OPINION No 01/2007

OF THE EUROPEAN AVIATION SAFETY AGENCY

for a Commission Regulation amending Commission Regulation (EC) No 1702/2003 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations, to provide for the continued operation of some aircraft registered in Member States

I. General

1. The purpose of this opinion is to suggest to the Commission to amend Article 2 of Commission Regulation (EC) No 1702/2003[1] to provide for the continued operation of some aircraft designed in the former Soviet Union and currently registered in Members States. As further explained below, for many of these aircraft the Agency has not been able to determine the approved design (Type-certificate or Specific Airworthiness Specification - SASs), which is necessary for the issuance of airworthiness certificates under the conditions specified in this regulation. To avoid grounding these aircraft at the end of the transition period specified by the legislator for such determination (28 March 2007), urgent measures need to be taken for a temporary solution.

2. This Opinion has been adopted, following the procedure specified by the Agency's Management Board[2], in accordance with the provisions of Article 14 of Regulation (EC) No 1592/2002[3].

II. Consultation

3. The draft opinion for a Commission Regulation amending Commission Regulations (EC) No 1702/2003 (Notice of Proposed Amendment -NPA 17-2006) was published on the Agency website on 14 November 2006 with a reduced consultation period taking into account the urgency of the matter.

4. By the closing date of 25 December 2006, the Agency had received 107 comments from national authorities, professional organisations and private companies.

5. All comments received have been acknowledged and incorporated into a Comment Response Document (CRD), which was published on the Agency's web site on 18 January 2007. That CRD contains a list of all persons and/or organisations that have provided comments and the answers of the Agency.

6. Most of the comments received support the envisaged measure as described hereunder. Some comments, while accepting the need to solve the case of aircraft currently registered, insist that the measure should not be used to further extend the fleet of aircraft that do not fully comply with the current airworthiness regime established by EU law. Few even require that aircraft benefiting of the measure should not be able to expend their activity beyond what they currently do, in particular in the territory of other Member States.

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[1] Commission Regulation (EC) No 1702/2003 of 24 September 2003 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations (OJ L 243, 27.9.2003, p. 6). Regulation as last amended by Commission Regulation (EC) No 706/2006 of 8 May 2006 (OJ L 122. 9.5.2006, p. 16).

[2] Decision of the Management Board concerning the procedure to be applied by the Agency for the issuing of Opinions, Certifications Specifications and Guidance Material. EASA MB/7/03 of 27.06.2003 ("Rulemaking Procedure").

[3] Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (0J L 240, 7.09.2002, p. 1.). Regulation as last amended by Commission Regulation (EC) 1701/2003 of 24 September 2003 (OJ L 243, 27.9.2003, p. 5).

Some others at the contrary insist that aircraft subject to the measure should not be discriminated by other Member States and should be allowed to expand their market opportunities. The same stakeholders also would like that more flexibility be introduced in the measure so that aircraft already operating in the Community or bought by Community citizens can benefit of the measure. Few would prefer that the measure can also apply to all aircraft whose type was already accepted by a Member State.

III. Content of the Opinion of the Agency

7. This opinion is aimed at amending Article 2 of Commission Regulation (EC) No 1702/2003[4] (the Commission regulation) to provide for the continued operation of some aircraft currently designed in the former Soviet Union and registered in Members States. As explained in details in the above referred to NPA, the Agency was required to determine the approved design (type-certificate or SAS) necessary to issue the airworthiness certificates of a number of aircraft registered in Member States at the time of entry into force of the Commission Regulation, which had not be certified on the basis of codes known at that time in the Community[5]. This had to be done before 28 March 2007. Unfortunately such determination could not be done by lack of support from the designers of these products[6]. As a consequence, now that the deadline for integration of these aircraft is approaching, very few have a chance to be covered by an EASA approved design in due time and many would have to be grounded if nothing is done urgently to provide for an immediate solution that would allow their continued operation. The Commission convened therefore a special meeting of the EASA Committee on 19 July, where it was agreed to investigate the magnitude of the issue and to explore possible options to avoid grounding aircraft for the only reason that the regulatory framework had changed.

