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INFORMATION NOTE

TRANSITIONAL PERIODS STEMMING FROM REGULATION (EU) No 965/2012 ON AIR OPERATIONS

Commission Regulation (EU) No 965/2012¹, **entered into force on 28 October 2012**. This Regulation initially addressed **Commercial Air Transport Operations** (OPS-CAT) and consisted of a Cover Regulation and five Annexes:

- Annex I – Definitions;
- Annex II – Authority Requirements (Part-ARO);
- Annex III – Organisation Requirements (Part-ORO);
- Annex IV – Commercial Air Transport (Part-CAT), and
- Annex V – Special Approvals (Part-SPA).

The structure of Regulation (EU) No 965/2012 was designed in such way as to subsequently allow its extension to other types of operation. Thus, to complement with non-commercial operations, Regulation (EU) 800/2013² amended the abovementioned Cover Regulation and Annexes, and added two new Annexes:

- Annex VI – Non-commercial operations with complex motor-powered aircraft (Part-NCC); and
- Annex VII – Non-commercial operations with other-than complex motor-powered aircraft (Part-NCO).

In July 2013 the EASA Committee voted in favour of two draft Regulations amending Regulation (EU) No 965/2012 to include:

- Annex VIII – Specialised Operations (Part-SPO), CAT operations with sailplanes and balloons (CAT S and B) and CAT operations starting and ending at the same airfield (CAT A-A) (hereinafter referred to 'the draft Regulation related to SPO'); and
- Flight time limitations (FTL) for CAT aeroplane operations.

The rules on flight time and rest have been adopted through Commission Regulation (EU) No 83/2014³. It was published on 31 January 2014 and shall apply from 18 February 2016. Adoption of Annex VIII (Part-SPO) is expected later on in 2014. The associated Acceptable

¹ Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 296, 25.10.2012, p.1.

² Commission Regulation (EU) No 800/2013 of 14 August 2013 amending Regulation (EU) No 965/2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 227, 24.8.2013, p.1.

³ Commission Regulation (EU) No 83/2014 of 29 January 2014 amending Regulation (EU) No 965/2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council

Means of Compliance and Guidance Material will be published by EASA on the same date or shortly after.

Several issues related to Regulation (EU) No 965/2012 were identified by the Member States as creating potential problems of **interpretation and implementation** such as transitional period, date of application, actions by the Member States and operators during transition and conversion processes, etc. Therefore, the objective of this paper is to provide answers to those questions and guidance concerning transition to the new rules.

1. Date of entry into force and date of application

In accordance with Article 10(1) of Commission Regulation (EU) No 965/2012, the latter shall enter into force and apply from 28 October 2012. This date applies to the Cover Regulation as well as to all its Annexes (Definitions, Parts-ARO, -ORO, -CAT and -SPA).

However, it has been recognised that it is not possible for the competent authorities of the Member States (NAAs) and air operator certificate (AOC) holders to become fully compliant with the new rules immediately after their entry into force. Accordingly, Regulation (EU) No 965/2012 includes an **opt-out** provision (Article 10(2)) which allows Member States to delay the application of that Regulation for a maximum of two years after the date of its entry into force i.e. the maximum possible opt-out may last until 28 October 2014.

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 – 28 October 2012. 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**.

To date the overwhelming majority of the Member States⁴ have notified the Commission and EASA that with regard to OPS-CAT they will apply a horizontal opt-out until 28 October 2014.

While in transition Member States shall continue to apply Annex III (EU-OPS) to Council Regulation (EEC) No 3922/91 with regard to CAT operations with aeroplanes, as well as national rules implementing JAR-OPS 3 with regard to CAT operations with helicopters.

2. What about opt-out possibilities for NCC, NCO, SPO, FTL etc.?

2.1 Regulation (EU) No 800/2013 entered into force on 25 August 2013. It provides for the following opt-out:

- for NCC, Member States may decide not to apply the provisions of Annexes II⁵, III, V and VI until 25 August 2016; and
- for NCO, Member States may decide not to apply the provisions of Annexes II⁶, V and VII until 25 August 2016.

