PART NCC AND THE OPERATION OF NON-COMMERCIAL COMPLEX AIRCRAFT IN THE EU WHO IS AT RISK?

News / Business aviation

The deadline for compliance with Regulation (EC) No 216/2008 better known as Part NCC becomes valid today and applies to ALL complex aircraft operated in Europe whether EASA registered or not. Aoife O'Sullivan, aviation expert at The Law Firm explains the issues.

To all owners and financiers of large aircraft, new regulation has been introduced, is coming into force soon and it affects you very personally.

Regulation (EC) No 216/2008 (the Basic Regulation) entered into force on 8 April 2008. Operators and personnel involved in the operation of certain aircraft have to comply with the relevant essential requirements set out in Annex VI to this EASA Air Operations Regulation. The rule applies to non-commercial operators of complex aircraft with a principal place of business or residence in a Member State of the European Aviation Safety Agency (EASA). Therefore it applies to EASA and non-EASA registered aircraft.
The new Implementing Rules (Regulation EU 965/2012 & EU 800/2013) came into force on 28 October 2012. However, Member States have the flexibility to postpone the applicability of the rule by up to two or three years. For those states who decided to opt out, the final cut-off date is 25 August 2016, by which time the non-commercial operation of business jets and other complex motor-powered aircraft will have to comply with a new regulation colloquially called “Part-NCC”._ _
Most professional operators will have been aware of the impending rules for some time and will

have already adapted their systems, procedures and manuals accordingly. In the case of aircraft which are not managed by a professional operator or indeed managed by an operator who is not up to date on the new changes, the owners and financiers and operators of such aircraft are at risk.

The regulation has highlighted an underlying risk within private and corporate aviation and the resulting exposure to financiers and owners. Furthermore, the regulation extends beyond EASA registered aircraft – the focus is instead on the “operator”. If your N Reg aircraft is based in the EU and operated from the EU, this regulation will apply to you. If the aircraft is not operated by a professional operator, responsibility for the safe and proper operation of the aircraft usually defaults to the owner and that owner must ensure compliance with the regulation. Not knowing what standards are required will not protect these owners from legal responsibility. More worryingly however in the case of many privately managed aircraft, there is no certainty as to who is in fact the “operator” of the aircraft and if not properly defined, the default position will most likely be the owner.

Image result for EASA Part NCC

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Private operations - who is the legal operator?

Article 3(h) Reg 216/2008 defines an operator as "a_n_y_ _l_e_g_a_l_ _o_r_ _n_a_t_u_r_a_l_ _p_e_r_s_o_n_,_ _o_p_e_r_a_t_i_n_g_ _o_r_ _p_r_o_p_o_s_i_n_g_ _t_o_ _o_p_e_r_a_t_e_ _o_n_e_ _o_r_ _m_o_r_e_ _a_i_r_c_r_a_f_t_". Depending on the underlying or surrounding operation and management of the particular aircraft, the definition can apply to many different people who oversee the day to day operation of the jet including the pilot, the flight department within a corporate group, aircraft managers or "consultants", or the owner itself.

The operator has full legal and regulatory responsibility for the aircraft and each flight. The operator is responsible for such things as:

i. Maintenance management
ii. Employment of flight crew
iii. Preparation and maintenance of operations manual
iv. Responsibility for entering into contracts for particular operations

v. Flight planning, fuelling and repairing the aircraft
vi. Keeping the required aircraft records e.g. log books
vii. Briefing the flight crew
viii. Control of the operation in the sense of deciding when the aircraft will take off, where it will go, and what it will carry
ix. The ability to abort the operation
x. Compliance with regulation and laws
xi. Safety oversight and systems

In the event that any supporting functions are contracted out the owner may still retain overall responsibility: full operational control of private aircraft cannot be easily contracted out and the ability to do so depends on many factors, not least the state of registration of the aircraft. For example if the aircraft is registered as a private aircraft with the FAA, Part 91 of the FAA regulations confirms that the owner retains full operational responsibility for the aircraft at all times and this responsibility cannot be fully transferred from the owner (with some carve outs for leases and fractional ownership models). The possibility for a legal nightmare arises in the context of a Part 91 aircraft based in Europe. If the FAA say the operator is the owner and he lives in the US but EASA say the operator may be the manager based in the EU, which regulation applies? Sadly this is not clear and is an issue EBAA will be tackling in the coming months at various working groups organised on topic.

