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Aircraft Owners & Pilots Association

Response Document to Notices of Proposed Amendment No. 2008-17A and NPA No. 2008-17B

Comments

Prior to an examination of the proposed amendments to Part FCL as proposed in NPA No. 2009-17B, due regard must be had to the contents of the Draft Opinion [NPA No. 2008-17A].

It is clearly understood, as declared in paragraph 2 of the Draft Opinion, that : *"The European Aviation Safety Agency (the Agency) is directly involved in the rule -shaping process"* in accordance with the functions set out in the Basic Regulation[1]. The European Aviation Safety Agency, being an Agency of the European Union, does not have the function to enact law, however it is understood to be a duty of the Agency to present to the institution of the European Union a view of the matter being addressed which is correct and to forward proposals which are coherent with EU policy, in particular that any measures adopted are in conformity with the principle of proportionality.

The aims pursued are the subject of the Basic Regulation – in a generic manner – as well as the Terms of Reference ToR FCL.001 reproduced in the Draft Opinion [NPA No. 2008-17A].These terms of reference are, inter alia :

- *"to establish in the form of essential requirements, high level safety objectives to be achieved by the regulations of pilot licensing"*

- *"to require all pilots operating in the Community to hold a licence attesting compliance with common safety requirement covering their theoretical and practical knowledge, as well as they physical fitness"*

Whereas AOPA Malta agrees with the adoption of a harmonized approach to regulation on a European level to address the issue of pilot licensing in accordance with the terms of reference, it emphasis that all such regulation must conform with the principle of proportionality. In its view, certain matters contained in the proposed amendments do not conform with the principle of proportionality whilst

[1] Article 17, EC Regulation 216/2008

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other proposed amendments are unwarranted and do nothing to achieve the objectives contained in the terms of reference and hence are objectionable.

It does further appear from the notice of proposed amendments that the holders of non-JAR licenses, and in particular FAA license holders as well as operators of aircraft registered outside JAA member states, will be the subject of political fiasco. This is evident from proposed FAA regulation which AOPA Malta believes to be a response to the current NPAs. It is in this sense that these proposed amendments are unwarranted, since license holders as well as owners and operators of aircraft registered in non-Member States should not be held at ransom to suit any political purpose or objective. This in particular when PPL licenses, being the category of license holders which AOPA Malta represents, issued either by a national authority, the JAA or the FAA are in conformity with ICAO Annex I.

It is further evident that the Agency has departed from the Commission recommendation spelt out in paragraph 10 of Draft Opinion [NPA No. 2008-17A], which textually reads as follows :

> *"When adopting its proposal, the Commission recommended, as suggested by the Agency itself, that common requirement to be specified in implementing rules be based as much as possible on exisiting JAA material"*

Whereas the Agency has retained certain issues contained in JAA material, it proposes without much explanation or albeit justification, to eradicate other issues, including but not limited to the validation of licenses issued by non-JAA states. Under the guise that the JAR structure is not the *"most appropriate"*, and citing in comfort the deficiency in JAR-FCL to address certain categories of aircraft introduced in the basic regulation, the Agency has though it fit, utilizing the discretion allowed by the Commission quoted above in utilizing the terms *"as much as possible"*, to amend not merely the structure utilized by the JAA, but its contents. Confirmation of this is contained in paragraph 33 of the Draft Opinion [NPA No. 2008-17A] wherein it is said that the difference between the JAR and EASA system is that whilst JARs have no legal value and had to be transposed in national law, with the liberty of national authorities to deviate therefrom, EASA rules will automatically bind Member States. In effect, the Agency seeks to impose on Member States mandatory rules of law from which no deviation is possible.[2]

[2] with the exception of deviation in very limited cases provided in terms of Article 14 of the Basic Regulation, the limited effect of which render farcical the title "flexibility provisions".

So much is this the case that it is declared in the Draft Opinion[3] that since may not deviate or derogate from the requirements in the implementing rules, it is stated to be *"imperative that only essential safety elements are contained in the rule"*. To eradicate the JAR provisions relating to validation of licenses, for instance is no case of essential safety. To state otherwise would imply that all FAA licensees holders are incompetent.