⁴ One Member State has not yet notified an opt-out.

⁵ and ⁶ Annex II was inserted with the SPO related amendment of Regulation (EU) 965/2012 as initially Regulation 800/2013 omitted to specify it.

The above possibilities for opt-out are understood to also cover the compliance with Air OPS rules of training flights performed by Approved Training Organisations (ATOs).

To date several Member States have notified the Commission and EASA that with regard to Part-NCC and Part-NCO they will apply a horizontal opt-out until 25 August 2016. One Member State has notified an opt-out until 28 April 2015.

2.2. The draft Regulation related to SPO, which will be under scrutiny by the European Parliament and the Council until 5 March 2014, provides that:

- for SPO, Member States may decide not to apply the provisions of Annexes II, III, VII and VIII until [*3 years after the entry into force of the amending Regulation*];
- for CAT (A-A), Member States may decide not to apply the provisions of Annexes II, III and IV until [*3 years after entry into force of the amending Regulation*]; and
- for CAT (S and B), Member States may decide not to apply the provisions of Annexes II, III and IV until [*3 years after entry into force of the amending Regulation*].

As was the case with OPS-CAT, it is expected that the majority of Member States will make use of the full horizontal opt-out opportunities provided here above.

2.3. The Regulation on FTL contains

- (a) a direct date of application for the whole Regulation i.e. 18 February 2016,
- (b) an opt-out concerning the provisions for in-flight rest up to the maximum of 3 years until 17 February 2017, during which national provisions concerning in-flight rest continue to apply.

While in the case of (a), there is no need for Member States to notify the applicability date to the Commission and EASA, in the case of (b) Member States will have to notify the Commission and EASA, if they make use of this opt-out provision and for how long.

The FTL Regulation does not foresee an earlier application date. However, under the provisions of Article 8.3 of the EU-OPS Regulation and completely independent from the new EU FTL, a Member State may derogate from Subpart Q by applying earlier the new EU FTL rules as ‘other means to achieve an equivalent level of safety to that attained by the common technical requirements and administrative procedures set out in Annex III’.

Current Subpart Q provisions are minima and an operator may commit itself to applying a more protective scheme subject to a derogation decision by the Commission as stated above. In case of unforeseen urgent operational circumstances or operational needs of a limited duration, an operator may be allowed to apply less protective provisions than those contained in Subpart Q in accordance with Article 8.2 of the EU-OPS Regulation, which foresees the possibility of an exemption. In all other cases the Member State needs to notify the Commission of its intention to grant an approval derogating from the common technical requirements and administrative procedures, the reasons therefor and the conditions laid down in order to ensure that an equivalent level of safety is achieved

3. General principles governing opt-out

In line with Article 10(2) of Regulation (EU) No 965/2012, 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 notification should provide the competent authorities of a Member State and the entities under its oversight with a **legal certainty** during transition as to which particular Annexes (Parts) become applicable and when.

The competent authority of a Member State shall, on the basis of its administrative capacity and level of compliance, indicate those Annexes (Parts) that 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 may decide to specify an earlier date of application of certain selected points, sections or subparts in order to allow aircraft operators benefit from a new implementing rule. For example, a competent authority has decided to advance the implementation of CAT.IDE.A.205, and in particular of 'upper torso restraint system', instead of seeking derogation from the EU-OPS requirement to have a shoulder harness mounted on any observer seat located in the flight crew compartment. In another example, the competent authority has decided to apply the ORO.CC earlier to match the application of Part-CC of the Aircrew Regulations.

It is recommended that the decision on an opt-out be made after consultation with the regulated persons, 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 the Air OPS 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, in a way which deviates from the direction taken at EU level.

