was followed by general comments by the delegations. Due to the high complexity of the file, at that point delegations had not finished the examination of the impact assessment and they expressed their intention to refer back to it in more detail in connection with the subsequent detailed discussions of the articles. The possible impact of the measures proposed by the Commission in the proposal was in particular discussed in connection to Annex I and to Section IV '*Financial Requirements*'.

On 13 April 2016, the Dutch Presidency organised an expert meeting dealing specifically with Annex I to the Regulation. The purpose of the meeting was to discuss the technical aspects of this Annex. Representatives from the relevant manufactures and the users have been invited to contribute to this discussion, as well. The outcome of the meeting formed the basis for further work on Annex I and all other matters related to general aviation in the Working Party.

During early days of the Slovak Presidency, Ireland presented set of questions and concerns in relation to Articles 53 and 54 dealing with the reallocation and the joint responsibility for the performance of tasks related to certification, oversight and enforcement. In close cooperation with the Council Legal Service and the Commission, the Presidency clarified in writing a number of concerns and suggested further amendments to the text of these articles, so that these could be acceptable for the Member States.

Regarding Section IV '*Financial Requirements*', delegations invited the Commission to present a more detailed justification for the provisions of Article 109(1)(f), which propose a new source of revenue for the budget of the Agency in order to finance its ATM/ANS regulatory tasks from *en-route* charges. In September 2016, the Commission presented the requested supplementary detailed justification to the Working Party.

General comments

A great deal of intensive work has been put into this file since its presentation in the Council. The Dutch Presidency dedicated twenty working party meetings to it, which resulted in a progress report covering Chapters I-IV , Section I of Chapter V, as well as Articles 124 and 125 of the proposal. The progress report of the Dutch Presidency was presented to the TTE Council on 7 June 2016.

Building on the progress made during the Dutch Presidency, the Slovak Presidency continued the work at the same intense pace, and fourteen more working party meetings had the proposal on the agenda. Together with the delegations and the Commission, the Presidency kept a pragmatic approach and worked hard to accommodate the views of the delegation in order to find compromise solutions with real added value, while at the same time bearing in mind the overall purpose to simplify the structure and the application of the Regulation.

Comments on specific issues

In particular, the Presidency has tried to further clarify some of the definitions in Article 3 in order to better reflect the content of the articles and of the annexes to the Regulation. The definitions for 'certification' and 'declaration' now include specific references to equipment to control unmanned aircraft remotely and to safety-related aerodrome equipment. A new definition for 'aircraft operator' has been introduced, in order to make a clear distinction from 'aerodrome operator'. The definition for unmanned aircraft has also been clarified on the basis of the ICAO similar definition but with additional language which further explains that such aircraft have the capacity to be operated autonomously or to be remotely piloted.

Section I '*Airworthiness and environmental protection*' of Chapter III provides that the design of aviation products needs to comply with the standards and recommended practices set out by ICAO in order to protect the environment and human health. However, the Commission proposal specifies that for reasons of technical, operational or scientific developments, the Union should have the flexibility to adjust or complement the technical standards set out by ICAO. Some delegations have expressed concerns that this could set a parallel set of environmental requirements for the European industry which could affect its global competitiveness. These delegations support the strict application of Annex 16 to the Chicago Convention. To complement that, the application of Annex III to the EASA Regulation should be limited to those environmental requirements which are not covered by the above-mentioned Annex 16.

The Presidency compromise text proposes to keep a certain degree of flexibility to deviate from the ICAO standards for aircraft other than large aeroplanes and large rotorcraft, for instance to give the European industry the possibility to apply those standards earlier or later, as the case may be. Certain European aircraft already comply with the amended standards of Annex 16 which are yet to enter into force, and could benefit from the possibility to be certified on their basis if the European legislation allowed it. Therefore, in Article 13b(1b), the Presidency text proposes that any such deviation from the ICAO standards could be done through implementing measures, which would ensure the involvement of Member States and would take into account the possible impact of the deviation on the global competitiveness of the European products.

