

REASONED OPINION: PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE IMPLEMENTATION OF THE SINGLE EUROPEAN SKY (RECAST) (COM(2013) 410)

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 subsidiarity principle as the Commission has failed to provide clear evidence of the need for legislative action on the part of the European Union. 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 (FABs) established by EU Regulation have already begun operating and will produce results in the coming months and years. There is no clear evidence of why legislation needs to be proposed at EU level in this sector and at this stage or of what will be achieved by this legislation as proposed.

The proposal 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 takes into consideration 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.

At this stage, the Maltese Parliament believes that any action taken at European level 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 the safety of air services cannot be affected in any way. 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 brought about 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 services provided by Air Navigation Service Providers (ANSPs) should be proposed – let alone implemented – if it has not been ensured that there is absolutely 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 scenario that will make the sector more complicated and have a negative impact.

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

Measures in the proposal

In line with the view that the Commission should focus on economic regulation and in particular on the performance scheme and Single European Sky ATM Research (SESAR), whereas the European Aviation Safety Agency (EASA – now EAA, under the agreement on standardisation of Agencies) supports the process through co-ordinating all technical rule drafting, a new Article 28 has been added to describe the manner in which the consistency between SESAR policies and new technical rules must be ensured. Moreover, the new rules on implementing and delegated acts stemming from the Lisbon Treaty have been included throughout the Regulation. One of the major needs identified in the impact assessment has been the need to strengthen the national authorities, both as regards their independence and their specialist knowledge and resources. For that purpose Article 3 describes the level of independence required from the authorities *vis-à-vis* the service providers they are intended to oversee. Due to the need in some Member States to carry out some administrative reorganisation, a transitional period is also foreseen until 2020. Furthermore more explicit requirements are set on the competences and independence of the staff hired, as well as strengthening the independent funding of the authorities through the route charges scheme in accordance with Article 14. To improve expertise amongst the authorities, a network of national authorities is foreseen in Article 5, including also the possibility of pooling experts so that States may benefit of experts coming from other Member States.

A definition of the term 'National Supervisory Authority' has been added, whereby it is clarified that for the purposes of this Regulation the competent authorities under Regulation (EC) No 216/2008 are considered to be National Supervisory Authorities, so that no second layer of administration is required.

The key provision of the proposal is Article 10, which provides for the freedom to provide services. This applies to support services until 1 January 2020. The Member States are required to take the necessary measures to ensure that the provision of air traffic services is separated from the provision of support services so that both sets of services are provided by separate undertakings.

Article 11 on performance schemes has been amended to rationalise the process of target setting and to allow more focus on target setting at local level. This allows for more informed and tailored setting of targets. Small adjustments to support this have also been made to Articles 12 and 13 on charging and the text has also been updated so that the provision concerning funding of authority tasks covers also the extension of EASA under Regulation (EC) No 1108/2009 to perform some of those tasks.

Article 16 was amended already under Regulation (EC) No 1070/2009 to give the FABs more of a performance focus and this process is continued in this revision. The FABs should not be seen as static blocks of airspace, but as industry-led initiatives to seek improvements in overall service provision. For that to be possible, the industry needs to be given more flexibility to develop the FABs, even to devise different types of FABs, depending on where they expect to find the most synergies. Therefore the focus of the article is now more on flexible "industrial partnerships" and the measure of success will be the level of performance improvements achieved.

The core air traffic services, which are considered to be natural monopolies, remain under the requirement to designate them, but the proposal provides that support services should be allowed to develop freely, using the full potential of specialist knowledge also from other sectors. A safeguard clause has been included, based on the model of Article 4 of Regulation (EC) No 1008/2008 to ensure vital security and economic interests are not endangered. A transitional period is foreseen until 2020.

Finally, a definition of support services has been included in Article 2 (37) to explain which services are targeted with this provision. In the second chapter of the proposal, Article 10 presents the most radical provision of the proposed legislation, namely that air traffic service providers must separate support services from air traffic control services. This provision brings about a radical change to the structure of all air traffic service providers, in that they will cease to be single organisations that encompass and are responsible for air traffic control services (ATSP) and for communication, navigation and surveillance support services (CNS).

Article 17 on network management has been updated in two ways. First, the previously inconsistent article has been reorganised to bring the listing of all of the services that the Network Manager provides into paragraph 2 and elements that were related to technical implementing rules on air traffic flow management — and hence not to the Network Manager itself — have been relocated in Annex V of Regulation (EC) No 216/2008, which already included the relevant provisions concerning flow management rules. In connection with this, a reference to the aeronautical information portal has been added to paragraph 2 as this service is already to some extent integrated in the Network Manager, but not expressly mentioned in the Regulation.

Secondly, the article has been revised to align it with the language used in Regulation (EC) No 1108/2009, naming the "functions" as "services" and treating the Network Manager consistently in the same manner as other service providers insofar as certification, oversight and safety requirements are concerned. The language of the relevant definitions has also been updated accordingly. Finally, a provision has been included in Article 17 to cover the further development of the Network Manager in the direction of an industrial partnership by 2020. The need to introduce more customer focus on the air navigation service providers was identified as

one area of improvement in the impact assessment. A new Article 19 has been created to ensure the airspace users are consulted and also involved in the approval of investment plans. A shorter separate explanatory memorandum has been created to accompany the proposed amendments to the EASA Basic Regulation, i.e. Regulation (EC) No 216/2008.

Conclusion

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 and 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 at the heart 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, 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.