14. Controls in the case of the EU civil aviation safety rules

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1. INTRODUCTION

This chapter examines to what extent the system of regulation and enforcement of the European Union (EU) civil aviation safety rules is under control. The EU civil aviation safety system covers all the main domains of the civil aviation sector, including design, production, maintenance and operation of aircraft, licensing of aircrew, provision of air navigation services and the design and operation of aerodromes.[2] In light of the aspirations of this volume to present case studies on various types of agencies' functions and decisions, we will focus on the analysis of controls for the important outputs of its shared regulatory and enforcement powers, namely opinions, technical standards, airworthiness directives and a quite novel oversight support mechanism.

2. EASA'S SHARED REGULATORY AND ENFORCEMENT POWERS

The European Aviation Safety Agency (EASA or the Agency), responsible for 'establishing and maintaining a high uniform level of civil aviation safety in

[1] The chapter elaborates on a joint reflection of the authors. The chapter is based on the research of Lisette Mustert for her Legal Research Masters thesis and the ideas of Miroslava Scholten on connecting controls from her article 'Shared Tasks, but Separated Controls: Building the System of Control for Shared Administration in an EU Multi-jurisdictional Setting' in the *European Journal of Risk Regulation*. All web pages cited in the chapter were checked during the research stage (April–June 2019).

[2] Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 and Council Regulation (EEC) No 3922/91 [2018] OJ L 212/1 (Basic Regulation), Art 62.

Europe',[3] shares its regulatory and enforcement responsibilities with the EU Commission and the National Aviation Authorities (NAAs).[4]

2.1 Regulatory Powers

EASA's rule-making task comprises the competences to develop and issue rules for the implementation of the Basic Regulation. It can adopt opinions for the EU Commission and Certification Specifications (CS), Acceptable Means of Compliance (AMC) and Guidance Material (GM) in order to assist the aircraft operators in complying with the requirements of the Basic Regulation.[5]

2.1.1 Opinions

EASA drafts proposals for binding aviation safety rules of general applicability and provides technical expertise to the EU Commission in the form of 'opinions' (Article 75, Basic Regulation). Importantly, the EU Commission *must* consult the Agency when it comes to technical questions.[6] This means that the discretion of the EU Commission becomes very limited. These opinions are submitted to the EU Commission, which formulates its proposals on the basis of these opinions. The Commission's proposals are then forwarded to the European Parliament and the Council. If the EU Commission wants to set aside the content of EASA's opinions on technical questions, it needs to give reasons.[7] The review of rule-making deliverables of EASA for the years 2004–2019 shows that, on average, EASA published 21 Notices of Proposed Amendment a year.[8]

2.1.2 Technical standards

Alongside this participation in the formal rule-making procedure, EASA retains a distinctive power to adopt soft law instruments that aim to standardize the enforcement of EU regulation in the most effective and uniform

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[3] Ibid, Art 1(1).

[4] Ibid, Art 75.

[5] EASA Management Board Decision No 18-2015 of 15 December 2015 on the rule-making procedure (Decision 18-2015), Art 2.

[6] M Groenleer, M Kaeding and E Versluis, 'Regulatory Governance through Agencies of the European Union? The Role of the European Agencies for Maritime and Aviation Safety in the Implementation of European Transport Legislation' (2010) 17(8) Journal of European Public Policy, 1222.

[7] Basic Regulation, Art 75(2)(b).

[8] Notices of Proposed Amendment available at https://www.easa.europa.eu/document-library/notices-of-proposed-amendment.

way.[9] EASA directly adopts technical standards such as CS, AMC and GM for possible future delegated and implementing acts (Article 76(3)).

GM is adopted in consultation with the Member States to promote a common understanding and application of the requirements contained in this Regulation and in the delegated and implementing acts adopted on the basis thereof (Article 62(10)). This GM is of a purely recommendatory nature, a non-binding collection of best practices which can be seen as support to the understanding and interpretation of implementing regulations.[10]

CS are tailor-made by EASA for each individual product and notified to the applicant as a final certification basis. The CS offer the NAAs a series of product requirements which shape the means and enhance the achievement of the goals and requirements covered by EASA's Basic Regulation.[11] Although the relevant party is free to demonstrate compliance with the type certificate requirements in another way, compliance with the CS is an effective and accessible means to demonstrate compliance with the EU laws on aviation safety itself.[12] This means that the CS are actually binding in individual cases.[13]

Similarly, the AMC create a presumption of compliance with essential requirements of the EASA Basic Regulation, the implementing rules and CS, even though the AMC are not legally binding. NAAs and holders of type certificates – often aircraft operators – may deviate from these instruments since these instruments are not formally binding, but then they need to demonstrate to EASA that they are using other means which have equivalent effects to EASA's AMC and can likewise achieve the goals and requirements set out in the Basic Regulation.[14]

Therefore, even though the CS and AMC are non-binding, in practice they may have the value of law and produce legal effects. Therefore, they are sometimes referred to as *soft law*.[15]

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[9] M Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine: A Study on EU Agencies* (Hart 2018), 65.

[10] M Simoncini, 'The Erosion of the Meroni Doctrine: The Case of EASA' (2015) 21(2) European Public Law, 309 at 321.

[11] Ibid, 320.

[12] See Commission Regulation (EU) No 748/2012 of 3 August 2012 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 [2012] OJ L 224/1, paras 21.A.16A–21.A.17, Part 21, Annex I.

