

COMMISSION IMPLEMENTING REGULATION (EU) No 646/2012

of 16 July 2012

laying down detailed rules on fines and periodic penalty payments pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC ⁽¹⁾, and in particular Article 25(3) thereof,

Whereas:

- (1) Regulation (EC) No 216/2008 aims to establish and maintain a high uniform level of civil aviation safety in Europe. That Regulation provides for the means of achieving that objective and other objectives in the field of civil aviation safety.
- (2) Pursuant to Regulation (EC) No 216/2008 the European Aviation Safety Agency ('the Agency') is responsible for the certification of certain products, persons and undertakings. In those areas under its responsibility, the Agency has to oversee that those products, persons and undertakings comply with the applicable requirements including the provisions of Regulation (EC) No 216/2008 and its implementing rules.
- (3) In cases where identified potential shortcomings are not adequately resolved during the existing oversight process, Article 25 of Regulation (EC) No 216/2008 empowers the Commission, at the request of the Agency, to impose fines or periodic penalty payments on holders of certificates issued by the Agency for the intentional or negligent breach of any of the obligations laid down in Regulation (EC) No 216/2008 or its implementing rules.
- (4) Through the introduction of fines and periodic penalty payments the Commission should have a supplementary tool, allowing it to give a more nuanced, flexible and graduated response to a breach of the rules, compared to the withdrawal of a certificate which the Agency has issued.
- (5) It is necessary to lay down rules concerning procedures, inquiries, associated measures and reporting by the Agency as well as rules of procedure for decision-making, including provisions on the quantification and collection of fines and periodic penalty payments. It is also necessary to lay down detailed criteria for establishing the amount of the fines or periodic penalty payments.

- (6) These rules and procedures should be guided by the need to ensure the highest possible safety and environmental protection standards, by the need to encourage an effective conduct of the inquiry and of the decision-making phases as well as by the need to guarantee the fairness and transparency of the procedures and the imposition of fines and periodic penalty payments.
- (7) The provisions of this Regulation can be effectively enforced only in a framework of close cooperation between the Member States, the Commission and the Agency. For that purpose it is necessary to set up arrangements for consultation and cooperation between them in order to ensure the effective conduct of the inquiry and the decision-making process regarding alleged breaches.
- (8) It is appropriate that, for the purposes of the initiation and conduct of the non-compliance procedure and the quantification of fines and periodic penalty payments, the Commission and the Agency should take into account other procedures against the same certificate holder which have been initiated or concluded by a Member State or by third countries.
- (9) The Commission and the Agency should also take into account any pending procedure initiated, or decision taken, by the Agency regarding the amendment, limitation, suspension or revocation of the relevant certificate in accordance with Regulation (EC) No 216/2008.
- (10) Without prejudice to Union law preventing the use of safety information for the purposes of blame or liability, in particular Article 16(2) of Regulation (EC) No 216/2008, Article 19(2) of Regulation (EU) No 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC ⁽²⁾ and Article 7 of Directive 2003/42/EC of the European Parliament and of the Council of 13 June 2003 on occurrence reporting in civil aviation ⁽³⁾, any oversight power conferred on the Commission or the Agency by Union law as regards certificates issued in accordance with Regulation (EC) No 216/2008 may be used in the course of the investigation or during the decision-making stages of such a non-compliance procedure. The Commission's decision imposing fines or periodic penalty payments should be based on the inquiry by the Agency, the observations of the certificate holder subject to the non-compliance procedure and, where appropriate, other information submitted to the Agency and the Commission.

⁽¹⁾ OJ L 79, 13.3.2008, p. 1.

⁽²⁾ OJ L 295, 12.11.2010, p. 35.

⁽³⁾ OJ L 167, 4.7.2003, p. 23.

