Risk-based oversight: who has control?

How Operators and Regulators need to address the challenges posed by the new Air Operations regulations

A Baines Simmons Thought Leadership Document by

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Air Operators:
- Are you worried about the impact of the new European rules for Air Operations on your business? Will they mean you’ll be seeing more of your Regulator?
- Are you clear you know what ‘risk-based oversight’ is and what the Regulator will be asking you to prove? Do you know who is responsible for safety and ensuring you keep your AOC?

Regulators:
- What is your new role? How will you assess and affect Operator safety performance? What will you be looking for and what questions do you need to be asking to ensure safety is managed effectively?

Peter Hogston, Air Operations Consultant at Baines Simmons asks who is leading the change from prescriptive regulation to performance-driven rules. What is risk-based oversight? What does it mean and importantly, who is in control?
The implementation of European rules for Air Operations on October 28th 2012 signalled a key moment in the evolution of the Aviation industry. Both Regulators and Operators are currently engaged in developing effective responses to the explicit and implicit implications of these regulatory changes to achieve compliance by October 28th 2014. The focus of this paper is to identify the intent of the legislation and to discuss measures to embed it into the operational performance of your organisation, whether you are an Operator or a Regulator.

Until recently the focus has been on the ubiquitous Safety Management System; what is becoming increasingly evident is that Safety Management, through risk-based decision-making, is now a fundamental element of the strategic plan for the success of any organisation.

The new rules demand that the Air Operator’s boardroom engages in demonstrable safety leadership which enables the organisations, that they are accountable for, to effectively and pro-actively manage safety performance.

The Competent Authority will be required to share the monitoring of safety management performance with the organisations under their oversight, whilst holding the same organisation to account for its safety performance.

The question is: who will ultimately control oversight, post October 2014?

At the heart of the Acceptable Means of the Compliance to the new Oversight, Certification and Enforcement rules, the following is clearly stated:

- The Competent Authority has to ensure full capability to assess the continued competence of an organisation, through appropriately qualified personnel

- Responsibility for safe operation lies with the Operator and they are to share the responsibility for monitoring safe operations

- The Accountable Manager, who has a direct accountability for safety to the authority and those that appoint him or her, must be able to clearly demonstrate they have sufficient funds, manpower and influence to rectify deficiencies indentified by the management system. If the effectiveness of the management system is judged to have failed, this is a breach of the rules which may call into question the validity of any, appropriate, certificate.

It is clear that in the new risk-based, continuous safety improvement, performance-driven regulatory environment, the Competent Authority will be saying:

‘Please demonstrate how you are managing your safety risks (and show that you have met the intent of the new rules)’

and

‘Show me evidence that this has been effective’
Through the eyes of the Regulator

The UK CAA states as a key element of its strategy\(^1\): The UK aviation industry and the CAA will have measurably increased capability and performance in Safety Management, Human Factors and Just Culture\(^2\), and demonstrated the benefits in terms of risk reduction. This will include the promotion of safety leadership and individual ownership of risk as key competencies at all levels in our industry.

The new EASA rules state:

**AMC1 ARO.GEN.300 (a); (b); (c) Oversight\(^1\)**

**GENERAL**
The organisation is to be assessed for its continued competence across all its activities by regulators who are appropriately qualified and competent.

**GM1 ARO.GEN.300 (a); (b); (c) Oversight**
The guidance material from Annex II ARO clearly indicates responsibility for safe operations lies with the Operator, however there is now a sharing of responsibility for monitoring safe operations. The guidance material (GM) goes on to state the success of this policy relies on Part ORO which requires the organisation to commit necessary resources to establish an appropriate Management System.

The Regulator is required to assess the effectiveness of the Management System as well as compliance with applicable requirements. If the Management System is not effective, the validity of the Air Operator’s Certificate will be called into question.

The Regulator will also establish a direct line of accountability from the Accountable Manager to the Competent Authority as well as to those who appoint them, therefore, it would be unacceptable to deny the Accountable Manager sufficient funds, manpower or influence to rectify deficiencies identified by the Management System.

As a crucial component of the oversight programme the Competent Authority, when performing an audit, will focus on the organisation’s compliance monitoring function (CMF) to determine if the organisation is identifying and correcting its problems. There is a requirement for the CMF to have a direct line of communication to the Accountable Manager whose responsibilities and accountabilities have been clearly stated. Thus, the CMF acts as the Accountable Manager’s eyes and ears and a key part of the management system.

To the educated eye, this will appear to be a classic Quality Management System approach to Safety, which is exactly how ICAO Doc 9859,\(^3\) describes it. However, a subtle shift in the CMF’s focus and capability to deliver safety performance and pro-active risk information to the Accountable Manager and the wider management system is required to enable intelligent responses to relevant ‘what are my risks?’ questions. Operators need to move on from a ‘world of reactivity to bad events and losses’ to one where the potential for such costly negative outcomes are identified and smart, affordable fixes implemented.

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\(^1\) UK CAA Strategic Plan 2011 to 2016 Consultation  
\(^2\) A philosophy which encourages honest reporting of dangerous occurrences with some protection from blame, in order to learn safety lessons and make improvements  
\(^3\) ICAO SMM Doc 9859 3rd edition 19 Oct 2012
The Competent Authority is required to train its inspectors to enable them to assess the performance and effectiveness of an organisation's management system. Policy and procedures don’t ‘do safety.’ It is people that make the system function, which immediately shifts the focus to Human Factors and culture - a culture which needs to be demonstrably ‘just’ to underpin the safety performance of the organisation.

It is clear that technical knowledge and experience alone should not be the sole criteria on which a Competent Authority should select and develop its inspectors in order for them to perform effectively and meet their own State Safety Programme objectives.

