

NOTICE OF PROPOSED AMENDMENT (NPA) No 09/2005

DRAFT OPINION OF THE EUROPEAN AVIATION SAFETY AGENCY,

for amending Commission Regulation (EC) No 2042/2003, on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks

AND

for 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

Principal place of business

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A. Explanatory Note

I. General

1. The purpose of this Notice of Proposed Amendment (NPA) is to envisage an amendment to Annex I, II and III to Commission Regulation (EC) No 2042/2003¹ and to the Annex of Commission Regulation (EC) 1702/2003². The reason for this rulemaking activity is to clarify the concept of principal place of business.
2. The Agency is directly involved in the rule-shaping process. It assists the Commission in its executive tasks by preparing draft regulations, and amendments thereof, for the implementation of the Basic Regulation³ which are adopted as “Opinions” (Article 14.1). It also adopts acceptable means of compliance and guidance material to be used in the certification process (Article 14.2).
3. When developing rules, the Agency is bound to following a structured process as required by article 43.1 of the Basic Regulation. Such process has been adopted by the Agency’s Management Board and is referred to as “The Rulemaking Procedure”⁴.
4. The text of this NPA has been developed by the Agency. It is submitted for consultation of all interested parties in accordance with Article 43 of the Basic Regulation and Articles 5(3) and 6 of the EASA rulemaking procedure.
5. This rulemaking activity is included in the Agency’s rulemaking programme for 2005. It implements the rulemaking task MDM-014 and is extended to Part 21.1(b) which uses the same term.
 - MDM-014: development of the concept of principal place of business through a decision to introduce acceptable means of compliance/guidance material (AMC/GM) to paragraph M.1, 145.1 and 147.1.

II. Consultation

6. To achieve optimal consultation, the Agency is publishing this NPA together with the draft opinion of the European Aviation Safety Agency on its internet site. Comments should be provided within 3 months in accordance with Article 6(4) of the EASA rulemaking procedure.

¹ OJ L 315, 28.11.2003, p. 1.

² OJ L 243, 27.9.2003, p.6.

³ Regulation (EC) No 1592/2002. OJ L 240, 7.9.2002, p.1.

⁴ Management Board decision concerning the procedure to be applied by the Agency for the issuing of opinions, certification specifications and guidance material (“rulemaking procedure”), EASA MB/7/03, 27.6.2003

Comments on this proposal may be forwarded (*preferably by e-mail*), using the attached comment form, to:

By e-mail: NPA@easa.eu.int

By correspondence: Rulemaking Process Unit
Rulemaking Directorate
EASA
Postfach 10 12 53
D-50452 Köln
Germany
Fax: +49(221) 89990 5508

Comments should be received by the Agency **before 22-02-2006**. If received after this deadline they might not be treated. Comments may not be considered if the form provided for this purpose is not used.

III. Comment response document

7. All comments received in time will be responded to and incorporated in a Comment Response Document (CRD). This may contain a list of all persons and/or organisations that have provided comments. The CRD will be widely available on the Agency's website.

IV. Content of the draft opinion

8. National authorities as well and industry requested a definition of the concept of principal place of business when answering the consultation document for the adoption of Commission Regulation (EC) No 2042/2003, so as to avoid misunderstandings that could rise when the authority is not clearly defined. In Commission Regulation (EC) No1702/2003 exactly the same concept of principal place of business is used as in Regulation 2042/2003 so for consistency the same definition should be valid for all cases. Therefore, the envisaged modification will also be applied to Part-21.
9. This rulemaking activity was included in the Agency's rulemaking programme of 2005, for a development of the concept of principal place of business through a decision to introduce AMC/GM material to paragraph M.1, 145.1 and 147.1. of Commission Regulation (EC) No 2042/2003. Nevertheless, the Agency considers that development of an AMC to clarify the concept of principal place of business will not provide sufficient legal certainty. In this particular case the legislator should give its own interpretation of the principle place of business in a given context, because policy reasons justify such level of details. Moreover, if the Agency adopts only an AMC stakeholders would have the possibility to diverge from that AMC when it is against their interest. The importance of the clarification of the concept of principal place of business to avoid misunderstandings that could rise when the authority is not

clearly defined, justifies the clarification be developed through an amendment to Regulations 2042/2003 and 1702/2003 in order to lift doubts that exist in this field.

10. Although the European Court of Justice (ECJ) has not established a definition of the concept of principal place of business through its jurisprudence, there are several decisions where the ECJ has been asked to clarify this notion, especially with regard to matters concerning the freedom of establishment.
11. In the judgments of the ECJ of 18 July 1998 and 9 March 1999⁵ the Court recognized that: *“companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person”*.
12. When Regulation (EC) No 2042/2003 was adopted, it was clearly the intention of the legislator to reflect what the ECJ established in its decisions, which is to create a connecting factor between the organisation and the authority in order to determine the authority responsible for oversight. The legislator chose as the connecting factor the organisation’s principal place of business, which was indeed a widely accepted concept throughout the aviation sector.
13. It is a general understanding that the concept of principal place of business should be construed to mean a permanent and regular place of transacting of general business, and would not include a temporary place of sojourn during ad hoc negotiations. It should as well indicate where is the seat of the management of the interests of the organisation or its guiding activity.
14. To clarify the concept of principal place of business established by Regulations 2042/2003 and 1702/2003, the Agency has considered several options to be retained; nevertheless it has rejected them because they do not clearly reflect the intention of the said Regulations. First of all, for the purpose of Regulations 2042/2003 and 1702/2003 and in order to ensure safety oversight by the competent authority it is less relevant that the principal place of business be where the general administration or social services are located. Secondly it should be noted, that the principal place of business is not always situated in the state where the organisation is registered regarding fiscal duties. Thirdly for the purpose of both Regulations it is also less relevant that the principal place of business be where the production lines, maintenance or training facilities are. This last option is similar to the one established by the Joint Aviation Authorities (JAA). Under this system, when the organisation had facilities in more than one JAA state, the JAR-145 approval was granted by the JAA state in whose state the primary maintenance facility of the organisation was located.
15. Nevertheless, the intention of these Regulations is that the principal place of business be situated where the organisation technical management is, in other words, in the

