

Information Letter: Principal Place of Business

Summary:

EASA and EU Commission issued information paper for EASA Member States competent authorities to ensure correct determination of the Principal Place of Business (PPoB) as it is considered to be vital to the ability of competent authorities to oversee organisations effectively and to ensure the required level of safety. The increasing existence of multinational companies has made this determination more complex and it is also evident that some companies are engaging in “authority shopping” to establish a convenient oversight regime for themselves. This paper is based on the results of joint work by EU Commission and EASA to study the legal requirements for determining PPoB, in the interest of providing competent authorities useful guidance on the subject. Determination of PPoB will also be given more attention in the future oversight work, in order to ensure that organisations cannot misuse the system.

PRINCIPAL PLACE OF BUSINESS (PPoB)

1. Background

Member States shall designate one or more entities as the competent authority for the certification and oversight of persons and organisations subject to Regulation (EU) 2018/1139 (216/2008) and its delegated and implementing acts.

Regarding organisations in the domains of continuing airworthiness, production and aircrew the competent authority shall be the authority designated by the Member State in which the organisation has its Principal Place of Business (PPoB).

The legislator used this notion of PPoB to determine who shall be the competent authority, as not only does this authority have presumably the closest links with an organisation, but it also ensures that the competent authority has a certain degree of regulatory “control” over the organisation, which is necessary for the effective conduct of safety-related certification and oversight tasks. As such, a competent authority shall be in the position to, among others:

- empower its inspecting staff to:
 - o examine records, data, and any material relevant to the execution of certification and oversight tasks;
 - o enter relevant premises, operating sites, or means of transport;
 - o perform audits, investigations, assessment and inspections, including ramp inspections and unannounced inspections;
 - o take or initiate enforcement measures as appropriate, including through national judiciary actions.

- cooperate appropriately with other national non-aviation authorities, such as labour inspectorates, police and judicial institutions etc.

A correct determination of the PPoB is therefore essential to ensure that the competent authority is the authority which is in the best position in the EU/EFTA to discharge its safety oversight responsibilities properly. If this is not ensured, safety is at stake by cutting the needed link between the competent authority and the organisations it oversees; and the principal objective of the Basic Regulation is to establish and maintain a high uniform level of civil aviation safety in the European Union / EFTA cannot be achieved.

The accurate determination of the PPoB in the aviation safety domain is also a legal protection against possible business attempts to “shop” between authorities.

At the same time, private corporations are constantly evolving and changing their multi-national organisations to optimise their business. Determining the PPoB for the purpose of the implementation of the EU's continuing airworthiness and aircrew Regulations in a standardised manner continues to pose challenges for the EASA Member States as well as to EASA itself, both when the issue arises amongst the EU / EFTA Member States and when it involves third countries in which case the Agency itself may be the competent authority.

While EU Regulations contain a definition of the PPoB, it is not excluded that certain problems of interpretation or application may be raised. This paper has been prepared in cooperation between the EU Commission and EASA. It intends to highlight the legal and oversight difficulties triggered by the definition of PPoB and provide a possible interpretation for implementing PPoB based on an operational set of criteria. These criteria shall be followed to ensure a standardised approach for prospective competent authorities to accept organisations' applications for certification and oversight purposes or for competent authorities to ensure continued compliance of organisations already certified.

2. Regulatory Framework

In aviation, and in particular, in the aviation safety domain, the diverse regulations establish the principal place of business of an organisation as the decisive link for determining which authority has the responsibility for ensuring that the services rendered by the said organisation are safe and compliant with Union law. Same principles can also be found outside pure safety regulations, for example, in the economic regulation of airlines.

Consequently, the regulations were built around the notion of PPoB to determine if the competent authority for certification, oversight and enforcement for a given organisation should be the competent national authority of the Member State where such PPoB is located OR the Agency when the PPoB is located outside the EU. This sharing of competencies between the EU and the EU Member States ensures enforceability of the EU acquis by giving responsibility to the EU Member States to take oversight and enforcement measures concerning organisations which carry out safety management in their territories.