In Section V '*ATM/ANS*' of Chapter III, the Presidency proposes a compromise text concerning the possibility for Member States to grant exemptions from certification to ATM/ATS providers located outside the territories for which Member States are responsible under the Chicago Convention, and providing services in a geographically limited part of the SES airspace for which the Member State granting the exemption is responsible, and where that part of the airspace borders with an airspace under the responsibility of a third country.

The Commission proposal extends the scope of the Regulation to include rules on unmanned aircraft. The purpose of the Articles 44 - 47 dedicated to unmanned aircraft in Section VII of Chapter III proposed by the Commission, together with a new annex containing the essential requirements for unmanned aircraft, is to provide the basic principles and the legal basis for more detailed rules on unmanned aircraft. In parallel with the examination of the proposal by the Council and the European Parliament, those detailed rules have been discussed at expert level by the Agency and, in August 2016, the Agency published a 'prototype' EASA rule for the 'open' and 'specific' categories of unmanned aircraft. Even though the new prototype rule has clarified the possible direction of the implementing measures which would accompany the provisions contained in this Regulation, some delegations still argue that low risk operations, where the risk for people on the ground or in the air is minimal (the so-called 'open category'), should be left out of the scope of the Regulation (Article 46(3)). Their concern is that one single system would not suit each Member State's specificities and that European level rules would be unjustified and could potentially hamper the development of this category.

To take care of the above-mentioned concerns, the Presidency compromise text, accepted by the delegations, proposes that local characteristics of Member States should be taken into account in the future implementing measures and should be based on best practices already existing at national level.

A number of delegations propose that Member States should be allowed to limit the activities of unmanned aircraft in certain circumstances for the protection of privacy, personal data, security, or the environment. In order to take care of these concerns, in Article 50a, the Presidency proposes a new paragraph with general application for the whole Chapter III which specifies that Member States have the possibility to prohibit, limit or make subject to certain conditions all the aviation the activities covered by the above-mentioned chapter, therefore including unmanned aircraft, for reasons falling outside the scope of this Regulation, such as security or protection of privacy, personal data or the environment. Recital 20b has also been redrafted to reflect the new paragraph.

The Presidency has clarified a great deal of questions from the delegations regarding the application of Articles 53, 54 and 55 related to the possible reallocation of responsibility from one Member State to another for the performance of certification, oversight and enforcement tasks in order to allow enhanced safety and a more efficient use of resources. Legal advice has been sought from the Council and the Commission Legal Services. On the basis of that advice, the current Presidency compromise text has been modified in order to clarify the responsibilities of Member States under the Chicago Convention on the one side and under EU law on the other side. The compromise text sets the framework for the cooperation between safety investigation authorities of the Member States involved. It also addresses any possible sovereignty issues, the detailed arrangements specifying the reallocation, its precise scope and the consultation of affected stakeholders, as well as the reallocation of responsibility upon request from group organisations with the principle place of business in several Member States.

Furthermore, the Presidency proposes the addition of a new Article 53a, in order to allow Member States to pool their resources in the joint performance of certification, oversight and enforcement tasks. The scope of the new article is proposed to be limited to aircraft operators and a maximum of five Member States and is subject to certain requirements which would justify the pooling of Member States' responsibility. This new article envisages prior Commission verification whose aim is to check compliance with the necessary conditions for the pooling of responsibility, as well as with the current applicable legislation, while not having a negative effect on the aviation safety and continuity of operations.

In Article 52 'European Pool of Aviation Inspectors', the Presidency compromise text introduces a new possibility for the national competent authority requesting assistance from the European pool of aviation inspectors to charge the industry for the certification and oversight activities performed by the experts from the European pool.

The Commission proposal introduces a new article, Article 55 'Emergency Oversight Mechanism', whose purpose is to mitigate possible serious and persistent safety oversight deficiencies identified at Member State level. In such a situation, the article proposes a new emergency oversight mechanism which would allow the Agency to temporarily take over certain certification, oversight and enforcement tasks from a Member State. The Commission intended it to be a last resort measure of temporary nature which would be activated/deactivated by the Commission through implementing measures.

