 EASA European Aviation Safety Agency WP 02	A Policy and Strategic Plan on the Implementation of Performance Based Regulations
Date: 16 February 2016	
RAG 1-2016	Jean-Marc Cluzeau

A policy and strategic plan on the Implementation of Performance Based Regulations Revision 01

Discussions at the November 2015 RAG meeting showed general support from the Members States. Valuable comments were made during the meeting.

Austria, The Netherlands, Switzerland, the UK and Germany provided written comments and additional inputs. Austria, The Netherlands and CAA UK broadly support the paper and propose further actions and clarification on some of the items. The need for a review of the current training and qualification plans of inspectors within the NAAs and EASA and for EASA Rulemaking Officers is highlighted. A more active role for the RAG is suggested in the identification of priority candidates for PBR implementation and subsequent validation. CAA UK suggests the EASA Standardisation Regulation should be considered a priority candidate. Specific comments relate to impact assessment, insist on the need to better capture differences in national legal systems as well as implementation costs of regulatory changes both for industry and authorities.

Comments from Switzerland and Germany are more reserved: Germany questions the benefits of a performance based regulatory system as they see this would lead to increased regulatory complexity, reduced legal certainty and thus create more challenges to oversight, while the safety benefits remained unclear. Germany recommends not applying PBR to small and general aviation organisations. Switzerland supports the overall objective as being in line with ICAO Annex 19 and the EPAS, but expresses concerns about the flexibility given to the NAAs in the area of Performance Based Regulations and the impact on the level playing field.


These comments confirm the need for an overall implementation support programme for the introduction of safety management across the European aviation system.

1 Introduction

A performance based approach is intended to make aviation safer, more efficient, robust and flexible. To support the evolution towards a performance based approach to managing aviation safety, EASA issued a paper laying down general principles and key concepts for ensuring a harmonised European approach in that area (ref. A Harmonised European Approach to a Performance-Based Environment (PBE)). The PBE paper proposed further work on Performance-based Oversight (see RBO paper IP 10) as well as Performance-based Regulation (PBR).

This paper focusses on PBR and has three parts:

- Define the terminology to enhance a common understanding
- Propose the main elements of a PBR policy to guide future action
- Propose future action (a draft implementation plan)

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In this context PBR is considered as key contributor to address overregulation in the European aviation system.

Performance Based Regulations are those where the implementing rules focus on desired, measurable outcomes, rather than on defining prescriptive means and conditions for achieving compliance with the requirements. The objective of PBR is thus to better focus on critical safety outcomes and to increase regulatory efficiency.

Besides the regulation of aviation safety this ‘performance based’ approach may also then apply to regulating capacity/efficiency, level playing field or environmental protection.

The expected benefits of PBR are threefold: Resilience, Flexibility, Safety Management.

Resilience: The increased complexity in operations and aviation activities, the dynamics of aviation business models, fast and proliferating technologic development require a regulatory framework capable of anticipating and self-adapting to changes.

Flexibility: By focussing on safety outcomes, performance based rules provide flexibility and encourage innovation by not restricting a priori the means to control specific risks.

Safety management: By providing a flexible implementation framework and focusing on safety outcomes, performance based regulations allow organisations to foster risk management capability and to better allocate resources against risks identified under their SMS and the SSP.

2 Terminology:¹

Prescriptive rule:

A rule that specifies what needs to be done and how.

Performance based rule:

A rule that specifies what the outcome should be instead of how to achieve the outcome.

‘Performance based rules’ come in different shapes and variants, which can generally be associated with one of the below categories:

Objective based rules: only the objective is defined, not the means to achieve it.
Example: *“Records must be stored in a manner that ensures preservation and traceability throughout the entire lifecycle.”*

Process based rules: specific organisational requirements and/or processes are prescribed as

¹ While the term regulations encompasses essential requirements, implementing rules, Certification Specifications, AMC and GM, these definitions apply to essential requirements and implementing rule material only.

enablers of a desired outcome.

Example: *"The operator shall establish, implement and maintain a management system that includes the identification of aviation safety hazards entailed by the activities of the operator, their evaluation and the management of associated risks, including taking actions to mitigate the risk and verify their effectiveness."*

Performance-standard based rules: a set of performance metrics (quantitative and qualitative) is defined based on which to determine whether a system or process is operating in accordance with expectations

Example: *"Record keeping must ensure that lost/destroyed record incidents remain below 2 over any 2 year period."*

3 Towards a policy on Performance Based Regulations


Through consultation of A-NPA 2014-12² on the topic of 'Reinforcing the performance based approach' stakeholders, while acknowledging the benefits of such approach, called for a consolidation of the existing regulatory system before implementing any new approach, in particular by ensuring uniform interpretation and application of the existing rules.

The Agency agrees with stakeholder views that PBR should not totally replace the prescriptive elements of the framework but should rather gradually complement them further or possibly replace them where appropriate.

The following policy elements for the implementation of PBR are proposed:

1. The further introduction or review of performance based elements in regulations shall be gradual and be part of the overall change management process to implement safety management in accordance with ICAO Annex 19.
2. To encourage and maximise the potential of proactive safety management introducing SMS should go in parallel with a review of existing prescriptive requirements, in particular in relation to items requiring competent authority involvement and to the nature of oversight, where both should be adapted to the level of risk and performance..
3. Safety critical issues should preferably be addressed with prescriptive requirements.
4. Combinations of prescriptive and performance based elements should be determined depending on context and domain.
 - a. Inclusion of prescriptive elements should be balanced with the need to ensure resilience of the Implementing Rules, provide flexibility, enhance safety management and efficiency.

