

SAB White Paper on Better Regulation

Vision of what Better Regulation system should look like

Aviation is a diverse, fast-moving industry, with the system comprised of many players of varying sizes and levels of integration with one another. In such a complex environment, technology, business practices and therefore safety risks change fast and continuously. The current COVID-19 pandemic with its implications hitting the entire aviation sector and beyond has demonstrated the effectiveness of a flexible, swift, proactive and pragmatic approach from regulators and industry. The regulatory framework therefore needs to be able to keep up with changing business models as well as technical progress, easily adapting to technological progress and risk development. This allows the regulatory framework to remain technology-neutral in order to ensure maximum levels of safety and avoid creating barriers to the single market through safety regulation which would run the risk of favouring particular technological solutions (and thus particular technology providers).

A regulatory system based on Better Regulation¹ principles as defined by the European Commission will ensure that the regulatory process is open, transparent, objective and evidence-based. Stakeholder participation is essential throughout the process in order to ensure that these goals are met, and that the eventual regulatory system is effective, focused, and relevant to operational reality. In some cases the appropriate regulation will tend to be more compliance-based, but in the modern aviation system only a performance-based oversight setup will ensure that safety levels continue to increase.

It is worth considering that in other industries, with a similar safety-first focus to aviation, have moved in recent years from prescriptive regulation towards the performance-based oversight principle, due to its potential for constant review and improvement of safety standards and processes.

This has notably been the case in the offshore oil & gas industry, which in Europe has long operated using the safety case approach. This approaches operations subject to a risk assessment using a safety management system. The safety case is assessed, revised and updated regularly in order to respond to developing risk factors, thus ensuring continuous improvement.

In the United States, a prescriptive “box-ticking” approach had historically been used, until the Deepwater Horizon accident of 2010, after which point a shift to the European-style system was undertaken in order to ensure continuously improving safety standards.

In this vein, the 2018 EASA “Basic Regulation” set out a requirement, in Article 4(1)(e) for the Agency to “lay down, where possible, requirements and procedures in a manner which is performance-based and focuses on objectives to be achieved, while allowing different means of achieving compliance with those performance-based objectives”.

This is precisely the approach which the aviation industry requires, so as to be able to ensure the maximum level of safety while maintaining the flexibility which the industry’s diversity necessitates, as well as to ensure that actions taken to ensure safety are focused, proactive and appropriate, and to underpin the industry’s competitiveness. Such evolution and innovation in delivering aviation safety has furthermore proved influential in other industries’ safety regimes, both within the transport sector and elsewhere. Continuous improvement in safety levels is furthermore brought

¹ https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en

about by a system of target setting and proactive engagement with all stakeholders to meet those targets.

In such a system based on focused, standardised objectives, rules are aligned in order to ensure that safety systems work together, and are set in a manner which is proportionate to the risk represented and the relative size of regulated entities in different parts of the aviation value chain. This delivers a body of regulations or other appropriate actions such as research projects, safety promotion activities and fora where cross-industry expertise can be exchanged² which enhances safety through continuous improvement and innovation. Yet it avoids unnecessary and excessive regulation, ensures a balance of quantity and quality of regulation, and drives harmonisation. Flexibility must be embedded in the rules so as to allow for the most appropriate solutions to be deployed in order to meet the common, harmonised objective.

Such a performance-based approach places a greater emphasis on addressing the risks to aviation safety in order to meet the defined safety objective. Through oversight and exchange on how the safety objectives are being met, both regulators and industry can develop an understanding of the key risks, take the correct action and monitor the effectiveness of safety management systems. This all contributes to continuous safety improvement.

Such a regulatory system is comprised of different levels of regulatory texts, safety promotion actions plus regular oversight and exchange between industry and regulators.

- At the highest level, a binding Regulation sets out what is to be achieved in terms of safety objectives and goals;
- This is supported by Acceptable Means of Compliance and Guidance Material, which set out how the requirements of the regulation may be met. This gives flexibility, providing various ways to meet a binding requirement, with the industry operators able to implement the most appropriate means to the operations at hand;
- The functioning of this regulatory setup is supported by regular consultation of industry and regulators, and revision of the regulatory framework based on experience;
- In the context of the safety of the aviation system, the regulatory setup depends on a strong occurrence-reporting system, with a positive no-blame reporting culture. This allows both regulators and industry to understand the underlying factors beneath safety statistics, and identify measures for improvement.

This constant feedback, reporting and oversight ensures robustness of the system, supporting the legal certainty provided by binding overarching regulation. Furthermore, it is easier and quicker to amend AMCs and GM as well as suitable safety promotion materials in response to progress than the text of a hard regulation, thus providing a nimble and high-performing regulatory regime.