8. The investigation conducted by the Agency shows that a number of the aircraft of soviet design registered in Member States are excluded from the scope of Community competence as they meet the conditions of Annex II of the Basic Regulation. Such aircraft are therefore fully under the responsibility of the States of registry, which act, consistent with the provisions of ICAO Annex 8, in co-operation with the authorised representatives of the States of design. If they continue to be issued an ICAO standard certificate of airworthiness by their State of registry, they shall continue to benefit of the freedom of movement granted by the Chicago Convention. When those aircraft are aeroplanes engaged in commercial air transport, they will be subject on 16 July 2008 to the provisions of the amended Council Regulation (EEC)

[4] Commission Regulation (EC) No 1702/2003 of 24 September 2003 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations (OJ L 243, 27.9.2003, p. 6). Regulation as last amended by Commission Regulation (EC) No 706/2006 of 8 May 2006 (OJ L 122. 9.5.2006, p. 16).

[5] To simplify, such codes could be described as those referred to in Council Regulation (EEC) 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation

[6] In the current Community legal framework, the Agency can certify an aircraft type only if the designer applies for it.

3922/91[7]. Such provisions may affect their continued operation as they will not hold an EASA certificate of airworthiness, unless such provisions are reviewed in between.

9. Around 300 aircraft[8] of soviet design (refer to attached list for information purpose) are fully subject to the Commission Regulation and should hold an airworthiness certificate issued in accordance with its annex – the so-called Part 21 - to continue to benefit of the freedom of movement in the Community. Grounding these aircraft, in particular those involved in commercial operations, would have a significant economic impact on their owners and operators, as well as on significant parts of the economy of the Member States where they are registered. This is seen by most stakeholders as unfair as affected persons have no direct responsibility in this situation and there is no immediate safety justification for such a radical action. The present opinion aims therefore at proposing an acceptable way to allow their continued operation until the time an appropriate EASA approved design can be determined by the Agency for most of them. This of course would require the support of the designers and of the authorised representatives of the State of design; if such a support could not be obtained, some of these aircraft would not be entitled to operate in the Community any more, but their owners and operators would have had time to adjust and take the necessary measures.

10. It is now too late and too uncertain to envisage a full legislative process to change the transitional provisions of the Basic Regulation[9] or to exclude all these aircraft from the scope of the Community competence by amending its Annex II. The only solution is then to allow their continued operation under restricted certificates of airworthiness provided they also comply with all other applicable requirements related to continuing airworthiness and environmental protection. It is however materially impossible that the Agency is able to determine before 28 March 2007 (see also paragraph 7 above) the necessary case-by-case SASs as required by Article 5.3 and 4 of the Basic Regulation and Part 21A. 184. The envisaged measure is therefore to amend the Commission Regulation to determine such SASs by reference to the approved design of the States of design, including its continuing airworthiness information (airworthiness directives). Such a measure is in fact a similar to that contained in Article 2.3(a), which maintained the validity of the type–certificates issued or validated by Member States for well known products. However, as such a measure does not allow the Agency to acquire an in-depth knowledge of the design of the concerned products, the measure can only be envisaged if that knowledge is provided by the authorised representative of the State of design under appropriate arrangements that also ensure the availability of the necessary continuing airworthiness information to update the SASs.

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[7] Regulation (EC) No 1900/2006 of the European Parliament and of the Council of 20 December 2006 amending Council Regulation (EEC) No 3922/91 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation (O.J. of 27.12.2006).

[8] 45 large aeroplanes engaged in commercial operations (mainly Antonov 24, 26, 28 72 and 74), 190 heavy helicopters (Kamov) and 80 general aviation aeroplanes (mainly Sukhoï 26/31 and Yak 18/55)

[9] The duration of the maximum period during which aircraft subject to Community laws may be maintained under national control – 42 months – is set by Article 56 of the Basic Regulation. Only an act of the legislator – European parliament an Council - can change this figure.

