REASONED OPINION: PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING REGULATION (EC) NO 216/2008 IN THE FIELD OF AERODROMES, AIR TRAFFIC MANAGEMENT AND AIR NAVIGATION SERVICES (COM(2013) 409)

1 Reasons

Article 6 of Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality annexed to the Treaty of Lisbon states that "[a]ny national Parliament [...] may, within eight weeks from the date of transmission of a draft legislative act, [...] send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity."

2 Reasoned Opinion

The EU's power to act

The Maltese Parliament considers that the proposal fails to comply with the principle of subsidiarity as the Commission has failed to provide clear evidence of the need for legislative action on the part of the European Union (EU). The need for action by the Union is a prerequisite for EU-level action and for compliance with the principle of subsidiarity. Need for EU action should be substantiated by evidence collected and evaluated in an impact assessment, rather than motivated by a perception of the need to act. Both the Commission's explanation and the impact assessment are based on subjective perceptions of a need for action rather than objective evidence of the need for action. And this, when the functional airspace blocks established by EU Regulation have already begun operating and will produce results in the coming months and years. At this stage there is no clear evidence of any requirement for legislation in this sector to be proposed at EU level or of what will be achieved by this legislation as proposed.

The proposal complements another proposal that introduces radical concepts to take effect from 2020 onwards, devised to address what are considered existing problems with the FABs. In accordance with the latest SES (Single European Sky) package, these FABs officially began operating in December 2012 and it appears that the Commission expected that the deadline of December 2012 would have produced positive results from the FABs. This is not realistic when one considers that the FABs are regional groupings and need time to begin to yield the desired results. One would therefore expect the Commission to allow more time for the FABs to become properly established and to begin to yield the desired results, rather than introducing radical changes for the next eight years.

The Maltese Parliament believes that any action at European level at this stage must be non-legislative in nature since only then can the diversity of European FABs be taken into account and incorporated, ensuring that the action is proportionate to the competitive nature of this sector where safety cannot be affected. It would therefore be unwise to take legislative

action while the current framework of the FABs has yet to be put to use. For these reasons we believe that legal certainty should be ensured by means of existing measures and other transparent guidance measures, together with specific action in the event of problems.

The Commission has yet to provide sufficiently convincing evidence that the proposed measures have been evaluated by means of a safety case. In the field of aviation, no changes to the service provided by Air Navigation Service Providers should be proposed – let alone implemented – if it has not been ensured that there is no risk to safety. Various problems of performance and effectiveness in relation to European airspace are already being addressed by the regional FABs that were set up in accordance with the current Single European Sky package and this proposal is therefore not necessary. It will create a complex situation that will have a negative impact on the sector.

In this regard, giving consideration to any legislative revisions would be premature at this stage.

Measures in the proposal

The development of the European Aviation Safety Agency (EASA) framework, set out in particular in Regulation EC No 216/2008, is intertwined with the development of the Single European Sky initiative. The Single European Sky (SES) initiative aims to improve the overall efficiency of the way in which European airspace is organised and managed through a reform of the industry providing air navigation services (ANS). Its development has included two comprehensive legislative packages – SES I and SES II composed of four regulations, i.e. Regulations (EC) No 549/2004, (EC) No 550/2004, (EC) No 551/2004 and (EC) No 552/2004, and also includes a comprehensive project to modernise equipment and systems for air navigation services under the SESAR (Single European Sky ATM Research) title.

In 2009, Regulation (EC) No 1108/2009 extended the competences of EASA to include air traffic management and air navigation services (ATM/ANS). Whilst this also implied the incorporation of various ATM/ANS technical regulation elements into the scope of EASA, the corresponding changes to the four SES Regulations were not completed simultaneously. Instead the European Parliament and the Council preferred to leave the corresponding and existing competencies in the four abovementioned SES Regulations intact to ensure that there would be no gaps during the move from the old legal framework to the new one and also to support the idea that the new EASA-based framework should be built on existing SES principles.

The legislators addressed this overlap in the Regulations by inserting a new Article 65a into Regulation (EC) No 216/2008. This article requires the Commission to propose amendments to the four SES Regulations to take into account the requirements of Regulation (EC) No 216/2008.

Secondly, there is a more general mismatch between the approach used for all other sectors of aviation (airworthiness, crew licensing, air operations etc.) in the EASA framework and air traffic management (ATM/ANS). Generally speaking the approach is that all technical regulations are concentrated within the scope of EASA to meet the objectives of Article 2 of Regulation (EC) No 216/2008 and economic regulation is carried out by the Commission. However in ATM/ANS (i.e. SES) the picture is more mixed, with technical regulations

stemming from various sources. It would therefore be beneficial to ensure a harmonised approach to this important regulatory area, so that all consultations are conducted with the same thoroughness, all rules fit in the same structure and serve the same objectives, making life easier for those responsible for applying the rules and finally to ensure that the impending wave of technological innovations stemming from the SESAR initiative can be implemented in a co-ordinated manner in both airborne and ground equipage and procedures.