This is sufficiently proven by the contradiction in terms contained in paragraph 36 wherein it is stated that that syllabi for pilot licensing with the exception of professional licenses shall be transferred to the AMC section so as to *"allow training organizations providing these courses to develop their own syllabi, adapter to their needs"*. Contrary to JAR-FCL which detailed the syllabus to be followed with respect to each license, the Agency considers it is sufficiently safe to allow a measure of discretion with regard to syllabi but not to validate licenses of non-JAR pilots, some with years of experience. All this in the name of safety.

Some relief may seem to emerge from the transition measures contained in paragraph 45, however this is only a half breath relief. The paragraph reads as :

> *"Transition measures for the entry into force of the new requirements will be established in the Licensing Cover Regulation, taking into account the time needed for preparing their implementation, as well as the **possibility** to grandfather existing certificates issued under sufficiently similar conditions"*

The grandfathering of existing certificate is thus only a possibility *(sic)* and not a concrete proposal. Moreover, it is unclear what is intended by the phrase *"issued under sufficiently similar conditions"*. It would not have been an arduous task for the Agency to assimilate certain licenses, at least generically. Moreover, the Agency has evidently failed to take into account similar experience, not to mention the fact that to-date non-JAR license holders had the option under JAR rules to validate their licenses accordingly.

[3] par.35

The fact that the Agency has failed to make a proper assessment is once again confirmed in the same Draft Opinion [NPA No. 2008-17A]. For ease of reference, paragraph 53 of the Opinion reads as follows :

> *"According to the formal Rulemaking Procedure of the Agency 43 , a full regulatory impact assessment (RIA) has to be introduced as a part of any proposed new rule. However, the development of a RIA in this task has presented particular difficulties. Firstly, when developing the NPA, it was apparent that development of a general RIA for the task would present limited value: the choice on whether or not to regulate flight crew licensing had already been made by the legislator, as well as the choice to maintain the system established by JARFCL in as much as possible. On the other hand, the proposals in this NPA are still subject to change, taking into account the comments received during the public consultation. Therefore, it was decided that the evaluation of the impact of the proposed new rules should only be made where the NPA either deviated from the JARs, or went beyond their scope"*

In simple terms, which required no such elaboration, it is stated that no regulatory impact assessment has been executed. This implies that the conclusions of the Agency are unfounded and not based on factual data.

Furthermore, note must be had that the Draft Opinion renders no guarantee that JAR license holders will be recognized by EASA[4]. The *"intention"* is only *"to propose"* that licenses and certificates issued by Members States in accordance with JAR-FCL requirements and associated procedures will be considered as having been issued in accordance with the implementing rules.

In essence, despite the emphasis on clarity, simplicity and precision as well as lack of ambiguity which Community legislation must demonstrate, the Draft Opinion does everything but *"leave[ing] no uncertainty in the mind of the reader"*.

The resulting uncertainty is undeniably unjustifiable, particularly so when to-date holders of JAR PPL licenses issued by Malta's Department of Civil Aviation and FAA PPL holders experienced no such uncertainty and superfluous bureaucracy and since the inception of JARs experienced no safety issues, incidents or accidents relating to the competency of the pilots. Nor does the Draft Opinion, on an EU wide level, justify its alleged "safety" cause to the proposed changes by reference to incidents or accidents relating to the competency of flight crew.

[4] par. 46

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Annex III : Requirements for Acceptance of Licences Issued by or on Behalf of Third Countries

AOPA Malta objects to the proposals set out in Annex III of the Draft Opinion [NPA No. 2008-17B] for the reasons explained hereunder :

1. Requirement to demonstrate knowledge in Air Law :

   No doubt, every PPL license holder would have passed an examination in Air Law. It is appreciated that Air Law, despite similarities, is not the same in every state. And it is for this reason that to require a license holder to demonstrate knowledge of Air Law is of no significance. It should also be acknowledged that the basic rules of the air are common the world over.