11. The envisaged measure is limited to aircraft that are already registered by Member States. Additional aircraft of the same types cannot be registered by Member States unless they have been issued an EASA approved design (type-certificate or SAS) providing for their full integration in the EASA safety system. To avoid also that the period during which the present rule was elaborated (from the date when the intention was made public after the special committee meeting referred to in paragraph 7 above and the 28 March 2007) is used to introduce additional grandfathered aircraft in the Community, the measure only applies to aircraft that were on the register of a Member State on 1 July 2006. This has been questioned by some comments as there seems to be some aircraft already bought by such date that are waiting for a registration. The Agency did not modify however its proposal on this point as it feared that introducing the requested flexibility opened the possibility for abuses. It may indeed be difficult to verify that an aircraft was bought and that the intention was to register it in a Member State. An additional difficulty would be to specify by whom such an aircraft should have been bought to be eligible; introducing a citizenship conditions could be considered as discriminatory or contrary to the freedom of establishment.

12. The envisaged measure only applies to aircraft that had been issued a certificate of airworthiness by a Member State by the above mentioned date. The objective of this restriction is to ensure that the beneficiaries are only the aircraft whose safety status is internationally recognised and whose continuing airworthiness is officially supported by their State of design. This aims at minimising the risks related to the limited knowledge of the design by the Agency. This of course may exclude from the benefit of the measure some aircraft that are currently flying under national restricted certificates of airworthiness or permits to fly. The Agency, in parallel with this opinion, is issuing an Opinion on Permits to fly that should provide, if adopted by the Commission, for a solution for such aircraft. That opinion suggests indeed that the conditions determined by the Member States for issuing such certificates are grandfathered and that the associated airworthiness certificates are deemed to be permits to fly issued in accordance with Part 21 until 28 March 2008. After that date, if such permits need to be prolonged, they will have to be re-issued on the basis of a design explicitly approved by the Agency.

13. The envisaged measure is limited in time; the SASs so determined are valid only for 5 years. This is justified on safety grounds by the fact that, as said here above, the measure does not allow the Agency to acquire the necessary technical knowledge of the design. The limitation will then create an incentive for designers to assist the Agency in determining the necessary approved design to fully integrate their aircraft in the EASA system. If the Agency could not determine an approved design, following a detailed technical evaluation, before the end of this period, it could be that some aircraft could not obtain any airworthiness certificate and would not be entitled to fly any more in the territory of Member States. This limitation has been questioned by few comments. Some would like the transitional period to be extended until the end

of the summer season of 2012 for contractual reasons[10]. Some others suggest a flexibility that would allow its extension in favour of aircraft under validation when some more time is needed to finalise it. Another comment suggests a mid-term review to evaluate in due time the consequence of the limitation. Again the Agency did not change its proposal as it would be possible to amend the Commission Regulation as necessary in view of developments if the Commission considers it appropriate. In this perspective the suggested mid-term review is a reasonable suggestion, but this can be done by the Agency without the need to introduce a legal requirement in the regulation. It seems moreover inappropriate to consider unavoidable that extensions would have to be envisaged.

14. Although this opinion was prepared to address the case of aircraft designed in the Soviet system, the envisaged measure does not specify this explicitly. As a consequence it will be applicable to aircraft, which have not been grandfathered or for which no EASA type certificate has been determined so far, as soon as they meet the applicable conditions. It should however be stressed that there are very few aircraft that have not yet been introduced in the EASA system. The exceptions are related to aircraft for which no design organisation willing to co-operate with the Agency could be identified. In such cases the Agency considers that the normal process is the determination on a case by case of individual specific airworthiness specification, just as it envisages doing for aircraft without design holders – the orphan aircraft – which according to Part 21 are not eligible for a type-certificate but have demonstrated sufficiently safe records to be entitled to continue to fly.