[13] Basic Regulation Art 77(1)(d); M Ratajczyk, *Regional Aviation Safety Organisations: Enhancing Air Transport Safety through Regional Cooperation* (Wolters Kluwer Law & Business 2015), 125.

[14] See Simoncini, supra note 10, 321.

[15] G Shaffer and M A Pollack, 'Hard and Soft Law', in J L Dunoff and M A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012); also see Ratajczyk, supra note 13, 126.

2.1.3 Rule-making procedure

According to Article 115(1) of the Basic Regulation, EASA's Management Board has adopted Decision No 18-2015 on relevant rule-making procedures. Two phases can be distinguished: a programming phase, where the priorities and criteria are set, and a development phase, where (soft) rules are adopted. In both phases the Agency avails itself of the expertise and inputs coming from experts of the Member States, NAAs and the Interested Parties' Advisory Bodies and considers the risks involved in the introduction of rules.

In the programming phase, the Executive Director prepares EASA's five-year rule-making programme, after consultation with the Interested Parties' Advisory Bodies, the Member States and the EU Commission, which is revised and updated every year.[16] 'Any person or organisation may propose the development of a new rule or amendments to existing rules.'[17] The rule-making programme must contain a Preliminary Impact Assessment (PIA), which needs to address, inter alia, safety and environmental improvements, possible alternatives, and an analysis of the costs compared with the possible safety and environmental improvements.[18]

In the development phase, EASA follows a Notice and Comment procedure. First, the Executive Director draws up Terms of Reference (ToR) for each rule-making project after consultation with the advisory bodies. The ToR must be published on EASA's website, including a clear definition of the project, the need to conduct a Regulatory Impact Assessment (RIA), the process to be followed, a timetable, the type of deliverable and (if necessary) a concept paper.[19] Following the previously conducted PIA, a RIA will be conducted to analyse the safety and environmental benefits of the proposed rule, 'as well as its implementation costs for national administrations. In the case of rule-making projects with high impact, the Agency conducts a more in-depth RIA',[20] which is supported by the Agency's advisory bodies and the rule-making group members (if a rule-making group is set up) as they provide economic and other quantitative data.

The Executive Director must then ensure that the new rules or amendments are drafted in accordance with the objectives of the ToR for the rule-making project and must issue a Notice of Proposed Amendment (NPA). The NPA must be published on EASA's website and must contain an explanatory note – describing the development process, including a summary of proposed changes, the type and estimated length of the consultation period and details of

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16 Decision 18-2015, Arts 3, 9–10.
17 Ibid, Art 3(3).
18 Ibid, Art 2.
19 Ibid, Art 4(1)(2).
20 Ibid, Art 5(1)(2).

issues during the drafting process – an RIA, the proposed draft rule (for public consultation), and proposed actions to support implementation.[21] After this, within three months 'any person or organisation with an interest in or being affected by the draft proposed rule may submit their comment on the published NPA'.[22] Subsequently, the comments made to the NPA are reviewed by experts – not directly involved in the drafting process – together with EASA's staff or a drafting group. This improves the quality of EASA's rules and it ensures that all the comments received are treated fairly and appropriately. If the received comments indicate major objections to the proposed rule, or if the text is revised substantially on the basis of the comments, the Executive Director has to consider whether further consultation with the stakeholders is necessary. 'If the comments contain major objectives against the proposed rule, the Executive Director shall consult the Member States Advisory Group.'[23] The responses to the comments are published in a Comment Response Document. After that, 'the proposed rule shall be published on the Agency's website together with an explanatory memorandum, and in the case of opinions, a revised RIA if the final text differs significantly from the initial text at the beginning of the consultation stage'.[24] All in all, *ex ante* controlling mechanisms such as ensuring participation and transparency seem to be essential.

When rule-making projects are expected to have a negligible impact, or rule-making projects affect only a limited group of stakeholders, the Executive Director may decide that a RIA is not required or that a NPA does not need to be developed and opened up for consultation. It is then sufficient to discuss the NPA with the affected stakeholders only.[25]

2.2 EASA's Shared Enforcement Powers

Continued Airworthiness entails 'all of the processes ensuring that, at any time in its operating life, the aircraft complies with the airworthiness requirements in force and is in a condition for safe operation'.[26] This means that, at any time, the aircraft needs to be safe to fly. Therefore, after 'EASA issues a type certificate to an aircraft type (which takes the form of an individual decision),[27] an individual aircraft can only enter service when an individual Certificate

[21] Ibid, Art 6(3).
[22] Ibid, Art 7(1).
[23] Ibid, Art 8(6).
[24] Ibid, Art 9(2).
[25] Ibid, Arts 15 and 16.
[26] Basic Regulation, Art 77.
[27] EASA Airworthiness Directive Policy, PO.CAP.00016-002 (2010) of 10 September 2010 (Airworthiness Directive Policy), para 4.1.1.