² 'European Commission policy initiative on aviation safety and a possible revision of Regulation (EC) No 216/2008' - <https://www.easa.europa.eu/system/files/dfu/A-NPA%202014-12.pdf>

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- b. Inclusion of performance based elements shall consider :
 - safety criticality of non-compliance
 - impact on international harmonisation
 - impact on oversight capabilities
 - proportionality & flexibility
 - risk management capability of regulated entities
5. As far as relevant the above principles shall apply to the EASA Authority Requirements and Organisation Requirements and should be promoted for any other regulation within the EASA remit³.
6. EASA shall ensure consistency in the use of prescriptive and performance based elements across domains.

4 From policy to implementation

Implementation of a Performance Based approach must take due account of the need to consolidate and stabilise the existing regulatory framework.

Implementation in specific areas shall be carefully assessed, considering the particular issue to be addressed, the benefits and drawbacks of different types of rules, specifically how they can be overseen in the field and their effects on international harmonisation, compliance with ICAO standards and on the level playing field. Related impact assessments shall specifically consider the diversity of national legal & administrative systems across Europe, the implementation costs for industry and NAAs and the impact on smaller NAAs.


The gradual process to introduce PBR complementing or as a replacement for prescriptive rules should allow to identify key areas where the benefits of Performance Based Regulations are expected to be significant. This process should also allow identifying which parts of the rules are obsolete and can be deleted without replacement.

4.1 Pre-Impact Assessment / Impact assessment

Identification of key areas suitable for Performance Based Regulation shall be made on the basis of sound **Impact Assessment** (IA). The new Rulemaking Process promotes IA as a tool to have “less and better regulation” as well as to implement a performance-based approach. Impact Assessments will be the means to determine if an area should rather be regulated in a prescriptive way or if it qualifies for Performance Based Regulations. This determination shall be addressed in three different phases:

- ❖ **Preliminary Impact Assessment** (PIA), occurring at programming phase, will consider the possibility of using more performance-based elements [e.g. find the optimal combination

³ With the implementation of a performance based approach the impact on Commission Regulation (EU) 628/2013) ‘Standardisation Regulation’ should be assessed.

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between soft law (i.e. Certification Specifications, Acceptable Means of Compliance and Guidance Material) and hard law (i.e. Implementing Rules)];

- ❖ **Regulatory Impact Assessment** (RIA) accompanying the drafting of the Notice of Proposed Amendment (NPA); will support the inclusion of performance based elements by way of checking:
 - if the objective of at least one of the 3 benefits is met: **Resilience, Flexibility, Safety Management**.
 - if at least an equivalent level of safety compared to a prescriptive rule will be ensured.
 - if effective oversight and enforcement will be ensured, taking into account the cost burden on NAAs particularly smaller ones.
 - if the impact on international harmonisation and mutual recognition can be minimised.
- ❖ **Ex-post evaluation**, assessing the implementation of the rules and systematically considering the possible introduction of performance based elements as a tool for increasing regulatory efficiency.

4.2 Oversight

The introduction of PBR shall be supported by common oversight methodologies ensuring harmonised implementation (including where relevant related AMCs and guidance material) to enable competent authorities to monitor compliance and assess performance as part of their oversight.

EASA's capabilities to ensure uniform interpretation and application of the existing rules shall be strengthened.

4.3 Priorities in the Rulemaking Programme (RMP)

Priorities for selecting candidate Implementing Rules for Performance Based Regulations should be:

1. Identified as part of the **Rulemaking Programming** process
2. confirmed through **Impact Assessment** or **Ex-Post evaluation** of Rules
3. discussed and **agreed with stakeholders** on that basis
4. formalised in the **Rulemaking Programme**

4.4 Implementation Plan

The above approach will allow to fully embed the Performance Based approach in the Rulemaking Process.

The gradual introduction of PBR will be effectively implemented through and accompanied by:

- a consistent, transparent and continual action plan, the Rulemaking Programme, which will define related actions in terms of rulemaking, oversight and safety promotion (See IP 04)

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- a revised rulemaking procedure aiming at efficient processing, enhanced impact assessment and uniform application of standards for the drafting of Performance Based rules (see WP 01).

Implementation will start with the next planning cycle, i.e. with the implementation of the new rulemaking process and the preparation of the 2017-2021 RMP in January 2016. In line with the new approach regarding planning and programming, all related actions (regulatory action, oversight, training or safety promotion) should be managed as a single project.

Throughout this process, proper change management, including communication and training, will be ensured.

5 Summary strategic plan

- The objective of PBR is to better focus on critical safety outcomes and to increase regulatory efficiency.
- Priority candidates (Implementing Rules) for the PBR approach should be:
 1. Identified as part of the **Rulemaking Programming** process
 2. confirmed through **Impact Assessment** or **Ex-Post evaluation** of Rules
 3. discussed and **agreed with stakeholders** on that basis
 4. formalised in the **Rulemaking Programme**
- The introduction of Performance Based Regulations shall be supported by:
 1. common oversight methodologies ensuring harmonised implementation
 2. a promotion programme for NAAs and industry on the performance based approach (SSP/EASP & SMS)
 3. a review of the current training and qualification plans of staff within the NAAs (inspectors) and EASA (inspectors and Rulemaking Officers)..
- Implementation will start as a continuous process in **January 2016**.