3.1. Commercial Air Transport

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 of Regulation (EU) No 965/2012, as well as in Recital (6). Following the same logic, it would be possible for a Member State to continue applying EU-OPS or national law implementing JAR-OPS 3 during the opt-out period with regard to 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 would be possible during the transition to apply **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 this Article providing that these are limited in time until the end of the transitional period.

Except as otherwise provided under Article 6 of Regulation (EU) No 965/2012, derogations and exemptions granted in accordance with Article 8 of the EU-OPS Regulation before or during the transitional period shall not, however, be valid any more after the new IRs have become 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.

One derogation measure under Article 8 of EU-OPS will, however, remain valid beyond 28 October 2014. As provided for in Article 6 of Regulation (EU) No 965/2012, **Annex II aircraft**, when used in CAT operations, shall be operated under the conditions of Commission Decision C(2009) 7633 of 14.10.2009. This concerns both CAT operators already using Decision C(2009) 7633 by that date and CAT operators which may be allowed to use it afterwards.

The Decision allows several operators and their Annex II aircraft to derogate from certain provisions of EU-OPS such as 1.180(a)(1)/(2), 1.875(a), 1.175(o) and 1.1070 on the condition that all other requirements of EU-OPS are complied with. After the end of the opt-out CAT operations fall under Regulation (EU) No 965/2012, including CAT operations with Annex II aircraft. In practical terms this means, for example, that the operation of a DC-3 may, from 28 October 2014 onwards, be conducted in derogation from those OPS-CAT rules which correspond to 1.180(a)(1)/(2), 1.875(a), 1.175(o) and 1.1070, whilst all other OPS-CAT rules must be complied with, including the management system.

3.2 Non-commercial operations, specialised operations, CAT S/B and A-A operations

Article 10 of Regulation (EU) No 965/2012 was complemented by Regulation (EU) No 800/2013 so as to include under paragraph (3) an opt-out provision for non-commercial operations. Article 10 was further amended by the draft Regulation related to SPO (voted on favourably by the EASA Committee in July 2013) to include under paragraphs (4) and (5) respectively opt-out provisions for specialised operations as well as certain specific CAT operations. Above-mentioned general principles are also fully applicable for these new opt-out opportunities.

4. Actions during transition

4.1. Commercial Air Transport

During the transition a Member State should start implementing Regulation (EU) No 965/2012 taking a step by step approach, while at the same time continuing with the routine implementation of EU-OPS and/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 28 October 2012 – the entry into force of Regulation (EU) No 965/2012, may continue to be certified on the basis of the old rules irrespective whether the certification is due to be completed after that date. The same applies to the renewal of an AOC started prior to 28 October 2012 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 Regulation (EU) No 965/2012. 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 peak backlog, non-compliance or deficiency which would inevitably occur if the implementation of the new rules was left for the last moment.

4.2. Non-commercial operations, specialised operations, CAT S/B and A-A operations

With regard to non-commercial operations and specialised operations as well as CAT S/B and A-A it is expected that all Member States will make use of the full opt-out opportunities provided under Article 10 of Regulation (EU) No 965/2012, as was the case with OPS-CAT. This means that in the majority of cases the relevant rules will begin to be applied effectively across the EU as soon as the opt-out has expired.

However, in order to prepare for this moment, the competent authorities should start **gradually** adapting their organisation and management system, procedures, staffing, inspector's handbooks, oversight program etc. **as from the date of entry into force of the respective implementing rules:**

- Authority's management system should be adapted for example to refer to the collection of declarations from NCC and SPO operators, as well as to the issuance of authorisations in case of high-risk commercial specialised operations.
- During the preparatory process the authority may organize seminars, workshops, information campaigns or use other ways of communication to instruct interested NCC and SPO operators.
- As part of its management policy the competent authority may decide to establish a list of commercial specialised activities posing high risk to third parties on the ground, so that interested operators are informed in advance of the required documents. To this end the authority may perform studies or (risk/impact) assessments to properly address particular needs.
- Safety inspectors should be trained against the new rules. Authority's procedures and checklists should be adapted to account for verification of risk assessments and SOPs in the case of high-risk commercial specialised operations as well as interaction with another Member State's competent authority in the case of cross border high risk commercial specialised operations.