The freedom of establishment in the EU cannot preclude or impede the correct application of the law governing a given company or organisation. Cross-border activities can be set up in very diverse ways in the EU, but such freedom should not be exercised in such a way that the principal place of business criteria is interpreted in a way which enables the formal establishment of "letterbox companies"¹ without any substantial, territorial, or jurisdictional link between the organisation and its competent authority. This would indeed circumvent proper enforcement by

¹ The term 'letterbox companies', used in the press, social media and legal literature, refers to companies with little or no activity at the place where they are registered. Other terms are also used to refer to the same business practice, such as mailbox companies, brass-plate companies, shell companies, Pro-forma companies. The primary purpose of such companies is usually to benefit from the right and establishment and enjoy tax benefits or prevent the application of less favourable legislation in the State where they conduct their activities.

the Member State naturally responsible for the certification and oversight and consequently pose safety concerns for the whole EU / EFTA system.

In this context, it is recalled that in aviation safety rules² the PPOB is defined as follows: *‘Principal place of business of an organisation means the head office or registered office of the organisation within which the principal financial functions and operational control of the activities referred to in this Regulation are exercised’*. There is also a very similar definition of PPOB in Regulation (EC) 1008/2008³ i.e. *“principal place of business” means the head office or registered office of a Community air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised”*.

It has to be assumed that the legislator’s choice of the PPOB as the connecting element to determine the competent national authority is deliberate. Reasons for this choice are connected to the need of ensuring a permanent, stable, and effective link between the operator and the legal order where the operator mostly operates. The core operational control and financial functions need to be tangible, visible and capable of being overseen and monitored by the competent national authority responsible for the certification, oversight, and enforcement of the organisation with a PPOB under the jurisdiction of the corresponding Member State.

For this same reason, there cannot be several principal places of business. There can be only one, where the operational control and financial functions are exercised and where the accountability for safety compliance can be traced back to and monitored effectively.

This same understanding of the principal place of business has been recently confirmed by two rulings of the General Court⁴, in the context of state aid granted to EU / EFTA air carriers with a principal place of business in a Member State of the EU / EFTA. In the first ruling, the General Court stated the following in paragraph 26:

(...) 26 *Secondly, under Article 2(26) of Regulation No 1008/2008, the ‘principal place of business’ is defined as the head office or registered office of an EU air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the air carrier are exercised. The notion of a principal place of business, in practice, corresponds to the registered office of that carrier (see, to that effect, judgment of 18 March 2014, International Jet Management, C-628/11, EU:C:2014:171, paragraph 66). It is therefore true, as the applicant maintains, that for a*

² See, respectively, Article 2 (m) of Commission Regulation (EU) N° 1321/2014 and Article 2 (22) of Regulation (EU) N° 1178/2011.

³ See Article 2(26) of Regulation (EC) 1008/2008 on common rules for the operation of air services in the Community.

⁴ Cases T-238/20 and T-259/20.

given legal entity that regulation permits the establishment of only one principal place of business and, consequently, the issuing of only one licence by the authorities of the Member State on whose territory that principal place of business is located. (...)

In the second ruling, paragraph 39 contains the following considerations on the concept of an air carrier's principal place of business in the framework of Regulation (EC) 1008/2008. It underlines the importance of the stable, reciprocal link between the organisation and the Member State responsible for regulating the activities of that operator:

(...) 39. Thirdly, while it is true that the Court considered that, in practice, the concept of principal place of business corresponded to that of a registered office (see paragraph 29 above) and that a change of registered office could be made relatively quickly, it should not be forgotten that Article 2(26) of Regulation No 1008/2008 contains other details, in particular in relation to the fact that continued airworthiness management must be carried out from the location of the principal place of business, that is to say, in the present case, in France. (...) Those provisions create reciprocal regulatory obligations between airlines holding a French licence and the French authorities and thus a specific, stable link between them that adequately satisfies the conditions laid down in Article 107(2)(b) TFEU, (...). Moreover, the loss of that link with the Member State concerned caused by the transfer of the principal place of business to another Member State cannot be narrowed down to a mere change of registered office, given that, as the applicant itself observes in paragraph 59 of the application, the airline must also take all the administrative steps with that State in order to obtain a new operating licence and satisfy all the conditions for that purpose, and the fact that the location of its new principal place of business is recognised is only one factor. (...)