of Airworthiness is issued by the NAA'. Thereafter, the continuing airworthiness processes are of primary importance for safeguarding flight safety.[28] Ensuring Continued Airworthiness is a shared responsibility between EASA and the NAAs as it is the NAAs that first ensure Continued Airworthiness by issuing Certificates of Airworthiness and Airworthiness Review Certificates. In Germany, for instance, this is in accordance with the German Air Traffic Act (*LuftVG*). If the aircraft is to be certified pursuant to an airworthiness certificate, then it must be confirmed at regular intervals, not exceeding a period of 12 months, that the aircraft remains in conformity with its airworthiness requirements and corresponds to its specifications.[29] Thus, the Airworthiness Review Certificate annually validates the Certificate of Airworthiness.[30] If some form of non-compliance is found during these annual inspections, the NAAs have to take appropriate action or they may revoke or suspend the Airworthiness Review Certificate.[31] In Germany, if the aircraft does not remain airworthy, the German NAA – which is the Luftfahrt Bundesamt (LBA) – must revoke the Certificate of Airworthiness.[32]

If EASA itself finds any design deficiency, it may issue an Airworthiness Directive (AD), which needs to be implemented by the NAAs by means of suspending, revoking or amending Certificates of Airworthiness or Airworthiness Review Certificates.

2.2.1 Airworthiness Directives

The situation is complex with regard to the application of ADs. EASA has an important responsibility since it must – on behalf of the Member States – 'ensure the continuing airworthiness functions associated with the design of products, parts, non-installed equipment and equipment to control unmanned aircraft remotely it has certified'.[33] For this purpose, EASA itself may conduct investigations that relate to products, parts and appliances certification. EASA

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[28] F Coman-Kund, M Ratajczyk and E Schmidt, 'Shared Enforcement and Accountability in the EU Aviation Safety Area: The Case of the European Aviation Safety Agency', in M Scholten and M Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edward Elgar Publishing 2017), 127.

[29] Verordnung zur Prüfung von Luftfahrtgerät vom 15. Februar 2013 (BGBl.I S.293) (LuftGerPV), para 5.

[30] Commission Regulation (EU) No 1321/2014 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks, [2014] OJ L 362/1, M.A.901.

[31] Ibid, M.B.304 and M.B.903(1).

[32] Luftverkehrs-Zulassungs-Ordnung vom 19. Juni 1964 (BGBl.I S.370) (LuftVZO), para 9.2.

[33] Basic Regulation, Art 77(1)(h).

may also conduct these investigations through the NAAs. The holders of type certificates are even 'required to have a system in place for the collection and analysis of information that relates to occurrences that may influence the airworthiness of the aircraft or parts of it. Defects that could result in an unsafe condition must be reported to EASA within 72 hours.'[34] If EASA discovers any deficiency in the engine, propeller, aircraft, part or appliance installed on the aircraft, which might also develop in other aircraft of the same type, the Agency issues an AD.[35] Such an AD 'means a document issued or adopted by EASA which mandates actions to be performed on an aircraft to restore an acceptable level of safety, when evidence shows that the safety level of this aircraft might otherwise be compromised'.[36] Issuing an AD is a very powerful enforcement tool: in extreme cases, ADs can be used to ground all aircraft of a given type on the registers of all Member States. Although EASA's Airworthiness Directive Policy Document stipulates that ADs are individual decisions, they apply to all aircraft of a certain type, and therefore it can be argued that they have a status between an individual decision and a regulation of general applicability.

EASA adopts these ADs on behalf of the Member States.[37] The NAAs ensure compliance with the AD by issuing or extending Certifications of Airworthiness, conducting Aircraft Continuing Airworthiness Monitoring (ACAM) procedure sampling inspections, and executing oversight of organizations involved in maintenance and continuing airworthiness management of aircraft.[38]

At the time of writing, EASA has just adopted an AD which suspends 'all flight operations of all Boeing Model 737-8 MAX and 737-9 MAX aeroplanes in Europe'.[39] This is a precautionary measure taken after the fatal accidents in the case of the Lion Air flight involving a Boeing 737-8 MAX in October 2018 and of the Ethiopian Airlines flight involving a Boeing 737-8 MAX in March 2019.

2.2.2 Oversight support mechanism

The 2018 Basic Regulation established a new framework for the regulation of civil aviation safety and prescribed quite a novel arrangement for shared tasks:

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[34] Regulation 748/2012, 21.A.3A.
[35] Airworthiness Directive Policy, 6.
[36] Regulation 748/2012, 21.A.3B.
[37] Basic Regulation, Art 77.
[38] Airworthiness Directive Policy.
[39] See 'EASA suspends all Boeing 737 Max operations in Europe', available at https://www.easa.europa.eu/newsroom-and-events/news/easa-suspends-all-boeing-737-max-operations-europe.

EASA and the NAAs 'shall establish a mechanism for the voluntary pooling and sharing of inspectors and other personnel with expertise relevant for the exercise of the certification and oversight tasks'.[40] This means that both EASA and the NAAs may request assistance from the EU aviation pool of inspectors in their oversight and certification activities. In addition, the Member States are now able to voluntarily delegate *all* responsibilities for certification, oversight and enforcement to EASA or another Member State.[41] 'Once the Agency or the Member State accepts such a request, it shall become the competent authority responsible for the tasks covered by that request and the requesting MS shall be relieved of the responsibility for those tasks.'[42] With regard to Continued Airworthiness, this would mean that the NAAs could, for instance, delegate their tasks to issue Certificates of Airworthiness or Airworthiness Review Certificates – which are also a means of implementing the ADs – to EASA or another Member State.