Private use

When an aircraft is operated privately, in very general terms it means that the aircraft cannot be used for charter or “Commercial Air Transport”. In such cases the aviation authorities have relaxed certain rules around the operation of these jets - the main reasons owners tend to want to keep the aircraft as a privately operated aircraft are as follows:

1. Flight time limitations - flying privately does not have the same restrictions on flying hours for pilots so effectively you can push them to fly for longer.
2. Runway length - some runways are deemed too short for commercial aircraft but you can land privately (e.g. Cannes).
3. Cabotage - a commercial aircraft is obliged to request flight permissions to fly point to point within a territory. So for example an EU registered aircraft would need permissions to fly point to point within the US. The permissions tend to be readily granted but the paperwork is an additional task.

In many cases, the structures put in place to manage and operate these aircraft remained unscrutinised by the regulatory authorities. Not only that, many owners have not engaged the services of professional advisors when putting these structures in place and are not aware that they may have exposed themselves to full responsibility for the operational control of the jet when they thought they had passed it off to the “aviation consultant” they trusted to do the job, usually at a very modest cost. An owner is at liberty to hire whoever he wants to operate the jet and in many cases many owners hired ad hoc consultants who provided varying services to keep the aircraft flying. Which one of them is the operator? Do you as an owner really want to wait to find out that it was you all along?

EASA has quite rightly identified the potential risk of allowing owners to do whatever they want with complex machines and under the new regulations the requirements for proper and safe operation of private aircraft (referred to in the regulations as non-commercial complex aircraft) has been increased. For example, all operators of such aircraft will be required to create and maintain an Operations Manual, a Safety Management System (SMS) and will be required to submit their aircraft to a CAMO. If the owner is the operator, this responsibility falls squarely on him.

There are many areas of risk for owners and operators of privately operated jets quite aside from the new responsibility introduced by the EASA Air **Operations Regulation. Some examples are**

set out below.

1. When an aircraft is operated privately the owner is on board or guests of the owners may be on board provided they are not paying for the flight. At EASA level, any payment for the flight is illegal unless the aircraft is operated by an AOC holder that is a licensed operator with an “Air Operators Certificate” (AOC). In the UK, the Air Navigation Order uses the definition of “public transport” which is a similar concept to “commercial air transport” save that “any consideration” may include non-cash payments. For example if I let you fly on my jet in return for a free room in your hotel, this is considered to be “valuable consideration” for the flight. If the flight is not operated by an AOC holder, technically it is an illegal flight, known colloquially as “grey charter”.

2. When aircraft are operated “privately”, the default position by law is usually that the owner is the legal operator. It is possible to delegate this responsibility to a professional operator but under many regulatory systems, the owner remains liable for the safe operation of that flight and is deemed by law to be in “operational control” of the flight. This goes way beyond the authority of the pilot in command – the person having operational control has regulatory responsibility and is accountable for safety and all other aspects of the aircraft operation. Many professional operators will agree to provide management services for the operation of an aircraft privately but the wording of such contracts is deliberately construed to ensure that the owner remains the legal operator. Certain services will have been delegated or subcontracted to the professional operator but the owner remains ultimately responsible and answerable if for example aviation regulation were breached in any way. It is very important in negotiating these agreements that the owner does hire an operator to provide management services and then unwittingly absolve the professional operator of all responsibility by acknowledging that the owner remains ultimately responsible.

3. Many owners have historically bought aircraft in their own name or even in the name of a company with other assets. This person or company becomes the owner and the legal operator and is the responsible party for the due and safe operation, maintenance and control of the aircraft. The buck stops with you. If you do not use special purpose vehicles to protect yourself from claims or the consequences of a major loss, now is certainly the time to review your holding structures. Even if you delegate the responsibility you will never be able to delegate it completely. If your corporate service provider tells you they will become the operator and they even allow you to register the aircraft with their name on the register as the “operator”, this will not help you. For one they are not really aircraft operators and calling them an operator won’t fool the regulators. You may not have divested operational responsibility (see above) and you certainly would have some awkward questions to answer as to why you think hiring a CSP as an operator instead of a professional aircraft operator should divest you of corporate (or Directors) responsibility for the safe operation of the jet.