A large number of delegations are against this article. While understanding the Commission's safety concerns, they argue that this article has legal and political implications which need to be taken into account. For that matter, they consider that any such safety deficiencies could and should be solved through other means.

Other Member States support the Commission's intentions. They consider that safety considerations are paramount and underline that such a mechanism would only be active temporarily. Moreover, these last resort measures would be a much quicker alternative to the lengthier infringement proceedings and thus would better serve the overall safety goal.

As a compromise, the Presidency tried to propose a significant shift compared to the Commission proposal whereby the focus should have been on offering the Member State concerned the technical assistance it needs in order to be able to resume performing its certification, oversight and enforcement tasks in an efficient way. Moreover, such a mechanism could only be activated with the consent of the Member State concerned, at the Commission's recommendation. However, even with these substantial changes - including a new title, '*Oversight Support Mechanism*', meant to reflect the modified content of the article - the majority of delegations could not accept the Presidency compromise proposal. Therefore the Presidency has decided to delete this article. The Commission has a reservation on this deletion.

In relation to three categories of aerodrome equipment proposed by the Commission, the Presidency compromise simplifies the categories and refers only to 'safety-related aerodrome equipment'. Furthermore, a new Article 67a. has been introduced in order to spell out the obligations of the Agency with respect to organisations involved in the design, production and maintenance of safety-related aerodrome equipment, used or intended to be use on aerodromes.

Article 57 'Acceptance of third country certification' has a new subparagraph (ba) in paragraph 1 to clarify that, in the absence of a Union-level agreement or of an implementing act regarding a specific third country, certificates from that third country could be accepted by the Agency or by the national competent authorities on the basis of an existing bilateral agreement between a Member State and the third country concerned.

In Article 109, the Commission proposes that a new source of revenue for the Agency for carrying out its ATM/ANS authority tasks from en-route charges. The Commission's underlying rationale is that since the "user-pays-principle" has historically been used in the ATM/ANS domain, then the Agency's ATM/ANS tasks should be financed on the same basis. Through this new provision, Commission proposes to create the legal basis for such funding, which should at a later stage be accompanied by a modification of the common charging scheme for air navigation services as established by Regulation (EC) No 550/2004 on the provision of air navigation services in the single European sky and its implementing rule, Commission Implementing Regulation (EC) No 391/2013.

A significant number of Member States have expressed concerns about this new provision from the beginning. They have been sceptical about EASA's receiving funds from *en-route* charges for its ATM/ANS tasks. They argue that such a possibility raises a lot of questions related to transparency, cost-neutrality and practical implementation. Other Member States have not been decidedly against the principle, but have doubts as to how this can be achieved. They also insist that cost-neutrality should be ensured. Another group of Member States have expressed their intention to establish their final position on this issue on the basis of a Commission - EASA - EUROCONTROL pan-European roadmap on safety, whose purpose is to clarify EASA's rulemaking and oversight tasks and EUROCONTROL's operational tasks.

As a compromise, the Presidency has tried to propose to clarify that the Agency's tasks which could be financed from *en-route* charges would only be ATM/ANS *regulatory* tasks which were previously performed by EUROCONTROL and which have been attributed to the Agency through its extension of competencies in the area of ATM/ANS since 2012. Furthermore, Member States and the Commission would have made a commitment to cooperate in order to ensure cost-neutrality. However, the majority of delegations cannot accept this compromise proposal and therefore the current Presidency compromise text has deleted the provisions of Article 109 concerning this new source of financing for the Agency from *en-route* charges.

In Article 123 amending Regulation (EC) No 1008/2008, the Presidency compromise text aligns the conditions under which an air operator certificate (AOC) can be issued by one or several national competent authorities jointly, or by the Agency, in conjunction with the relevant provisions of Articles 53 and 54.

Regarding the Annexes to the Regulation, the Slovak Presidency has tried to further clarify and adapt their text to the overall purpose of a more proportional and flexible safety system. In particular, too prescriptive essential requirements have been redrafted with focus on the safety objective without specifying the means of compliance and thus allowing more flexibility, especially with regard to general aviation.