- (11) It is appropriate to give certificate holders the opportunity, within a specified time-limit, to voluntarily comply with Regulation (EC) No 216/2008 and its implementing rules, in which case no fines or periodic penalty payments should be imposed by the Commission. This possibility to demonstrate voluntary compliance should nonetheless be limited in time.
- (12) Decisions imposing fines or periodic penalty payments should be based exclusively on grounds on which the certificate holder concerned has been able to comment.
- (13) The fines or periodic penalty payments imposed should be effective, proportionate and dissuasive, having regard to the circumstances of the specific case.
- (14) It appears appropriate to provide for a specific procedure in cases where the Commission intends to impose periodic penalty payments for failure by a certificate holder subject to a non-compliance procedure to cooperate with the Commission or the Agency with regard to measures of inquiry or other requests for information.
- (15) This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular as regards the rights of defence and the principle of confidentiality in accordance with the general principles of law and the case-law of the Court of Justice of the European Union.
- (16) For the purposes of ensuring legal certainty in the conduct of the non-compliance procedure, it is necessary to lay down detailed rules for the computation of time-limits and limitation periods for the imposition and enforcement of fines and periodic penalty payments.
- (17) Decisions imposing fines and periodic penalty payments should be enforceable in accordance with Article 299 of the Treaty on the Functioning of the European Union and should be subject to review by the Court of Justice of the European Union.
- (18) The measures provided for in this Regulation are in accordance with the opinion of the Committee established by Article 65(1) of Regulation (EC) No 216/2008,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject-matter and scope

1. This Regulation lays down detailed rules for the implementation of Regulation (EC) No 216/2008 concerning the criteria for establishing the amount of fines or periodic penalty payments, procedures for inquiries, associated measures and reporting, as well as rules of procedure for decision-making, including provisions on rights of defence, access to the file, legal representation, confidentiality and temporal provisions and the quantification and collection of fines and periodic penalty payments.

2. This Regulation applies to the imposition:

- (a) of fines on persons and undertakings to which the European Aviation Safety Agency ('the Agency') has issued a certificate ('certificate holder') where, intentionally or negligently, the provisions of Regulation (EC) No 216/2008 or its implementing rules have been breached and where interests of the Union are involved;
- (b) of periodic penalty payments on certificate holders referred to in point (a) in order to compel them to comply with Regulation (EC) No 216/2008 or its implementing rules.

CHAPTER II

NON-COMPLIANCE PROCEDURE

SECTION 1

Inquiry

Article 2

The non-compliance procedure

1. The non-compliance procedure laid down in this Chapter covers all the administrative stages of investigation of possible breaches of Regulation (EC) No 216/2008 or its implementing rules.

2. The Agency may initiate the non-compliance procedure on its own initiative or following a request from the Commission or a Member State.

3. Where the initiation of the non-compliance procedure follows a request from the Commission or a Member State, the Commission or the Member State shall be informed by the Agency of the course given to their request.

Article 3

Requests for information

1. For the purposes of initiating and conducting a non-compliance procedure the Agency may use any information obtained in the exercise of any oversight power conferred on it by Union law as regards certificates issued in accordance with Regulation (EC) No 216/2008. This empowerment is without prejudice to Union law preventing the use of information for the purposes of attributing blame or liability.

2. Prior to initiating a non-compliance procedure, the Agency may request from the certificate holder concerned information relating to the alleged breach.

The Agency shall state the purpose of the request and the fact that it is made under this Regulation, and set a time-limit for the submission of the information.

Article 4

Notification

1. The Agency shall send written notification of the initiation of a non-compliance procedure to the certificate holder, to the Commission and to the national aviation authorities of the Member State(s) or the third country or countries where the certificate holder has its principal place of business and where the breach has taken place as well as, where appropriate, to the aeronautical authorities of third countries and international organisations competent in matters covered by this Regulation.

2. The notification shall:

- (a) set out the allegations against the certificate holder, specifying the provisions of Regulation (EC) No 216/2008 or its implementing rules allegedly breached, and the evidence on which those allegations are founded; and
- (b) inform the certificate holder that a fine or a periodic penalty payment may be imposed.

Article 5

Inquiries

1. Once the inquiry has been initiated, the Agency shall clarify the facts and allegations.

2. The Agency may request the certificate holder to provide written or oral explanations, or particulars or documents.

The request shall be addressed in writing to the certificate holder. The Agency shall state the legal basis and the purpose of the request, set a time-limit by which the information is to be provided, and inform the certificate holder about the periodic penalty payments provided for in Article 16(1)(a) and (b) for failing to comply with the request or for supplying incorrect or misleading information.

3. The Agency may request national aviation authorities to cooperate in the investigation and, in particular, to provide any information relating to the alleged breach.

The request shall state the legal basis and the purpose of the request and shall set a time-limit for the submission of the reply or the conduct of the measure of inquiry.

4. The Agency may ask any natural or legal persons or aeronautical authorities of third countries to provide information relating to the alleged breach.