This goes even further when EASA indicates, during its monitoring and inspection activities, that a Member State is seriously and persistently unable to effectively conduct its oversight, certification and enforcement tasks in accordance with the Basic Regulation (and the NAA did not remedy such deficiencies after an EU Commission's request to do so). Then, the Agency and the Member State must jointly establish a temporary technical assistance programme on the basis of a Commission request, with the aim of remedying the identified deficiencies. In the case when a Member State cannot implement the programme, the national oversight and enforcement tasks *must* be reallocated to EASA or another Member State.[43] The scope of the tasks that are reallocated is limited to what is strictly necessary in order to address the deficiencies. The phrasing of the Article with the words 'shall reallocate' implies that a Member State can even be forced to reallocate its enforcement tasks to EASA or another Member State.

One could think of many threats to EU aviation safety that would require such a system and history has shown that Member States are not always able to implement and enforce the EU aviation safety rules by themselves. The Germanwings crash in the Alps in 2015, for example, might have been prevented if the German LBA had not been suffering from a lack of staff resources. However, this system requires a high level of transparency as it will complicate the shared system of enforcement even more. It would need to be very clear exactly which tasks belong to which NAA or to the Agency in order

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40 Basic Regulation, Art 63(1).
41 See Basic Regulation Art 77(1)(d), supra note 13.
42 Basic Regulation, Art 64.
43 Basic Regulation, Art 66.

to establish which authority can be held accountable or liable for damages. In any case, it needs to be seen how it will work out in practice when one Member State takes over the responsibilities of another Member State.

3. ANALYSING CONTROLS

Opinions, CS, AMC, ADs, etc. are the outputs of EASA's shared rule-making and enforcement activities. These documents and decisions can produce legally binding effects *de jure* or *de facto* in relation to private actors and/or more generally. To what extent have the controls been arranged for these acts and exactly which controls?

3.1 Questionable Judicial Control for Soft Law

When applying the two standards with regard to authorship and the intention to produce legal effects, in the case of EASA's opinions, it is the EU Commission that has the final authorship as it adopts the final legislative proposal on the basis of EASA's opinions. According to Article 263 Treaty on the Functioning of the European Union (TFEU), acts adopted by the EU Commission can be challenged before the Court of Justice of the European Union (CJEU). However, the legislative proposal does not intend to create legal effects and therefore these proposals and their basis – EASA's opinions – do not fall within the scope of Article 263 TFEU.

EASA's technical standards – GM, CS and AMC – are all adopted by the Agency, the acts of which are reviewable by the CJEU in accordance with Article 263 TFEU. However, it is questionable whether the technical standards are intended to produce legal effects as they are, in principle, non-binding. In this regard, Scott argues that there are three situations in which *de facto* rule-making tasks may have legal effects for the purposes of Article 263 TFEU and thus be amenable to judicial review.[44] The first is where guidance is construed as introducing new obligations and adding to the relevant EU legislation; the second situation is where guidance sets out how an EU institution will exercise its discretionary and supervisory powers; and the third is where 'certain measures, through an express statement in legislation or via implication, may be binding on Member States'.[45] EASA's AMC and CS fall within the first category as they add to the existing EU legislation by being a part of

[44] J Scott, 'In Legal Limbo: Post Legislative Guidance as a Challenge for European Administrative Law' (2011) 48 Common Market Law Review, 340–342.

[45] Ibid, 340–342; M van Rijsbergen, *EU Agencies' Soft Rule-making: Lessons Learnt from the European Securities and Markets Authority* (PhD Thesis Utrecht University 2018), 218.

the certification basis for aircraft type. This is, however, not the case for GM as it only helps to illustrate the meaning of a requirement or specification laid down in the Basic Regulation.

In any case, the CJEU interpreted Article 263 TFEU on the acts 'intended' to have legal effects quite narrowly and therefore most agencies do not seem to produce acts with legal effects as understood in the case law of the EU Courts. Often, the CJEU rules that, by their very nature, soft rule-making acts lack the intention of having legal effects. Therefore, soft law instruments do not fall automatically within the scope of legally reviewable acts by the CJEU pursuant to Article 263 TFEU.[46] Thus, a broad interpretation of Article 263 TFEU would allow for more legal protection. In fact, the CJEU rules on a case-by-case basis as to whether an act intended to produce legal effects. However, van Rijsbergen argues that, in most judgments so far, the CJEU has been very reluctant to recognize an intention to produce legally binding effects. With regard to technical standards, the General Court has argued that these cannot be judicially challenged. The General Court has often concluded that it 'only measures the legal effects of which are binding on the applicant and capable of affecting his interests by bringing about a distinct change in his legal position [which] are acts or decisions against which proceedings for annulment may be brought'.[47] This means that, in a procedure that involves several stages, only measures definitively laying down the position of the institution, body, office or agency of the EU on the conclusion of that procedure are, in principle, open to judicial review by the CJEU. Therefore, measures of a purely preparatory nature that pave the way for the final decision are not amenable to judicial review. Finally, the Article that deals with EASA's rule-making tasks (Article 76(1)(2) and (3) of the Basic Regulation) does not seem to be subject to internal review by EASA's Board of Appeal (BoA) according to Article 108 of the Basic Regulation.