4. In many cases, owners run their own flight departments which will at least consist of one or two pilots. If the aircraft has always been operated as a private aircraft, it is very unlikely these people will know or be sufficiently experienced to ensure the aircraft as an NCC aircraft is operated to AOC standards. Being licensed to fly an aircraft does not necessarily translate into being an expert on operational requirements and to some degree it is unfair to expect this of the pilots. However, if the owner is the operator, the fact that the flight department does not work to the requisite standard is an exposure for the owner. Non-compliance and the resulting breach of regulation exposes the owner to penalty but even more seriously has the potential to negate the insurance policy, a pre-condition of which tends to be that the aircraft be operated to aviation regulatory standards. Similarly the on-going covenants of most financing documents require proper and safe operation to the requisite regulatory standard and failure to do so is an immediate breach of the loan or lease entitling the financier to repossess and in most cases sell the aircraft. This is particularly the case in finance leases where the lender is the legal owner of the aircraft. The finance documentation ensures that operational responsibility passes to the borrower. Many

financiers do not appreciate that it may not be legally possible to divest all operational responsibility for the safe and proper operation of an aircraft. The financier as the legal owner may be the legal operator and is ultimately responsible.

Grey charter – who is the legal operator?

An aircraft which is intended to be offered for third party charter (i.e. operated commercially or for public transport) must be operated by a professional operator with an AOC. As soon as the aircraft is added to the AOC, that operator becomes the “operator” and the owner is absolved of operational responsibility.

Many privately operated aircraft should be on an AOC because they are unwittingly breaching the rules and regulations surrounding charter of aircraft. Quite simply, if consideration passes for a flight, that is commercial air transport and the aircraft must be on an AOC with a professional operator. Failure to do so is illegal and will negate the underlying insurance policy. One of the biggest underwriters in the aviation insurance market told us recently that if they were aware of an incident involved an illegally operated aircraft, they may not even have a choice in terms of whether they would cover the loss. Insurance cannot cover illegal acts. If the act is illegal, the underwriter is restricted by insurance law from paying out.

So when is the flight illegal? Most immediately consider the flagrant breach of regulation as the obvious example. I own a jet which is registered on a private register and I advertise that jet as being available for charter. This is a clear breach.

The “grey” aspect of illegal charter can however arise in the context of charge backs for flights. So for example a corporate owns an aircraft and charges throughout the Group for the use of the jet – this is a sensible corporate policy and is a way of defraying both the fixed and operational costs of running the aircraft. The Group benefits from the use of the aircraft for the benefit of the business as a whole and no one subsidiary has to carry the on-going costs. The problem arises when the “Group” is not really a group. The definition of Group in the context of aviation regulation does not necessarily marry with the definition of Group within IFRS accounting rules. The definition is quite restricted and generally includes wholly owned subsidiaries of a common parent company. Affiliates are not included where the equity share falls below 51%. Any company outside that definition is not within the Group for aviation regulation purposes and charging that entity for a flight is third party charter. If the operation of that flight is not carried out by an AOC holder, it is illegal. Taking an unconnected client on board the aircraft and allowing them to share in the fuel cost is illegal. Allowing the same client to pay for the hotel room in return for the flight makes the flight an illegal charter. In some countries even conducting a business meeting on board the aircraft whereby some benefit passes is “valuable consideration” and potentially illegal.

The potential exposure to the owner of the aircraft is immense – the owner is the operator and if the owner has allowed illegal charter on the aircraft, the owner is ultimately responsible. The Directors of that owning company have a duty of care to the company and to the shareholders and hiring a flight department will not absolve them from liability. If the illegal flight has an incident, the owning entity will be responsible as the operator and the Directors will need to answer some very difficult questions surrounding their approved operation. If you are one such owner and you have never audited your flight department now is the time to do so. In many cases the flight department themselves have not appreciated the legal subtleties. This is even more pronounced in comparing EASA and FAA regulation. The FAA has quite sensibly introduced a type of licensing or oversight of privately operated aircraft (Part 91) and permits what is known as “time share agreements”. Under these agreements, sharing the cost of fuel on the flight in certain circumstances is permitted (up to two times fuel). In an EASA context, this is illegal because somebody who is not connected to the owner is paying for the flight.

So how do you resolve it? You either audit your flight department thoroughly or re-assess your charge back systems throughout the Group or you place the aircraft with an AOC holder and you can charge whoever you want for the flights with the comfort of knowing someone else has taken

legal responsibility for the safe operation of the aircraft. If your passengers pay market rate for the charter and you use that to defray the fixed costs, this is all permissible and even helps with any benefit in kind issues created by your Directors and management using the jet. The added bonus is that there are some very attractive tax reliefs and structures available for commercially operated aircraft.

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