15. As regards aircraft designed in the States that joined the Community after the entry into force of the Basic Regulation, it is not the intention to include them in the envisaged measure. A parallel process has been initiated with the support of the concerned National Aviation Authorities to fully integrate them into the EASA system. If no TC can be determined in due time or if they have become orphan by lack of support of their design holders, such aircraft may be issued Restricted CoA on a case by case basis. The Agency is considering issuing the necessary SASs with the help of the concerned NAAs.

16. The envisaged measure, by determining the necessary SASs, provides the legal basis for National Aviation Administrations to issue the restricted certificates of airworthiness. Such SASs are design approvals, including all necessary conditions and restrictions that are necessary to provide for a level of safety and environmental protection equivalent to that provided by the verification of compliance with certification bases determined in accordance with Par 21. The Agency does not see any reason to introduce in these SASs restrictions, which would prevent the affected aircraft from being used in activities they are currently engaged in. Moreover introducing such limitations would negate the objective of the measure. Additional restrictions would any how be difficult to justify as the same aircraft would not be subject to these restrictions if it were registered in a third country. As a consequence aircraft covered by the envisaged measure will be entitled to carry persons or freight if they are

[10] Operators of aircraft engaged in agricultural aerial work.

entitled to do so currently. The related restricted certificates of airworthiness constitute certificates issued in accordance with the Basic Regulation and are eligible to the provisions of its Article 8. They must be accepted by all Member States, which may not impose on the operation of the related aircraft conditions that exceed those contained in the SASs.

17. Using however aircraft with a restricted certificate of airworthiness in commercial operations is not a current practice. The recently approved extension of Regulation 3922/91 to the commercial air transportation by aeroplanes requires that such aircraft hold a "standard" certificate of airworthiness issued in accordance with the Regulation. Although the word "standard" is not specified in the regulation, it can be understood as meaning a normal certificate of airworthiness and excluding therefore restricted certificates of airworthiness. This should be corrected before the said extension enters into force (probably in June 2008). The Agency intends to address this issue when developing the implementing rules for the extension of the Basic Regulation to air operation and will make proposals to the Commission in due course.

18. It has been mentioned in the comments that international practice is to consider that aircraft under a restricted certificate of airworthiness are not eligible to the free movement provided for by the Chicago Convention. As a consequence European registered aircraft holding a restricted certificate of airworthiness could be subject to restrictions by other ICAO contracting States. In this context the Agency wants to explain that while being fully compliant with the minimum ICAO Standards contained in Annex 8, the Community decided to introduce more stringent requirements as it considered current ICAO airworthiness Standards as insufficient to provide for a sufficient level of protection of its citizens. By doing so, the essential requirements contained in Annex I of Regulation 1592/2002 provide then for compliance with ICAO Standards, while the reciprocity may not be true. This may imply that aircraft, which do not comply with Community essential requirements but which comply nevertheless with ICAO Standards, shall not be limited in the freedom of movement they are granted under the Chicago Convention and, where applicable, bilateral air service agreements. Such is the case of the aircraft covered by the envisaged measure as they have been issued standard certificates of airworthiness by a number of ICAO Contracting States and no one contested their compliance with the applicable ICAO Standards. To avoid any misunderstanding, the restricted certificates will bear the mention that they comply with ICAO Standards. This should be accepted by all ICAO Contracting States as it would be discriminatory that the same type of aircraft be treated differently if it is registered in an EU Member States or in other ICAO Contracting States.

19. As regards continued airworthiness, aircraft with a restricted certificate of airworthiness are subject to the provisions of Commission Regulation 2042/2003 related to aircraft maintenance (Part M). They shall therefore be issued an airworthiness review certificate (ARC), which validity shall comply with the applicable provisions of that regulation. It must be noted that among the aircraft at stake, the large ones and those involved in commercial air

transport should already comply with such provisions and that unfortunately the non availability of design data had made practically impossible the issuing of Part 145 approvals and Part 66 licences for the aircraft at stake. As a consequence such aircraft fly illegally. The same will happen to all other aircraft when Part M fully enters into force on 28 September 2008. Work is therefore being conducted in parallel by the Agency and some of the most affected Member States to find a solution on the basis of the provisions of Article 10 paragraphs 5 and 6 of the Basic Regulation. Although such an exemption would be addressing only the maintenance of An-26 aircraft, it would be adaptable to other aircraft types under similar conditions. This should allow aircraft with a restricted certificate of airworthiness issued in accordance with the envisaged measure to be maintained properly in a sufficiently controlled environment.