The request shall state the legal basis and the purpose of the request, and shall set a time-limit by which the information is to be provided.

Article 6

Voluntary compliance

1. At the notification of the initiation of the non-compliance procedure or thereafter the Agency shall set a time-limit within which the certificate holder may indicate in writing that it has voluntarily complied, or, where appropriate, that it intends to comply, with the breached provisions. In case of voluntary compliance by the certificate holder within the time-limit set by the Agency, the Agency shall decide to close the initiated non-compliance procedure.

The Agency shall not be obliged to take into account replies received after the expiry of that time-limit.

2. The time-limit provided for in paragraph 1 shall in no case expire later than the date on which the Agency notifies the statement of objections provided for in Article 7.

Article 7

Statement of objections

1. When the Agency has established the facts and found that there are grounds to continue the non-compliance procedure, it

shall notify in writing a statement of objections to the certificate holder concerned. The statement of objections shall contain:

- (a) the allegations against the certificate holder, specifying the provisions of Regulation (EC) No 216/2008 or its implementing rules allegedly breached, and the evidence on which those allegations are founded;
- (b) the information that a fine or a periodic penalty payment may be imposed.

2. When notifying the statement of objections, the Agency shall invite the certificate holder to submit written observations in response. It shall do so in writing, indicating a time-limit for the submission of those observations.

Article 8

Oral hearing

1. Where a certificate holder requests it, the Agency shall give them an opportunity to develop their arguments at an oral hearing.

2. Where necessary, the Agency may invite the national aviation authorities or any other persons to take part in the oral hearing.

3. The oral hearing shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of certificate holders and other persons in the protection of their business secrets and other confidential information.

Article 9

Time limits

For the purposes of ensuring legal certainty in the conduct of the inquiry procedure, the Agency shall lay down detailed rules for the setting of time-limits.

Article 10

Report

1. The Agency shall provide the Commission, the Member States and the certificate holder with a report summarising its findings in the light of the inquiry conducted in accordance with this Section. The Agency shall also submit to the Commission the file under inquiry.

2. Where the report by the Agency concludes that the certificate holder has breached provisions of Regulation (EC) No 216/2008 or its implementing rules, the report shall also include:

- (a) an assessment of the circumstances of the case in accordance with the criteria set out in Article 15 of this Regulation;
- (b) a request to the Commission for imposition of a fine or a periodic penalty payment;
- (c) a reasoned proposal containing the amount of the fine or periodic penalty payment.

3. The Agency shall adopt its report no later than [12 months] after notification of initiation of the non-compliance procedure in accordance with Article 4 or [6 months] after notification by the Commission of the return of the file in accordance with Article 12.

SECTION 2

Decision-making

Article 11

Requests for information

1. Where, following a request from the Agency pursuant to Article 10 (2)(b), the Commission decides to further pursue the non-compliance procedure, it may request in writing the certificate holder to provide written or oral explanations, or particulars or documents. In such a case, the Commission shall inform the certificate holder of the periodic penalty payments provided for in Article 16(1) (c) and (d) for failing to comply with the request or for supplying incorrect or misleading information.

The Commission may also request the Agency, national aviation authorities or any natural or legal persons to provide information relating to the alleged breach.

2. The Commission shall ensure that the certificate holder can provide any written explanation or particular or documents in support of its case. Certificate holders may request an oral hearing but the Commission shall have the right to agree to such request only when it considers it necessary.

Article 12

New period of inquiry

Having regard to the report of the Agency, the observations of the certificate holder on the basis of that report, and other relevant information, the Commission may consider that additional information is needed. In that case it may return the file to the Agency. The Commission shall clearly indicate to the Agency the points of fact which the Agency needs to investigate further and, if appropriate, suggest possible measures of inquiry to that effect, as provided for in Regulation (EC) No 216/2008. Section 1 of Chapter II of this Regulation shall apply to the conduct of the new period of inquiry.

SECTION 3

Decisions on fines and periodic penalty payments

Article 13

Fines and periodic penalty payments and maximum amounts

1. Where following the decision-making provided for in Section 2, the Commission finds that the certificate holder has intentionally or negligently breached Regulation (EC) No 216/2008 or its implementing rules, it may adopt a decision imposing a fine not exceeding 4 % of the annual income or turnover of the certificate holder in the preceding business year.