The content of Annex I has been subject to intense debate. This annex contains the categories of aircraft to which the Regulation does not apply and which, therefore, are under national rules. Compared to the current Regulation (EC) No 216/2008, the Commission proposal leaves Annex I largely unchanged, except the addition of light electric aircraft, of single occupancy hot air balloons and the adjustment of weight limits for sail planes. The Presidency compromise text also adds to this annex tethered aircraft with no propulsion system.

All delegations agree with the Commission's aim to develop proportionate rules for the design and manufacture of light aircraft, but views varied as to what would be the best way to achieve that. The current European rules were considered by some as too inflexible and too complicated for the users and the industry involved in these activities. Some delegations suggested the increase of the weight limits and of the stall speed of certain categories of the aircraft excluded from the European system. They argued that the aircraft developed in the last 15 years and now are much more sophisticated and safer than those available when this annex was proposed in the first EASA Basic Regulation in 2002. Moreover, they argued that adding the additional mass would allow for a more fuel and /or and additional safety equipment to be carried on board, thus having a positive safety effect.

Other Member States warned against the possible safety risks such an increase in weight and stall speed could entail. They argue that increasing the weight would not mean increased safety. On the contrary, increased weight and speed would mean more than doubling the kinetic energy and therefore, in case of an accident, the impact of such an aircraft would become much more damaging.

Furthermore, instead of easier access to the European market, the end result would be even more fragmentation than today, as confirmed by the fact that there has been no noteworthy harmonisation of the national rules since the introduction of the EASA Basic Regulation back in 2002. Some delegations argued that the increased mass and speed would also mean that aircraft will require longer runways or that a whole range of other changes would be necessary at the national level, in relation to pilots' licensing and training, or certification and operational requirements.

As a compromise solution, the SK Presidency text proposes to increase the weight limits for landplanes by 50 kg. The compromise text also proposes to treat helicopters and gyroplanes similarly, since these categories of aircraft have similar characteristics and are exposed to similar safety risks. These modifications should be seen in combination with the increased

flexibility and proportionality of the European system through declarations instead of the more cumbersome, demanding (and more expensive) certification procedures. In the end, the overall purpose is to simplify the rules without deregulating the system in its entirety and therefore to use the opportunity of the revision of the current Regulation (EC) No 216/2008 and introduce common European standards for certain categories of light aircraft.

Furthermore, the Presidency text proposes to combine the simplified rules with a new paragraph 2a in Article 126, which requires that implementing rules concerning sports and recreational aircraft should be amended every two years, in order to provide for simpler and more proportionate rules for this very dynamic segment of the aviation sector.

In Annex IV, point 1.9.2 now clarifies that only flight instructors (but not instructors on simulators) could also act as pilots in command on the aircraft on which they conduct the training.

Annex V, points 7.4, 8.10a and 8.10b clarify the conditions under which simulations for emergency or abnormal flights can be performed with or without passengers or cargo being carried onboard. Point 8.1.(c) of the same Annex establishing a Minimum Equipment List for the operations of an aircraft has been deleted because such a list has been considered excessive to be required for all air operations. The list has been included in Article 27, as a requirement for implementing rules which would take into account the proportionality and the risks associated with each type of activity.

In Annex VII, point 4.2.2 clarifies that the management system of ground handling providers should contain a more simplified occurrence reporting system but that they have the obligation to transmit information on all occurrences to the aerodrome operator's reporting system.

With a similar logic as above, the provisions of point 3.2 of Annex IX have been modified to reflect that the management system of organisations involved in unmanned aircraft production or activities must be proportionate to the organisation's size and type of activity. Furthermore, the text of this Annex has been aligned with the text of relevant articles on unmanned aircraft.