3.2 Judicial Deference in the Review of EASA's Binding Acts

The situation is different in the case when the Agency holds the final authority to, for instance, adopt ADs (as EASA has the exclusive competence to do so). Here, the first requirement of Article 263 TFEU is met, as agencies' decisions fall within the scope of this Article. Secondly, the ADs intend to produce legal effects as they may, for instance, ground all aircraft of a certain type. Therefore the second requirement of Article 263 TFEU is met and these decisions could be challenged before the CJEU by natural or legal persons when the AD brings

[46] Ibid, 215.
[47] Ibid, 217; Case T-312/06 *FMC Chemical v EFSA* [2007] ECLI:EU:T:2007:67.

about a distinct change to their legal position. However, in the case of EASA, certain decisions adopted by the Agency related to inspections, investigations and certification may only be brought before the CJEU for the annulment of acts by natural or legal persons once all *internal* appeal procedures within the Agency have been exhausted. In such a case ADs are first brought before the internal BoA. 'If the BoA finds that the appeal is admissible and that the grounds for appeal are founded, it shall remit the case to the Agency. The Agency shall take a new reasoned decision taking into account the decision of the Appeal.'[48] When a natural or legal person, an EU institution or an EU Member State does not agree with the BoA's decision, it may bring proceedings before the CJEU. EASA itself cannot do much against a decision of the BoA if it does not agree: the Agency can neither go to the CJEU, nor can it appeal to the BoA itself. Since the establishment of the Agency, only five cases have been reviewed by the BoA,[49] of which only one was referred to the CJEU. However, none of these cases dealt with an AD.

When the NAAs take action in order to implement an AD, it is the national courts that rule on these actions. Although this seems clear, the situation is more complex: EASA's ADs are often adopted on the basis of information collected during investigations by the NAAs. Are the EU Courts competent to scrutinize these investigations that were conducted in accordance with national law which prescribes that scrutiny of such investigation tasks is a matter for the national courts? This could result in a situation where there is no access to justice for certain parts of the responsibility concerning the ensuring of Continued Airworthiness.

If it is established that the national courts are competent, it is up to the individual Member States to decide which national court is competent and what procedural rules are applicable. In the Netherlands, certification decisions or administrative fines of the Dutch NAA – the Inspectie Leefomgeving en Transport (ILT) – qualify as administrative decisions adopted by the central administration, and therefore such acts are subject to review before the Dutch administrative courts. However, first an objection needs to be lodged at the Ministry of Infrastructure and Water Management or the ILT.[50] Moreover, any wrongful decision of the ILT can give rise to state liability. It seems that the examination of ILT decisions is regulated by the general judicial accountability procedure of the Netherlands. Within Germany, wrongful administrative

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[48] Ibid, Basic Regulation, Arts 108–109, 113–114.

[49] EASA, 'EASA Board of Appeal', available at https://www.easa.europa.eu/the-agency/other-easa-boards/easa-board-of-appeal.

[50] Wet van 4 juni 1992, houdende algemene regels van bestuursrecht (Algemene wet bestuursrecht), Art 6:7.

acts[51] can be appealed (*Widerspruchsverfahren*[52]) at the LBA or be the basis for the commencement of an action for rescission (*Anfechtungsklage*) at an administrative court (*Verwaltungsgericht*). This must concern an administrative act (*Verwaltungsakt*), which must concern the licensing itself, not preparatory actions, such as the decision on medical fitness. A second appeal can be lodged before the Supreme Administrative Court (*Oberverwaltungsgericht*) and in the last resort parties can go to the Federal Constitutional Court (*Bundesverfassungsgericht*). However, the latter is only possible with regard to constitutional complaints.[53] These actions can also be used against LBA sanctions, such as grounding of an aircraft or an operating ban. With regard to inspections, purely factual acts may also be subject to judicial review where they affect the rights of an individual, and this also applies to preparatory acts;[54] however, they may only be reviewed as part of the review of the final decision made by the authority.[55]

With regard to the second requirement of Article 263 TFEU – that the EU Courts must be competent to rule on both fact and law – it was established above that the CJEU is able to review ADs. However, with regard to technical assessments, the EU Courts often only perform a marginal review. As explained in Chapter 6, the meaning of 'judicial deference' and 'marginal review' is that 'a court that has to decide upon the appropriateness, necessity, reasonableness or justifiability of a certain measure or decision will not place itself in the position of the administrative body or legislator who has originally drafted it'.[56] When the court conducts a marginal review, it only examines whether the decision-making process has been conducted well and, secondly, whether or not this led to an unreasonable outcome. At the time of writing, the CJEU has only ruled on one case that relates to EASA, the *Heli-Flight GmbH & Co. KG v EASA* case. The CJEU in its ruling confirmed the discretion of the Agency in making complex technical assessments such as certification evaluations.[57] This means that the CJEU is only performing a marginal review, in which it is not willing to take over the position of the administrative body.[58] Judicial deference seems to rely on the assumption that all procedures govern-

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[51] Administrative Procedure Act, 25.02.1976 BGBl.I, p. 102 (VwVfG), Art 35.

[52] Administrative Procedure Code, 21.01.1960 BGBl.I, p. 2222 (VwGO), Arts 68ff.

[53] VwGO, Arts 42, 45–53.

[54] See Coman-Kund et al, supra note 28, at 136.

[55] Ibid, 136.

[56] J Gerards, 'Deference and the margin of Appreciation Doctrine' (2011) 17(1) European Law Journal, 87.