These extracts from Annex II Part (ARO) Authority Requirements for Air Operations demonstrate the evolving relationship between the Regulator and the regulated, starting with the accountability and shared responsibility for monitoring safety and the need for both parties to be able to establish competence to perform their respective functions.

The Regulator has to be able to see beyond the regulations and to understand the leadership and cultural challenges Operators face. Importantly, they need to be able to judge if the systems in place are performing effectively in line with the Operator’s own expectations and thus support safe operations.

**What the new regulations mean for the Operator**

The regulatory requirement states:

**ORO.GEN.200 Management system**

Annex III (ORO) Organisation Requirements for Air Operations sits at the heart of the current regulatory changes for the Operator which are highlighted by the following key principles:

- Safety performance and continuous improvement
- Accountability for safety
- Risk-based decision-making
- Proportionate Safety Management Systems
- Safety management capability
The Accountable Manager is required to make decisions based on a clear understanding of the risks within the organisation and demonstrate that he or she is able to resource, manage and influence the mitigations effectively.

The classic Quality Assurance role has been superseded by the CMF. This independent function must be able to recognise the risk any mitigation is designed to manage, how effective the mitigation is in practice and be able to identify any subsequent drift away from safe working practices and, as a result, influence safety behaviour and support continuous improvement.

Whilst not necessarily a Nominated Person in the normal structures of an organisation, the ‘Safety Manager’ now takes centre stage.

EASA states: Depending on the size of the Operator and the nature and complexity of its activities, the Safety Manager may be assisted by additional safety personnel for the performance of all safety management related tasks. Regardless of the organisational set-up it is important that the Safety Manager remains the unique focal point with respect to the development, administration and maintenance of the Operator’s Safety Management System.

In terms of safety, the CMF is therefore expected to ensure that the Safety Management System is functioning effectively on behalf of the Accountable Manager and the Competent Authority.

The scale of the organisation’s Safety Management System will depend on the size of the organisation and the risks it faces. However, there is a requirement for a complex organisation to operate a Safety Review Board which will be a high level committee that considers matters of strategic safety in support of the Accountable Manager’s safety obligations. Acting on behalf of the Accountable Manager, this high level board is required to carry out three broad functions:

- Monitor safety performance against the Operator’s policy and objectives
- Ensure risk mitigations are implemented in a timely manner
- Ensure appropriate resources are allocated to achieve the established safety performance.

These risk-based safety decisions will need to be supported by data and information brought to the board by the Safety Manager.

Depending on the complexity of the organisation, a Safety Action Group will also need to be created which should report to and take strategic direction from the Safety Review Board.

It is widely perceived by Operators that safety behaviour cannot be regulated, prosecuted or legislated into existence. It is also commonly accepted that human behaviour is influenced by factors that are frequently beyond their control or by practices which have been allowed to stray into unsafe norms.

As a result, both the Operator and the Competent Authority will be required to develop and apply skills and practices that account for Human Factors, and continuously reinforce compliant behaviour and risk-based decision-making.
Conclusion

The European Aviation Safety Agency has, along with most other Air Safety Regulators, recognised that compliance alone cannot assure safe operations. In the current and foreseeable future, there is also pressure to ensure that regulatory oversight is targeted, effective and affordable. In order to achieve these competing objectives, EASA aims to alter the relationship between the Operators and their Competent Authorities and apply greater oversight to those Operators that need it.

How will this happen in practice? We see the following as likely scenarios:

- The enhancement of Operator and Authority Inspector competence will enable them to assess safety performance and the key factors that influence it
- If an Operator’s Compliance Monitoring Function demonstrates that regulatory and procedural compliance is being looked after internally, it will attract less external oversight
- Ongoing assessment of Operator ‘riskiness’ will influence the level of oversight applied, i.e. the assessment of performance-influencing factors, organisational changes and other safety performance indicators will affect the oversight programme
- Those Operators exhibiting a high-performing SMS and clear safety leadership will attract less oversight

A paradigm shift

It is clear that there is a paradigm shift in focus for the regulator from: “Are you following the rules?” to: “How well is your safety management system performing to manage your risks?” This shift is being driven by a shared responsibility for compliance monitoring and an explicit, clearly articulated accountability for safety within the Operator’s organisation through the Accountable Manager. He or she should be able to demonstrate to their board room colleagues and the Regulator that it is not about “this is what we have done following yesterday’s event” but “this is what we are doing to prevent tomorrow’s.”

The Safety Manager should be the Accountable Manager’s trusted advisor, perceived as a key manager in monitoring and influencing the organisation’s safety performance and behaviour and thus providing the Regulator with the confidence to back off.

The challenge from the Accountable Manager, as the owner of safety, should be:

“How much of the Regulator will my organisation see?”

The trick is to recognise that the amount of time a Regulator spends with you is one indicator of your demonstrated safety performance.
Looking at the impact of the new regulations on the Regulator, we see potential difficulties in the following areas:

- Developing competence programmes for inspectors to deliver effective oversight
- Understanding and defining Just Culture and how this concept supports performance
- Creating the capability for inspectors to measure and discuss safety performance

On the other side of the fence, Operators are increasingly coming to us with the following problems:

- We have published a safety policy and safety manual, yet our SMS is not working: why?
- How do we generate a Just Culture and what will it do for our business?
- We constantly have repeat compliance failures even though we have an SMS?
- As an Accountable Manager what do I need to do to understand where the risks are in my business?
- How do we develop a strategy for safety and deliver the necessary plan to make it effective?

By addressing these questions an Operator will be able to define the contact they have with their Regulator; in turn, the Regulator will be able to differentiate performance levels of the organisations within their oversight responsibilities.

One thing is clear: those who do not perform will ultimately bear the greater burden and probably greater costs of oversight.

The Operator has, as always, control
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