- The authority should start collecting data about the regulated persons through questionnaires survey programs or other available means. The data may be further arranged by specific nature of the organisation, complexity of activity, area of operation. Alternatively, it may consider requiring its operators to submit declarations some time in advance of the rule applicability date. All this should help the competent authority prepare for the first time its oversight schedule and checklists to be ready for use when the opt-out expires. This will enable the authority to gain an insight into the risks of the SPO activities performed in its territory and adapt its organisational structure, oversight programme etc. accordingly.
- NCC and SPO operators (except those that perform non-commercial SPO with non-complex aircraft) should begin preparations related to establishment of management systems, procedures, training programs 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 rules.

Despite the expectations that a full opt-out opportunity will be used across EU there might be cases where certain Member States have decided to advance the implementation of Part-SPO. Thus, a SPO operator wishing to engage in cross border commercial specialised operations during the horizontal opt-out might then face a situation where the rules applicable in the territory of another Member State differ from the rules applicable in the territory, where this operator has its principal place of business. For example, this might happen when Part-SPO is fully applicable in the place where the operation is planned to be conducted, whilst the Member State where such operator has its principal place of business has notified an opt-out.

In all cases of cross border services, the general principle should be that the rules of the Member State where the operation takes places or is planned to be conducted prevail and the operator should comply with them. This is unchanged from the current situation. In the above example the operator might be required to prepare a risk assessment and Standard Operating Procedures (SOPs) by the competent authority of the place where the operation is planned to be conducted whilst, at the same time, his competent authority might not be ready with issuing authorisation and verifying operator's risk assessment. At this rate the operation may be conducted without holding such authorisation at the sole discretion of the Member State where the activity is planned to take place. However, Member States are reminded to account for the forthcoming SPO rules and to take no decision that would contradict these rules or discriminate operators based on their nationality.

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 that the AOC has been found EU-OPS compliant and has been issued before the transition elapses. Grandfathered privileges need not be evaluated or verified again, because this has been done

during the EU-OPS certification process. Such privileges shall be 'frozen' to their current levels.

In other words, all EU-OPS compliant privileges shall be re-issued under the new form included in Part ARO. However, the new AOC shall only be issued if full compliance is demonstrated notably in relation to the differences between old and new system, in particular SMS. Automatic re-issuance of AOCs is not allowed. The NAA should verify compliance with these differences, including assurance that a SMS has been established and related operator's documentation and manuals updated. Issues which have not changed, e.g. performance, should not be reassessed.

If the operator waits until 28 October 2014, without carrying out the necessary adjustments, the AOC cannot be reissued.

If during normal oversight activities findings against EU-OPS compliance are raised by the NAA, such findings should be closed as far as possible. The authority needs to decide on a case-by-case basis. If a level 2 finding is made one week in advance of 28 October 2014, corrective action may not be implemented within one week and the finding may be “carried over” to the new AOC provided the authority has sufficient assurance that it will be closed expeditiously. However, there shouldn't be any open findings on the new management system, procedures etc. This means that the operator and authority have not done their job during the transition and so a new AOC should not be issued as compliance cannot be demonstrated.

As from 28 October 2014:

- new certificates, under the new format, and associated operations specifications can only be issued in accordance with the new implementing rules;
- the privileges stemming from grandfathered AOCs can only be updated in accordance with the new implementing 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 28 October 2014. Accordingly, there is no automatic grandfathering of the related AOCs.

The conversion process shall start from the date of entry into force of Regulation (EU) No 965/2012 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 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 the 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.