[57] Case T-102/13 *Heli-Flight GmbH & Co KG v EASA* [2014] ECLI:EU:C:2014: 1064.

[58] See Gerards, supra note 56, 80–120.

ing decision-making and regulation work correctly and that these are transparent and thereby lead to correct outcomes.[59]

3.3 Ensuring Transparency

As explained in Chapter 9, transparency contains a number of key elements, namely clarity and application of the legal text, foreseeability of the law, and access to information concerning government activities and its reasoned decisions. EASA tries to guide the NAAs that enforce the requirements and the aircraft operators that need to comply with the requirements adopted in all those laws by collecting an overview of all applicable initial and additional airworthiness laws on their website. Under this heading, the website also refers to the relevant AMC and the CS that come with the applicable rules. Furthermore, 'easy access rules' for Airworthiness Specifications are applicable and can also be found on EASA's website. EASA has provided easy access to all its technical rules 'which are displayed in a consolidated easy-to-read format with advanced navigation features through links and bookmarks'.[60] These easy access documents also include links to the applicable (implementing) rules, GM, AMC and CS.[61] Thus, it seems that EASA has made a great effort to make such a complex technical field of law more accessible and thereby clearer.

With respect to foreseeability of the law, the application of the law requires consistency in the action of the authorities concerned. Therefore, the use of, for instance, discretionary powers must be further framed and structured.[62] As the complex system of laws not only lays down many requirements for the certificate applicants, but also for EASA and the NAAs, one would expect consistency in the outcome due to the consistency in the procedure. Furthermore, paragraph 1.5.3 of the Basic Regulation requires that 'instruction for continuing airworthiness must be in the form of a manual, or manuals, as appropriate for the quantity of data to be provided. The manuals must cover maintenance and repair instructions, servicing information, trouble-shooting and inspection procedures, in a format that provides for a practical arrangement.' As these manuals also require instructions for the investigations and the actions to be taken are clearly described in the Basic Regulation, inconsistencies are thus more likely to be prevented.

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[59] Ibid, 87.

[60] Easy Access Rules for Continuing Airworthiness, available at https://www.easa.europa.eu/document-library/general-publications/easy-access-rules-continuing-airworthiness-regulation-eu-no-0.

[61] Ibid.

[62] JH Jans, R de Lange, A Prechal and RJGM Widdershoven, *Europeanisation of Public Law* (Europe Law Publishing 2015), 256.

Transparency is often related to the right of access to documents. Article 41(2) of the Charter of Fundamental Rights (CFR), for instance, may be considered as a personal manifestation of access to documents in general as part of the right to good administration.[63] First of all, the requirements which require compliance are made publicly available both in the *Journal of the European Union* and on EASA's website. When an AD is adopted, it is up to the Member States to notify the owners and operators; however, the ADs are also made public on EASA's website (this website provides actual information, 24/7, on any AD).[64] Secondly, all the steps taken with regard to continuing airworthiness are stored in the aircraft's Continued Airworthiness records. This consists of an engine module logbook, a propeller logbook, the technical logbook (for commercial flights) and a logbook for any component with a limited service life. The records must consist of the aircraft type, its registration number and its total flight time, flight cycles and flight landings. Furthermore, the status of any AD and the measures taken as immediate reaction to the safety problem are recorded.[65] The records must be presented to the competent authority upon request. Lastly, with regard to reasoned decisions, an AD shall contain some specific information.[66] All in all, ensuring transparency seems to have been given a great deal of thought.

3.4 Reporting on the Rule-making Activities

Given the limits of judicial controls for soft law regulatory powers, we turn to the possibilities of political accountability for these tasks (in line with the framework introduced in Chapter 4). Each year the Management Board must adopt a consolidated Annual Activity report containing the Agency's activities which must be sent to the EU Parliament, the Council, the EU Commission and the Court of Auditors.[67] This Annual Activity report 'shall describe the way in which the Agency has implemented its annual work programme, budget and staff resources and indicate which of the mandates and tasks of the Agency have been added, changed or deleted in comparison with the previous year'.[68] Furthermore, the report shall outline the activities carried out by the Agency and evaluate the results thereof with respect to the objectives, performance indicators and timetable set, the risks associated with those activities, the use

[63] Ibid.
[64] See a comprehensive list of EASA's Airworthiness Directives available at https://ad.easa.europa.eu/.
[65] Regulation 1321/2014, M.A.305(4)(g).
[66] Regulation 748/2012, 21.A.3B(c).
[67] Basic Regulation, Art 98(2)(b).
[68] Ibid, Art 118(1).

of resources and the general operations of the Agency, and the efficiency and effectiveness of the internal control systems.[69]

As EASA has many tasks and therefore carries out many activities, it seems that the Annual Activity reports cover a very large and broad spectrum.