   In essence, it is a pilot's responsibility to adhere to the applicable law of the jurisdiction over which he flies. The question hence is a relative one. Which law of the air should a pilot demonstrate knowledge of ? The state by which his licence is issued or some other law ? The issue is a merely relative one and devoid of all logic, at least unless the Agency proposes conformity of laws. Even in the latter scenario, what if the flight is to extend beyond the territorial jurisdiction of Europe ?

2. Requirement to demonstrate knowledge in Human Performance

   On a similar note, every PPL license holder would have been guided through the limits of the human body. These limits however are not relative in the sense that they do not depend on nationality, color or race but depend purely of scientific knowledge and individual limitations and conditions.

   Hence, the requirement to demonstrate knowledge in Human Performance, likewise, is no safety case since every pilot, no matter in which jurisdiction his license has been issued, and who proves to the authority that he has passed an examination in air law, should not be required to demonstrate any such knowledge as proposed. If this where to be the case, every pilot should be required periodically, to demonstrate knowledge of all subjects deemed necessary for the issue of a PPL which has not been the case so far the world over and should not be introduced by the Agency unless a clear safety case supported by statistical documentation necessitates otherwise.

3. Minimum of 100 hours pilot in command

   This basis on which this requirement is based is once again unclear. Is an EASA licensed pilot who has not logged a minimum of 100 hours considered not to have the necessary competence to act as pilot in command ? The JAR requirement, proposed to be adopted by EASA, is for a minimum of 45 hours of training, on the basis on which minimum hours a license will be issued.

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It is therefore discriminatory, in the absence of sound reasons, for the Agency to issue licences based on 45 flying hours and to deny licence holders having a total number of flying hours in excess of 45 flying hours but less than 100 hours the rights to exercise the privileges of their license in an aircraft registered in a Member State.

4. Validity

It is further proposed that even where the holder of a PPL license issued by a third country satisfied the conditions of Article 4 of Annex III, the validity of such license shall not exceed one year.

Once again the question which arises, similar to the above, is : does the pilot, whose license has been recognized in terms of EASA Part-FCL and allowed to act as pilot in command of an aircraft for a period of one year, suddenly become incompetent to act as pilot in command ?

If the basis for this requirement truly was one of safety, which has not been demonstrated by the Agency, these proposals would not have been included. It is for this reason that AOPA Malta once again, without prejudice to the comments included in the preceding paragraphs, objects to such proposal, which finds no justification whatsoever on any grounds on the basis of which this Draft Opinion has been prepared.

The validation of licenses contained in JAR-FCL should be maintained. Alternatively, transitional provisions should be included in the proposed Part-FCL whereby holders of non-JAR licenses, without any further requirement, should be allowed to convert their license to an EASA license.

In practice, this situation will be avoided by many license holders who undoubtedly will, prior to the coming into force of EASA Part-FCL, seek to convert their licenses in accordance with JAR-FCL 1.015, hopeful that the proposed intention contained in par. 46 [NPA No. 2008-17B] will be adopted. Despite the similar requirements, this is essential in the absence of provisions regarding the continued recognition or validation of non-JAR licenses in the Draft Opinion [NPA No. 2008-17B].

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Conclusions

AOPA Malta consistently fosters a safe flying mentality amongst its members. The conduct of safe flight is a concern for many, including the crew, passengers, owners, the State as well as its citizens. Safety should be a paramount concern in every flying activity.

Nonetheless, AOPA Malta considers that the Draft Opinion and the proposed Implementing Rules go beyond any issue related to safety, which issue is merely being utilized as a reason to justify the non recognition of licenses issued by non-JAR states.

AOPA Malta, whilst considering the measures being the subject of the Draft Opinion relating to Part-FCL and considered above to breach the principle of proportionality and of being discriminatory, hence :

1. objects to the proposed Implementing Rules as contained in Annex III concerning the requirements for acceptance of licenses issued by or on behalf of third countries.

2. solicits the Agency to clarify the contents of paragraph of 46 of the Draft Opinion [NPA No. 2008-17A] relating to the conversion of licenses and certificates issued in accordance with JAR-FCL

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