⁵ ECJ C- 264/96 and C-212/97

case of Regulation (EC) No 2042/2003 where the organisation personnel specified in paragraphs M.A.606, 145.A.30 and 147.A.105 directs, controls or co-ordinates its activities, ensuring that the organisation complies with the requirements specified in their respective annexes.

16. The organisation technical management defines in particular the safety policy and procedures for the organisation and is responsible for quality assurance. It also has the corporate authority to finance it so that it remains in compliance with the requirements. These elements are the fundamentals of the safety of the company. Also enforcement actions may be easier because the key personnel is residing in the same country as the competent authority. Such choice may imply that the competent authority may have to make arrangements with the authority of the Member State where the production line, maintenance facility or training facility is located to ensure an appropriate oversight.
17. Concerning Regulation 1702/2003 the principal place of business is situated where the personnel specified in 21.A125(b)3 perform their activities under Part 21 Subpart F, and where the organisation personnel specified in paragraph 21A.145(c) directs, controls or co-ordinates its technical activities, ensuring that the organisation complies with the requirements specified in Part 21 Subpart G.

V. Regulatory Impact Assessment

18. Intent of the NPA

The purpose of NPA 9/2005 is to clarify of the concept of principal place of business to avoid misunderstandings and lift doubts that exist in this field that could rise when the authority is not clearly defined. The clarification will be developed through an amendment to Commission Regulations 2042/2003 and 1702/2003.

19. Options

The alternative option would be to do nothing. As consequence the Agency would not take into account the demand of National authorities as well and industry that requested a definition of the concept of principal place of business in order to lift doubts that exist in this field.

20. Sectors affected

The sectors of the EC regulated civil aviation community affected by this activity are all approved organisations, mainly large organisations, and National authorities.

21. Impacts

From the safety point of view there could be loopholes in the oversight if the authority is not clearly defined and then the quality of the oversight is reduced. For

that reasons, this rulemaking activity would clarify relations between the competent authority and organisations as it facilitates the determination of the authority for the issuance, investigation and continued oversight of an approval. As such therefore it has no direct economic or social impact on the industry as it only aims at facilitating the application of existing rules. It may have an indirect cost effect as the fees collected by competent authorities vary for one State to the other. This impact however is a natural consequence of the EASA system that does not attempt harmonising fees and charges in the Community and cannot therefore be seen as an obstacle to the sought clarification.

The impact of possible relocation due to the proposed definition of principle place of business has also been evaluated. Management personnel may be more easily relocated than a maintenance facility, a training school or a production line. However there are several mitigating factors here:

- The management would have to do the required oversight from a distance and this may be costly
- EU competent Authorities are standardised by the Agency
- In case of relocation outside EU, the organisation would be approved by EASA.

22. Conclusion of the Regulatory impact assessment.

Based on this RIA, the proposals of NPA 9/2005 are considered as having no safety, economical, social or environmental impact. Therefore the progress of the proposals is justified.

B. DRAFT OPINION

I. Proposed changes to Commission Regulation (EC) No 2042/2003

a) It is proposed to add the following paragraph 5) to M.1 of Annex I to Commission Regulation (EC) No 2042/2003:

“5. For the purpose this regulation and regarding organisations included within its Annex I, principal place of business is intended to mean the organisation site from which the organisation’s management personnel specified in M.A.606 directs, controls or co-ordinates its technical activities, ensuring that the organisation complies with the requirements of Part-M.”

b) It is proposed to add the following paragraph 3) to 145.1 of Annex II to Commission Regulation (EC) No 2042/2003:

“3. For the purpose this regulation and regarding organisations included within its Annex II, principal place of business is intended to mean the organisation site from which the organisation’s management personnel specified in 145.A.30 directs, controls or co-ordinates its technical activities, ensuring that the organisation complies with the requirements of Part-145”

b) It is proposed to add the following paragraph 3) to 147.1 of Annex III to Commission Regulation (EC) No 2042/2003:

“3. For the purpose this regulation and regarding organisations included within its Annex IV, principal place of business is intended to mean the organisation site from which the organisation’s management personnel specified in 147.A.105 directs, controls or co-ordinates its technical activities, ensuring that the organisation complies with the requirements of Part-147”

II. Proposed changes to Commission Regulation (EC) No 1702/2003

It is proposed to add the following point (c) to 21.1 of the Annex to Commission Regulation (EC) No1702/2003:

“(c) For the purpose this regulation and regarding organisations included within its Annex, principal place of business is intended to mean the organisation site where the personnel specified in 21.A125(b)3 perform their activities under Part 21 Subpart F, and where the organisation personnel specified in paragraph 21A.145(c) directs, controls or co-ordinates its technical activities, ensuring that the organisation complies with the requirements specified in Part 21 Subpart G.”