This regulatory initiative aims to fulfil the requirement of article 65a, by deleting the overlaps between the SES and EASA Regulations and simplifying and clarifying the border line between EASA and SES legal frameworks. In doing so, the amendment also supports the political objective of ensuring clarity of tasks between the Commission, EASA and the Eurocontrol organisation so that the Commission focuses on economic and technical regulation, with EASA acting as its agent on technical regulation drafting and oversight, while Eurocontrol will focus on operational tasks, in particular built around the Network Manager concept.

As well as deleting SES provisions as part of the SES recast, some minor adaptations are also required to Regulation (EC) No 216/2008, because previously the text of this Regulation relied on the terminology of some SES provisions – in particular in the area of interoperability – and hence the same terminology needs to be introduced in Regulation (EC) No 216/2008, now that it is being repealed from the four SES Regulations.

The development and implementation of the ATM master plan (SESAR) requires regulatory measures in a wide variety of aviation issues. Previously the coordination and alignment of rules (between air traffic management and airworthiness for example) has created problems as there has been no central coordinator ensuring consistency between the drafts prepared by different contributors. This problem does not exist in other fields than ATM/ANS as EASA prepares and co-ordinates the whole range of technical rules, while ATM/ANS has still been split between two frameworks. The amendment to Article 2 underlines that ATM/ANS should be treated in the same way as other sectors. More specifically, in supporting the Commission in the drafting of technical rules, EASA should adopt a balanced approach to regulating different activities based on their specific characteristics, acceptable safety levels and an identified risk hierarchy of users to ensure a comprehensive and coordinated development of aviation.

Regulation (EC) No 1108/2009 introduced the possibility of self-declaration rather than certification, of certain flight information services. The text of Regulation (EC) No 216/2008 has been adapted throughout to take account of this possibility in the various places where certification is mentioned.

Article 8b has been amended to align the wording with the proposal to repeal Regulation (EC) No 552/2004, thus ensuring that the existing principles and concepts of the interoperability Regulation (EC) No 552/2004 remain. A mistake in part (2)(c)(iv) has been corrected to bring the text back into line with the provisions of the International Civil Aviation Organisation (ICAO) and with existing EU rules. This was an unintentional mistake in the drafting of Regulation (EC) No 1108/2009, which led to an unfeasible requirement for air traffic controllers to provide aircraft with obstacle clearance even when they were outside the aerodrome manoeuvring area.

Secondly, in parts (2)(g) and (2)(h) as well as part 3 some text has been inserted from Regulation (EC) No 552/2004 to highlight the fact that the approach used to regulate these matters will not be needlessly changed from what it is today. These additions do not change the scope, but further align the SES and EASA frameworks.

A number of small typographical corrections have been made (in Article 7, for example) and some small editorial amendments have been made to rules (in Articles 9, 19 and 33) where the text did not reflect the actual situation after previous amendments to the Regulation. Furthermore some small changes have been made throughout (for example in Articles 52 and 59, and in Annex Vb) to avoid any unintended changes to the principles agreed in SES since 2004.

The Regulation has also been aligned with the regime established by Articles 290 and 291 TFEU and Regulation (EC) No 182/2011, governing the use of implementing acts and delegated acts. Furthermore the core elements of agreed standard provisions for agencies' founding acts in accordance with the Commission Roadmap on implementation of the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, of July 2012, have been included. The latter agreement includes also standardisation of the names of EU Agencies, so that the name of EASA shall be modified to European Union Agency for Aviation (EAA).

Since a separate explanatory memorandum has been drafted to accompany the proposed recast of the four SES Regulations Nos 549-552/2004, this document contains mainly the amendments required in the Regulation 216/2008 to ensure continuity of the current SES approach after the alignment of the four SES Regulations on accordance with Article 65a of Regulation (EC) No 216/2008.

Conclusion

This Proposal complements the Proposal for a Regulation on the implementation of the Single European Sky[1] – in respect of which the Maltese Parliament concludes that the Commission has failed to provide clear evidence of the need for legislative action on the part of the European Union or of what will be achieved by this legislation as it is proposed. The Proposal does not take sufficient account of safety aspects before it separates support services from air traffic services. Although a separation of these services may be possible in the future in the centre of Europe, this would be much more difficult to achieve in countries on the edges of the continent, which in Malta's case includes North African countries that are not regulated in the same way as EU Member States. Furthermore, in Article 10 of COM(2013) 410, the Commission proposes measures that could negatively affect the industrial relation systems in place in the Member States.

The Maltese Parliament has decided to object to the proposal and submit this reasoned opinion in accordance with the procedure defined in Article 6 of Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality, annexed to the Treaty on the Functioning of the European Union.

[1] COM(2013) 410