Ensuring international consistency is also a vital part of the system. In the context of EASA regulation, this means supporting and implementing ICAO regulation in Europe to the highest degree possible, and also providing momentum from Europe for the development of effective regulation at world level. This implies ensuring the participation of industry and national authorities in the rulemaking process, as is the case at ICAO and should be a matter of course in EASA rulemaking.

How industry can support

2 The EASA Safety in Aviation Forum for Europe (SAFE) 360° platform or the EASA Annual Safety Conference offers unique opportunities to look at various risks and potential solutions from different angles without necessarily introducing new regulations.

A Better Regulation system is supported by strong industry engagement in the rulemaking and continuous review process. In the context of European aviation safety regulation, this involves membership in the EASA consultative bodies as well as in rulemaking groups which are constituted for individual rulemaking tasks. Such groups should be established as a general rule, in order to ensure real co-creation in the regulatory process and avoid regulation being developed in a vacuum removed from operational reality. Where for reasons of urgency immediate safety concerns need to be addressed, an expedited process may be deemed necessary. An expert group should nonetheless be convened in order to maintain stakeholder consultation and input. In the event of actions not involving consultative participation when the regulatory agency considers the action to be of insignificant regulatory impact, stakeholders should have the opportunity to contribute to the drafting of rules if deemed necessary by them.

The primary advantage of such an approach is that it ensures the provision by industry and NAAs of guidance on technical and safety developments, both at the initial regulatory stage but also based on experience over time. Constant input and support from industry ensures that safety issues can be identified in good time, that regulations are drafted and implemented appropriately, and that technical progress which may improve safety standards (or present new safety risks) is identified and integrated into the regulatory framework. This facilitates an environment of trust and a common will to innovate in addressing safety risks. Experience has shown that early and continued engagement also leads to better (and clearer) regulation from the technical as well as the business perspective.

Industry support and engagement is not restricted to the European level. The critical role of national aviation authorities in maintaining the regulatory framework and ensuring oversight means that industry and NAAs need to work in partnership to achieve the best outcome. This allows constant and mutual learning of operational realities, risk and technological developments, and exchange on the appropriate means of addressing risk.

What is needed for NAAs to operate effectively

The system of standardisation pursued by EASA is highly effective in ensuring that the interpretation and implementation of aviation rules across the European Union is continuously strengthened. This is a prerequisite for a level playing field for all industry participants and favours harmonization of rules. However, such a system can only function effectively if NAAs are also provided with sufficient resources to maintain oversight and regular consultation with industry. Furthermore, it is essential that NAAs are sufficiently resourced and provided with adequate guidance in order to properly assess and approve the use of Acceptable Means of Compliance and other flexibility tools such as Special Conditions (SC) or Equivalent Level of Safety (ELOS) in a performance-based regulatory system. Strong partnership between industry and regulators is vital in maintaining a system based on common action to meet agreed safety goals. We therefore strongly propose joint meetings in the framework of EASA, for instance, by organizing joint MAB & SAB consultations.

Where is Better Regulation working

- Set out examples of good regulations, why they work, examples of good consultation practices – e.g. RFFS where Guidance Material was the adopted approach
- Promotion of best practices in different states
- Development of Safety Promotion campaigns and resources (e.g. SP on drones, bird strike prevention, lithium ion batteries, unruly passengers etc.)

Where can it be reinforced

- Identify areas where can be done better – RWY safety, pilot training? etc.
- Identify overlap between different regulations in order to update them
- Joint meetings between Member States and Industry
- Strengthening Standardisation for instance by Identifying discrepancies in EASA rule interpretation by industry and member states

What are the elements of a good regulatory structure

A solid, well-performing regulatory structure should be based upon open exchange with industry stakeholders and their concrete input to the regulatory process. Transparent consultative structures enable genuine co-creation, which allows industry to be prepared for regulatory change and for regulators to benefit from the expertise of those who it will affect.

Such exchange is supportive of the performance-based regulatory system, as it allows industry input to the development of the implementation measures which support regulation based on continuous improvement. Regular exchange allows the regulator awareness of the effectiveness of measures being used to implement regulatory requirements and all parties the ability to adapt implementation measures to safety risk.

Performance-based implementing rules and regular, transparent stakeholder consultation and involvement in the regulatory process therefore go hand-in-hand and are mutually-reinforcing. In order to ensure flexibility and the use of appropriate measures to meet safety targets, implementing rules should avoid prescriptiveness wherever possible, and instead use a performance-based system supported by robust consultation and oversight. Furthermore, the flexibility of AMC / GM allows EASA to use its technical expertise in an agile manner to regularly update rules as and when required, , rather than following the cumbersome and often politically fraught processes of involving the Council, the Commission and Parliament when IRs need to be updated/corrected. Principles of Performance Based regulation should therefore be applied wherever practicable, ensuring harmonisation but with flexibility in compliance.