Regarding the delegated/implementing acts proposed by the Commission, on the basis of the delegations' comments, the Slovak Presidency has maintained the modified structure of the articles contained in Chapter III '*Substantive Requirements*' as in the NL Presidency's progress report. By doing this, the Presidency has taken into account as much as possible the position expressed systematically by Member States concerning the delegation of power to the Commission, and therefore, with advice from the Council Legal Service, the current compromise text has transformed most delegated acts into implementing acts. The overall purpose of this structure modification is to ensure that the current system of implementing rules based on Regulation (EC) No 216/2008 could be maintained and it received broad support from Member States.

Furthermore, regarding the amendment of the annexes to the Regulation, since they have been rather stable in time, most delegations favour keeping them part of the Regulation and therefore they would only be adapted through the ordinary legislative procedure. The only exception would be Annex IX '*Unmanned Aircraft*', where Presidency compromise text keeps the Commission's delegation of power to amend this annex through delegated acts, since they considered it justified by the rapid pace of technical, operational and scientific development of this unmanned aircraft sector or by operational safety-related evidence. However, the Commission's delegation of power is granted for a period of 5 years.

The Commission has a reservation on the deletion of the possibility to amend the annexes through delegated acts.

5. Main outstanding issues

In spite of the extensive work carried out in order to reach an agreed text, some issues are still outstanding.

a) Access to safety information by courts (Article 61(4)(c) footnote 44, Article 62(2) footnote 45, Article 63(5) footnote 46 and recital 28a)

The Commission proposal contains provisions aimed at facilitating the exchange and the confidentiality of safety-related information gathered under this Regulation.

However, some delegations would like to ensure that judicial authorities should have full access to any safety-related information and/or evidence gathered in safety investigations and that national court procedural laws could always be applied.

The Presidency compromise text proposes to keep the language of this Regulation aligned with Regulation (EU) No 376/2014 on occurrence reporting but, in order to respond to the above-mentioned concerns, introduces a new recital 28a. The new recital clarifies that even though the main objective of a safety Regulation is to protect the information gathered, exchanged and analysed under the Regulation, as well as the sources of that information, there should be no undue interference with the Member States' justice systems or criminal proceedings, including the right of a third party to institute civil proceedings under national law.

b) Aviation security (Article 76 - footnotes 48, 49 and Article 1- footnote 13)

In Article 76 '*Aviation security*', the SK Presidency has kept the compromise text proposed by the NL Presidency in order to bridge the views of the delegations on this issue.

All delegations agree with the Commission proposal regarding the need for cooperation on security matters related to civil aviation. Some welcome the involvement of the Agency in security and consider that the Agency should be able to build such expertise, especially if one wants to be prepared for the unknowns of future years. Others are opposed to such a possibility. They consider that the Agency's competence should remain within the safety field and express concerns regarding the proposed directives and recommendations to be issued by the Agency on corrective actions to be taken at national level. They argue that these are matters of national security on which Member States are better informed and should be able to keep decision-making at national level. The Presidency compromise text proposes to limit the Agency's recommendations to safety-related security matters, thus building on the competence that the Agency already has today.

Along the same line, Article 1 provides that one of the aims of the Regulation is to contribute to maintaining a high level of security in the Union aviation sector. In connection to their position on Article 76, some delegations propose the deletion of the above-mentioned provision of Article 1.

Other concerns and reservations expressed by delegations appear in the footnotes in the addenda 1 and 2 to this report. The footnotes which are related to the articles are to be understood to also apply to the recitals corresponding to those articles.

The compromise proposals were last examined by the Working Party on Aviation on 8 November 2016.

All delegations, as well as the Commission, have a general scrutiny reservation on the latest version of text (addenda 1 and 2 to this report)¹. Changes with respect to the previous version of the text are marked with **bold** and ~~striketrough~~.

¹ 13505/16 ADD 1 REV 1 and 13505/16 ADD 2 REV 1

UK has a parliamentary scrutiny reservation on the text.

Furthermore, the Commission fully reserves its position on the entire compromise proposal, pending the negotiations with the European Parliament.

6. Conclusion

In the light of the above, Permanent Representatives Committee is invited to examine the text as set out in the Annex to this report and to resolve the outstanding issues with a view to allowing the TTE Council to reach a general approach at its meeting on 1 December 2016.