Our analysis of the Annual Activity reports shows that the information presented there has differed through the years and the Agency seems to have been looking for an effective way to report on its rule-making activities. This could, in part, be explained by a broad, not very specific, legislative reporting obligation ('you get what you ask for'[70]). In 2008 the first Annual Activity report was adopted. With regard to rule-making, it included the 2008 Rulemaking Programme, listing the seven opinions that were adopted.[71] In the following two years, the Agency only included a small amount of information on its rule-making tasks in the Annual Activity reports. In 2011 EASA added, for the first time, an annex to the Annual Activity report, listing all of its rule-making deliverables. However, the information remained limited. This trend continued in 2012, when the information on rule-making projects became a little more extensive: as well as communicating what had been done, the Agency provided some background information on the reasons for some rule-making projects. However, this was still formulated in very broad terms. For instance, the 2012 Annual Activity Report stated that 'the NPA 2012-19 on the CS for Airborne Communication Navigation and Surveillance was published by EASA for consultation. The intent was to introduce new CS applicable to all aircraft, which will ultimately contain all communication, navigation and surveillance airworthiness, and interoperability standards in support of airspace applications.'[72] This was stated in very general terms and revealed little about the substance of the CS. In 2013 the Annual Activity report expanded a bit further on the rule-making activities: instead of only providing a list with all deliverables and mentioning the biggest achievements separately, EASA also offered an analysis of the origin of opinions and technical standards (e.g. with regard to safety, air accident investigation recommendations, certification requests, EU Commission requests, Member State requests etc.) and drivers of the opinions and technical standards (e.g. safety, legal requirements, level

[69] Ibid, Art 118(2).

[70] M Scholten, *The Political Accountability of EU Agencies: Learning from the US Experience* (Universitaire Press Maastricht 2014).

[71] EASA's Annual Report 2008, available at https://www.easa.europa.eu/sites/default/files/dfu/EAS_AnnualReport%202008_6-1_RZ_Online.pdf.

[72] EASA's Annual General Report 2012, available at https://www.easa.europa.eu/sites/default/files/dfu/EASA-Annual_General_Report_2012.pdf 24.

playing fields etc.).[73] The three Annual Activity reports, covering the years 2015, 2016 and 2017, offer a more structured overview of the Agency's main achievements with regard to rule-making. Although the reports say little about the substance of the deliverables, these three Annual Activity reports at least increase transparency as the main achievements are structured on the basis of their substance. In this respect, the 2017 Annual Activity report offers an overview of the deliverables with regard to Initial Airworthiness, Aircrew and Medical, Air Operations, Aerodromes, Air Traffic Management and Air Navigation Services, and Environmental Protection.[74]

Annual Activity reports are clearly interlinked with annual programming and multi-annual programming documents. The annual work programme 'shall comprise detailed objectives and expected results including performance indicators and shall take into account the objectives of the European Plan for Aviation Safety'.[75] The annual work programme 'shall also contain a description of actions to be financed and an indication of the financial and human resources allocated to each action, indicating which activities are to be financed through the regulatory budget and which activities are to be financed through fees and charges received by the Agency'. Furthermore, in the multi-annual work programme, the overall strategic programming is set out. This includes objectives, performance indicators and expected rules.[76] Thus, the programming document is an *ex ante* plan which shows what the Agency is going to do in the coming three years. EASA's programming document adopted in 2019, for instance, sets out the rule-making projects for the coming three years. It states that 'the Agency's efforts are focused on operation of drones via the introduction of a regulatory framework. For the fully certified drone category, EASA opinions and decisions will be issued between 2019 and 2023'.[77] However, it seems that the programming documents are not always as transparent: in 2018, for example, there was no separate heading for rule-making or regulatory tasks.

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[73] EASA's Annual General Report 2013, available at https://www.easa.europa.eu/sites/default/files/dfu/TOAC14001ENN.pdf 21.

[74] EASA's Annual Activity Report 2017, available at https://www.easa.europa.eu/sites/default/files/dfu/EASA%20Annual%20Activity%20Report%202017.pdf.

[75] Basic Regulation, Art 117(1).

[76] Ibid, Art 117(4).

[77] EASA's Single Programming Document 2019-2021, available at https://www.easa.europa.eu/sites/default/files/dfu/EASA%20MB%20Decision%202019-01%20Annex%20SPD%202019-2021.pdf 39.

3.5 Discussing the Performance

According to Article 104(2) of the Basic Regulation 'the Executive Director shall report to the EU Parliament on the performance of his or her duties when invited to do so'.[78] The Council may also invite the Executive Director to report on the performance of those duties. It should be noted that the Council has never made use of this right.[79]

When analysing the documents of the Transport and Tourism Committee (TRAN) of the European Parliament for the past five years (2014–2019) it seems that the Executive Director is mostly invited to discuss general aviation policy, which makes one wonder if these talks can be classified as rendering accountability on a daily basis. In 2017 the Executive Director Patrick Ky was, for instance, invited for an exchange of views on Africa and Aviation.[80] The only discussions that dealt with individual cases were related to air crashes. In 2015 the Executive Director was invited to discuss the regulatory and political consequences to be drawn from the Germanwings crash[81] and the follow-up to the crash.[82] Furthermore, in 2015 the European Parliament, the Dutch Safety Board VP and EASA's Executive Director discussed the MH17 crash.[83] Most recently, on 18 March 2019, TRAN invited the Executive Director to discuss the safety of the Boeing 737-8 MAX and Boeing 737-9 MAX. The Executive Director provided the Committee with an in-depth overview of the two fatal accidents, the follow-up actions of Boeing and the US Federal Aviation Administration (responsible for the investigations of the accidents) and EASA's AD, which led to the ultimate grounding of all aircraft of that type within the EU. The Executive Director also made a presentation about the software (Manoeuvring Characteristics Augmentation System) that is specific to the Boeing 737 MAX. Members of the Committee asked whether EASA had

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[78] Basic Regulation, Art 104(2).