The correct determination of the PPOB is an essential condition to determine the relevant competent authority, including in cases where the Agency will act as a competent authority either upon request of a Member State or of an organisation operating in more than one Member State. In those cases, the reallocation from a Member State to EASA concerns only those certification, oversight and enforcement tasks which are covered by Regulation (EU) 2018/1139 and its implementing rules. Any other tasks not directly regulated by EU aviation safety regulations (such as criminal enforcement or administrative enforcement) continue to remain with the Member State. EASA and the Member State in which the organisation has its PPOB will cooperate with each other, including in the framework of the detailed arrangements on the reallocation of responsibility, to make sure that enforcement actions taken by EASA and national authorities are coordinated and effective.

It is also noteworthy that in the specific domain of continuing airworthiness, the notion of PPOB as the connecting element to determine the competent authority has been kept in Opinion

04/2021⁵. The new proposed framework of “one CAMO” does not introduce any change in the concept of identifying the competent national Authority of a contracted CAMO; it just enlarges the known concept to air carriers. The competent national authority continues to be the one designated by the Member State where the CAMO PPOB is.

3. Criteria for Interpretation and Implementation of PPOB

The PPOB is the result of a complex equation of several elements, which need to be verified by the authority before granting the approval and undertaking the responsibility for certification, oversight, and enforcement. A concrete assessment needs to be made, based on the verification of two cumulative criteria, to be applied in conjunction:

- the head office or registered office of the organisation must be located in the Member State; **and**
- the principal financial functions and the principal operational control of its operational activities
must be held within that head office or registered office located in that Member State.

Although the regulatory details substantiating the implementation of PPOB have not been harmonised under EU company law, the definition in force contains sufficient elements from which substantial indicators of a principal place of business can be extracted.

The **Head office or registered office** of a company is quite straightforward to determine, as this information should be present in the Articles of Association and the company register.

⁵ This Opinion contains a proposal to amend Regulation (EU) 1321/2014 and was discussed in the last EASA Committee of 26/27 October 2021. This proposal allows the AOC holders of the same business grouping to hire a CAMO instead of demanding one CAMO per AOC holder.

About the **principal financial functions** of a company, these comprise all financial activities which are required to operate and maintain a corporation viable and financially fit, capable not only of receiving funds and profits and rewarding shareholders but also of fulfilling their obligations and making due payments, ranging from costs with staff and facilities to comply with contractual, tax or any other financial obligations, payment of dividends, salaries, employment benefits, investment decisions and so forth. The financial functions require *planning and management* of the funds of the company, which cannot be artificially dissociated from the operations of the company. The financial managerial functions are therefore essential to run a business and are a strong indicator of where the actual seat and management of the company take place and to which system of law the company has the closest link.

The **principal operational control of its activities** entails managing the operational decisions of the company regularly. Determining the place of operational control of a company requires a case-by-case assessment, but the following elements might be indicative: a place from where the supply of services is monitored and controlled. The definition of a “permanent business establishment” from the Union Customs Code⁶ could also serve as a proxy: “a fixed place of business, where both the necessary human and technical resources are permanently present and through which a person's customs-related operations are wholly or partly carried out”.

It is recognised that a multitude of operational scenarios is possible. It is also recognised that national company laws may vary from Member State to Member State as the legal requirements are not fully harmonised in the EU / EFTA and depend on the legal theory dominant in each Member State (theory of incorporation *versus* real seat theory⁷). However, it is an obligation of the Agency to remind competent national authorities of their legal obligation to check if the designated principal place of business has any effective link to the authority's jurisdiction. For that, there are boundaries to be assessed on a case-by-case basis, and there are indicators which can be used to verify such jurisdictional link, necessarily bound by the territory in which the activities of the organisation are conducted, managed, financed and controlled.

⁶ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L 269 10.10.2013, p. 1.

⁷ The real seat theory holds that the laws applicable to a given legal entity are those of the jurisdiction in and from which the entity is effectively managed and/or operated i.e., where the company has its real seat, regardless of the jurisdiction where the company has been registered or incorporated.

The incorporation theory, on the other hand, understands that the laws applicable to a legal entity are those of the jurisdiction in which the legal entity has been incorporated, irrespective of where the entity has its real seat i.e., the jurisdiction under which the legal entity was created and under whose laws its statutes and articles of association were adopted.

Both theories are equally valid and are applied by Member States of the EU in accordance with their own legal systems. EU law has so far not formally opted for one of the theories, but recent case law points to a new trend which is more favourable to the real seat theory to the detriment of the incorporation theory.