2. Where the certificate holder has not terminated the breach at the time of the adoption of the decision referred to in

paragraph 1, the Commission may, in that decision, impose periodic penalty payments per day not exceeding 2,5 % of the average daily income or turnover of the certificate holder in the preceding business year.

These periodic penalty payments may be imposed for a period running from the date of notification of the decision until the day on which the breach is brought to an end.

3. For the purposes of paragraphs 1 and 2, the preceding business year refers to the business year preceding the date of the decision referred to in paragraph 1.

4. Fines and periodic penalty payments shall be of an administrative nature.

5. The decision imposing fines and periodic penalty payments shall be enforceable.

Article 14

Contents of decisions

1. The decision provided for in Article 13 shall be based exclusively on grounds on which the certificate holder has been able to submit observations to the Commission.

2. The Commission shall inform the certificate holder of the judicial remedies available.

3. The Commission shall inform the Member States and the Agency about the adoption of the decision.

4. When publishing details of its decision and informing the Member States, the Commission shall have regard to the legitimate interest of certificate holders and other persons in the protection of their business secrets.

Article 15

Criteria governing the application and quantification of fines and periodic penalty payments

1. In determining whether to impose fines and periodic penalty payments and the amount of those fines and payments, the Commission shall be guided by the principles of effectiveness, proportionality and dissuasiveness.

2. In each case, the Commission shall take into consideration, where relevant, the following circumstances:

(a) the seriousness and the effects of the breach and in particular, the implications and effects for safety and for the environment of such breach;

(b) the degree of diligence and cooperation shown by the certificate holder in the detection of the breach and the application of the corrective action, or during the course of the non-compliance procedure or, any obstruction by the certificate holder of the detection of a breach and the conduct of a non-compliance procedure, or any non-compliance by the certificate holder with requests made by the Agency, the Commission or a national aviation authority in application of this Regulation;

(c) the good faith of the certificate holder in the interpretation and fulfilment of the obligations connected with certificate holders in accordance with Regulation (EC) No 216/2008 or its implementing rules, or any evidence of wilful deceit on the part of the certificate holder;

- (d) the turnover involved in the case and the economic capacity of the certificate holder concerned;
- (e) the need to adopt provisional or urgent measures;
- (f) the repetition, frequency or duration of the breach by the certificate holder;
- (g) prior sanctions, including financial penalties, imposed on the same certificate holder.

3. In determining the amount of the fine and the periodic penalty payment, the Commission shall take into account any enforcement measures already taken regarding the certificate holder at national level or by the Agency and based on the same legal grounds and the same facts.

SECTION 4

Non-cooperation

Article 16

Periodic penalty payments for non-cooperation

1. At the Agency's request or at its own initiative, the Commission may by decision impose on certificate holders periodic penalty payments per day not exceeding [0,5] % of the average daily income or turnover of the certificate holders in the preceding business year where, intentionally or negligently:

- (a) they do not comply with a measure of inquiry adopted pursuant to Article 5;
- (b) they supply incorrect or misleading information in response to a measure of inquiry adopted pursuant to Article 5;
- (c) they do not comply with a request for information pursuant to Article 11;
- (d) they supply incorrect or misleading information in response to a request for information pursuant to Article 11.

Periodic penalty payments may be imposed for a period running from the date of notification of that decision until the non-cooperation has ceased.

2. For the purposes of paragraph 1, the preceding business year refers to the business year preceding the date of the decision referred to in paragraph 1.

Article 17

Procedure

Where the Commission intends to adopt a decision as referred to in Article 16(1), it shall first notify in writing the certificate holder, setting a time-limit within which the certificate holder may submit written observations to the Commission.

The Commission shall not be obliged to take into account written observations received after the expiry of that time-limit.

Article 18

Complementarity of procedures

For the purposes of the initiation and conduct of the non-compliance procedure, the Commission and the Agency shall take into account:

- (a) any non-compliance procedures already initiated or concluded by a Member State or a third country against the same certificate holder and based on the same legal grounds and the same facts; and
- (b) any procedure initiated by the Agency pursuant to Regulation (EC) No 216/2008 against the same certificate holder and based on the same legal grounds and the same facts, with the view to amending, limiting, suspending or revoking the relevant certificate.