20. When preparing the amendment to Commission Regulation 1702/2003 necessary to reflect the above described measure, the Agency realised that the text of the amended article, which is already difficult to understand, would become too complex if the opportunity is not used to restructure it. It thought also appropriate to clarify the interpretation to be given to the first sentence of paragraph 2.3. as there are some aircraft, which were designed at a time when the concept of type-certificate did not exist. This is not a reason for not grand-fathering their approved design as the certificates of airworthiness they were issued at the time had the same value than a type-certificate. The attached amendment of the Regulation aims at fulfilling these objectives without affecting the initial intend of the legislator more than necessary to allow the continued operation of aircraft that cannot be otherwise transferred into the EASA system. It should be noted however that the provisions or paragraphs 10 and 11 of Article 2 disappear as they are only valid until 27 March 2007.

21. From the comments received about the concept of “Specific Airworthiness Specifications”, the Agency realised that some confusion was created by the fact that Part 21A.173(b)(2) and 21A.184 do not reflect properly the provisions of Articles 5.3(b) and 15(1)(b) of the Basic Regulation as they mention that the basis for restricted certificates of airworthiness are “Specific Certification Specifications”. This is clearly an editorial mistake that has to be rectified by amending these provisions of Part 21.

IV. Regulatory Impact Assessment

22. The regulatory impact assessment contained in NPA 17 identified 5 potential options to address the issue at stake. After discussing however their feasibility in view of time constraints, it concluded that only two were actually possible: the one described here above and the “do nothing” one. On the basis of the detailed evaluation contained in the NPA, which no received comment contested, the Agency concludes that the “do nothing” option is not practicable. Its negative economic, social and international impacts largely outweigh the few potential safety and environmental gains. It is its opinion therefore that a grandfathering measure allowing the continued operation of the concerned aircraft under restricted certificates of airworthiness is the best way forward

provided appropriate safeguards are built in such a measure to avoid the proliferation of former soviet designed aircraft in the fleet of Member states and encourage the integration of these types of aircraft in the EASA regulatory system. Such is the objective of the amendment to the Commission Regulation attached to this opinion.

Cologne, 30 January 2007

P. GOUDOU
Executive Director

Aircraft of soviet design subject to Part 21

This list includes aircraft types for which Member States have issued airworthiness certificates or permits to fly. This list has been produced on the basis of the information available to the Agency; it is not a formal document that commits the Agency.

It shall be noted that only aircraft, which have been issued a certificate of airworthiness as defined in part 21 (that definition excludes restricted certificates of airworthiness), would be eligible to the measure described in this opinion.

Large transport aircraft

- Antonov
  - An-24
  - An-24B
  - An-26
  - An-26B
  - An-28
  - An-72-100
  - An-72-100D
  - An-74
  - An-74-200
  - An-74-TK-100
- Tupolev
  - Tu-154M
- Yakovlev
  - Yak-40

Rotorcraft

- Kamov
  - Ka-26
  - Ka-32
  - Ka-32A11BC
  - Ka-32AO
  - Ka-32C
  - Ka-32T

General aviation

- Interavia Servis
  - 62TA
  - 70TA
  - 80TA
  - 82TA
- Sukhoï
  - Su-26*
  - Su-26M*
  - Su-26M2*
  - Su-29
  - Su-31

    - Su-31M
- Yakovlev
    - Yak-18T
    - Yak-54
    - Yak-55
    - Yak-55M

* According to EASA files, such aircraft have only be issued restricted certificates of airworthiness or permits to fly by Member States