[79] See Coman-Kund et al, supra note 28.

[80] EU Parliament, Minutes Meeting of 22 November 2017, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-613.558+01+DOC+PDF+V0//EN&language=EN.

[81] EU Parliament, Minutes Meeting of 13 April 2015, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-554.708+01+DOC+PDF+V0//EN&language=EN.

[82] EU Parliament, Minutes Meeting of 29 June 2015, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-560.877+01+DOC+PDF+V0//EN&language=EN.

[83] EU Parliament, Minutes Meeting of 9 November 2015, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-571.499+01+DOC+PDF+V0//EN&language=EN.

received reports by pilots about the functioning of the software; however, in the EASA database there were no such reports.[84]

3.6 Limited Sanctions

Given that the sanctions can be of an institutional and a personal character,[85] it seems that sanctions of a personal character are unlikely to be available for the outputs that we investigate as these outputs are the results of collective, cumbersome procedures involving many actors and inputs. The Management Board members can only be removed by Member States according to their own rules and it is questionable whether these could be used for a collective decision of the Board. This means that the EU institutions cannot have any rectification influence on the Management Board. In general, it could be argued that this is not that problematic as the competences of the Management Board often depend on proposals or approval from the Executive Director or the EU Commission, which can be seen as a form of ongoing control. However, with regard to rule-making, the EU Commission's role is very limited as it will only be consulted during the programming phase. Furthermore, the procedure for the removal of the Executive Director is quite burdensome and is likely to be used only in serious cases of misfeasance. The Director can only be removed by the Management Board on a proposal of the EU Commission. Thus, sanctions of an institutional character, such as disapproving the annual accounts, denouncing a policy, the annulment of a decision by the courts, or public condemnation of a specific action, seem the most feasible, even with the limits outlined above, such as questionable judicial control for 'soft law', judicial deference, and the limits of political control on a 'daily basis'.

3.7 Observations

Rule-making activities result in a number of non-legally binding acts for which judicial controls can be limited, thereby necessitating that other types of controls are present. The possibility of an intervention by the CJEU is dependent on the willingness of the CJEU to be convinced of an act's intention to create legal effects against third parties. This means that uncertainty exists with regard to judicial control, which is also the case with legally binding acts like ADs, although for a different reason: judicial deference towards technical

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[84] TRAN, Newsletter of TRAN Committee Meeting of March 2019, available at http://www.europarl.europa.eu/cmsdata/162141/TRAN%20Newsletter%20March%202019.pdf.

[85] See Scholten, supra note 70.

assessments. In this situation, we observe that the emphasis seems to have been placed on balancing the limits of judicial controls with *ex ante* elements of controls, transparency requirements and political accountability.

The essential elements of controls *ex ante* include ensuring the participation of all relevant stakeholders in the stages leading up to making the rules and ensuring transparency. In order to implement EU law correctly, the Notice and Comment procedure, for instance, makes EASA respond to the comments that are made by both NAAs and private parties that are subject to the EU aviation safety rules. The consultation process is lengthy and therefore consultation can continue until the major disagreements and issues are resolved. If these cannot be resolved, the reasons for this, and the results and consequences of the decision are included in the Comment Response Document.[86]

Political accountability through reporting, discussions and sanctions can be seen as a way to mitigate the challenges of judicial control; however, it faces problems, too. Annual Activity reports include some information and year on year more is included with regard to EASA's opinions and technical standards. However, even today the Annual Activity reports include little information on the *substance* of the deliverables. Although the opinions and technical standards are listed and the main achievements are highlighted, it does not necessarily become clear what rule-making procedure was used, whether a rule-making group was set up, which stakeholders were consulted and whether an RIA was conducted. The programming document provides an *ex ante* form of control as it provides an overview of the main rule-making projects for the coming three years. The 2019 programming document offers, for instance, a clear overview of the rule-making projects and the topics they will be dealing with. However, this has not always been the case: the 2018 Programming Document, for example, was not as clear on the rule-making projects and so it would have been very difficult for the reader to establish what the main rule-making projects were. The clearer and more specific *ex ante* plans are, the more feasible it is to hold to account *ex post*.[87] Furthermore, the Executive Director *must* be invited by the EU Parliament and *may* be invited by the Council. The latter has never happened so far and, concerning the former, it is unclear whether these meetings should be classified as giving expert advice to the European Parliament, rather than rendering account. Further research on this point is clearly crucial. The possibility of sanctioning *ex post* also seems somewhat unlikely.

[86] Decision 18-2015, Art 6.
[87] See supra note 70.

4. CONCLUSION

EASA has been given various regulatory and enforcement tasks with such features as soft law, technical assessments and a whole new regime of delegating tasks either to the national authorities or in conjunction with EASA. These features challenge individual controlling mechanisms and require interconnections between these mechanisms to address their limits and create a comprehensive system of controls. In this chapter we have connected a few types of concrete outputs by EASA, at times with input from other actors, with specific types of controls and have found such interconnections. Where *de facto* or *de jure* legally binding decisions face limits of judicial controls due to the nature of such decisions (soft law) or judicial deference (for technical assessments), *ex ante* controls (specific legislative guidance), transparency requirements and political accountability are essential to ensure a more comprehensive system of control.