SECTION 5

Article 19

Recovery of fines and periodic penalty payments

The Commission shall proceed with the recovery of fines and periodic penalty payments by establishing a recovery order and issuing a debit note addressed to the certificate holder concerned in accordance with Council Regulation (EC, Euratom) No 1605/2002 ⁽¹⁾ and Commission Regulation (EC, Euratom) No 2342/2002 ⁽²⁾.

CHAPTER III

ACCESS TO THE FILE, LEGAL REPRESENTATION, CONFIDENTIALITY AND TEMPORAL PROVISIONS

SECTION 1

Rights of defence

Article 20

Access to the file

1. Following notification under Article 4, the certificate holder shall have the right, on request, to access the documents and other materials compiled by the Commission and the Agency which serve as evidence of an alleged breach.

2. Documents obtained through access to the file shall be used only for the purposes of judicial or administrative proceedings for the application of this Regulation.

Article 21

Legal representation

The certificate holder shall have the right to legal representation during the non-compliance procedure.

Article 22

Confidentiality, professional secrecy and right to remain silent

1. Without prejudice to the exchange and use of information provided for in Articles 5(3) and 11(1), a non-compliance procedure shall be conducted subject to the principles of confidentiality and of professional secrecy.

The Commission, the Agency and the national aviation authorities, when involved under Articles 5(3) and 11(1), their

⁽¹⁾ OJ L 248, 16.9.2002, p. 1.

⁽²⁾ OJ L 357, 31.12.2002, p. 1.

officials and other persons working under their supervision shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of confidentiality and professional secrecy.

2. Without prejudice to the right to access the file, the certificate holder shall not have access to business secrets, confidential information or internal documents held by the Commission or the Agency.

3. Any person who submits observations or information pursuant to this Regulation shall clearly identify any material considered to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission or the Agency. In the absence of such identification, the Commission may assume that the observations or information submitted do not contain confidential information.

4. A certificate holder shall have the right to remain silent in situations where they would otherwise be compelled to provide answers which might involve an admission on their part of the existence of a breach.

SECTION 2

Temporal provisions

Article 23

Application of time-limits

1. The time-limits laid down in this Regulation shall run from the day following receipt of a communication or delivery thereof by hand.

Where the certificate holder is required to submit observations or information within a time-limit, it shall be sufficient for the submission to have been dispatched by registered post before the expiry of the time-limit.

2. Where a time-limit falls to expire on a Saturday, Sunday or public holiday, it shall be extended up to the end of the following working day.

3. In setting the time-limits provided for in this Regulation, the Commission and the Agency, as the case may be, shall have regard both to the time required for preparation of the submission and to the urgency of the case.

4. Where appropriate and upon reasoned request made before the expiry of the original time-limit, time-limits may be extended.

Article 24

Limitation periods for the imposition of fines and periodic penalty payments

1. The right of the Commission to adopt a decision imposing fines and periodic penalty payments pursuant to Article 13 shall expire after five years.

In the case of the periodic penalty payments provided for in Article 16, the right of the Commission to adopt a decision imposing such a penalty shall expire after three years.

Time shall begin to run on the day on which the breach is committed. However, in case of continuing or repeated breaches, time shall begin to run on the day on which the breach ceases.

2. Any action taken by the Commission or the Agency for the purpose of the investigation or non-compliance procedure shall interrupt the limitation periods provided for in paragraph 1. The limitation period shall be interrupted with effect from the date on which the action is notified to the certificate holder.

3. Each interruption shall start time running afresh. The limitation period shall, however, not exceed a period equal to twice the initial limitation period, except where limitation is suspended pursuant to paragraph 4. In that case, the limitation period shall be extended by the time during which limitation is suspended.

4. The limitation period for the imposition of periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union.

Article 25

Limitation periods for the collection of fines and periodic penalty payments

1. The right to start a recovery procedure shall expire one year after the decision pursuant to Article 13 or 16 has become final.

2. The limitation period for the recovery of fines and periodic penalty payments shall be interrupted by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fines or periodic penalty payments.

3. Each interruption shall start time running afresh.

4. The limitation period for the recovery of fines and periodic penalty payments shall be suspended for so long as:

(a) time to pay is allowed;

(b) enforcement of payment is suspended pursuant to a decision of the Court of Justice of the European Union.

CHAPTER IV

FINAL PROVISIONS

Article 26

Application

In the case of breaches which began before its entry into force, this Regulation shall apply to the part of the breach which takes place after that date.

Article 27

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 16 July 2012.

For the Commission
The President
José Manuel BARROSO