Before deciding on the PPOB, competent authorities should therefore ascertain that the elements above are satisfied/fulfilled as demonstrated by evidence. The PPOB is the place where a junction of elements can be found:

1. The organisation has registered its organisation with the local company or tax register and where it pays corporate tax.
2. The organisation performs its main administrative and financial functions, such as payment of salaries, employment benefits, invoicing, etc.
3. The organisation's accountable manager is ultimately responsible for safety. They are responsible for ensuring that all activities can be financed and carried out in accordance with the applicable requirements and that the organisation is adequately structured and staffed with suitably qualified staff. As the ultimate responsibility for safety and compliance vis à vis the competent authority, they should either reside permanently in the Country where the PPOB is or demonstrate to the satisfaction of the authority that there are suitable means in place to discharge their responsibilities in full while not residing at the PPOB.
4. The organisation's key personnel (Head of Training, Chief Flight Instructor, Safety Manager, Compliance Monitoring Manager, FSTD Manager, etc.) controls and coordinates daily operational activities, including holding operational management meetings and processing of operational correspondence, that ultimately lead to meeting the safety objectives of the EU aviation safety *acquis*.
5. The head office or registered office is the effective and actual centre of operations from where direction, control, planning, coordination, and corporate finance activities, particularly in the case of Regulation (EC) 1008/2008 airworthiness management, are managed on a daily or regular basis. With the obvious exception of situations, such as the Covid-19 pandemic, that necessitate widespread telework, it shall, in any case, not be an office where the organisation holds sporadic meetings that are attended by the accountable manager and the key personnel who have travelled there just for the occasion, nor an office where only a few meetings are held per year.
6. The records regarding the operational and financial decisions affecting the direction, control, planning, coordination and corporate finance of the organisation's activities and operations, within the scope of the applicable regulations, are always tangible and potentially subject to physical inspection and assessment by the competent authority.

As the PPOB is an aggregate of different elements and corporations can be organised in various ways across borders, there cannot be an artificial separation drawn between financial and operational control. An objective assessment shall be performed to determine where **a particular activity's centre of gravity (most of the criteria listed above)** is. This means that no approval shall be given unless the aforementioned financial and operational control criteria are cumulatively met. Since the criteria are not necessarily met in a binary way in a concrete corporation (and can change over time), an objective measurement will sometimes need to be supplemented with an assessment of *the degree* of financial and operational control in a given location vis-à-vis other parts, subsidiaries, facilities, or local offices of the same corporation, or its parent organisation(s).

EASA is legally bound to alert to the safety problems triggered by situations where it is detected that the chosen PPOB is devoid of genuine activity, control, or financing. In those situations, where in the chosen PPOB it is concluded that no activity can be found, where staff and key personnel are not regularly working and are only accessible remotely, or through travel planning and booking, it is likely that damages to the intended safety objective of the single aviation system will be caused as the authority formally responsible for safety oversight may not, in fact, have sufficiently tangible components of the organisation under its effective jurisdiction.

In addition to the safety considerations, the establishment of letterbox companies may lead to an undermining of the single market or distortion of tax regimes in cases where the chosen PPOB is in an EU Member State, but the features of a PPOB (activity, operational control etc.) are situated in a third country.

Where the enforcement of any legal obligations towards the organisation and its accountable manager is virtually impossible because the formal PPOB is in one Member State and the genuine economic activity, finances and operational control take place elsewhere, further investigation needs to be pursued to cease a potential infringement of EU law.

4. Conclusions

The PPOB is the decisive factor in determining the competent authority responsible for certification, oversight, and enforcement, as applicable. To discharge their safety oversight responsibilities, competent authorities need to be able to take effective, proportionate and dissuasive enforcement actions on any organisation they approve and to ensure that its accountable manager can be held accountable in their role as ultimately responsible for safety. A correct PPOB implementation is therefore essential to achieve a high and uniform level of aviation safety across the EU.

The definition of PPOB in the aviation safety domain allows extracting substantive aspects which, when put together and assessed, allow to determine where the actual centre of gravity of the company is located.

The determination of the PPOB is based on an objective assessment – supplemented with a specific assessment - of the degree of financial and operational control in a given location in comparison with other locations where the same corporation may have established subsidiaries, affiliates, local offices, etc. and is not to be misconstrued to circumvent the correct application of EU law when it comes to certification, oversight, and enforcement of the organisation and its key personnel by the relevant competent authority.