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Datum 13 januari 2023
Betreft Application of the European rules on air operations for
search and rescue activities in the Netherlands

Dear 5.1.2.e ,

With reference to your letter of 21 November 2022 (Ref. Ares(2022)8035022) on the concerns that EASA has over the decision to apply the EU rules on air operations for search and rescue activities in the Netherlands, I would like to clarify, also on behalf of 5.1.2.e (Director of supervision and investigation of the Inspectie Leefomgeving en Transport), the position of the Netherlands on the regulation and oversight of search and rescue. Unfortunately the coordination of the reply and the drafting of this letter has taken some time, for which I would like to express my apologies.

Previously a Belgian operator was contracted to perform the search and rescue operation in the Netherlands. Based on the investigation into an incident during one of the training missions it was determined that no safety oversight was being performed on the search and rescue operation. The Belgian authorities did not oversee the operation, due to the fact that this was deemed a Dutch state operation. The Netherlands civil aviation authorities did not oversee the operation because the operator was certified by Belgium. An initiative was started to better regulate the search and rescue operation in the Netherlands. In determining the options for regulation of search and rescue, it was concluded that the Basic Aviation Law (Wet Luchtvaart) in the Netherlands did not contain a provision to promulgate a national regulation for non-military state aircraft. In order to issue national regulations, the Wet Luchtvaart needs to be amended. This process has been started but will take need time before the necessary provisions can be enacted. The Netherlands needs a solution until then.

Both in the Chicago Convention, article 3(d) and the Basic Regulation, article 2 paragraph 3, it is stated that a state shall ensure that the operation of state aircraft is regulated in such a way that the safety of the navigation of civil aircraft is ensured. Specifically, in the Basic Regulation it is noted that, as regards article 2, paragraph 3, point (a), Member States shall ensure that activities and services performed by the aircraft referred to in that point, are carried out with due regard to the safety objectives of this Regulation. Member States shall also ensure that, where appropriate, those aircrafts are safely separated from other aircraft.

Bestuurskern

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Ons kenmerk

IENW/BSK-2023/12766

Uw kenmerk

Ares(2022)8035022 -
21/11/2022

In the same article, the legislator has provided the Member States with the possibility to decide to apply the European regulations to the activities that are normally excluded from the application of the Basic Regulation, where it considers that, in light of the characteristics of the activities, personnel and organizations in question and the purpose and content of the provisions concerned, those provisions can be effectively applied. Based on initial discussions with EASA in 2021 and the estimate that there would be only a limited number of deviations from the European regulations, the Minister of Infrastructure and Water Management decided to apply the opt-in to search and rescue, at least for the period until national regulation can be applied.

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Even though search and rescue operations do have specific characteristics, it is considered that the operator that has been contracted to perform the search and rescue operations can effectively comply with Regulation (EU) No. 965/2012. The requirement to hold an Air Operator Certificate, combined with the necessary specific approvals (Part-SPA), ensures that the operator is able to at least perform regular commercial air transport flights and the specific operations that are covered by the approvals. This does cater for the majority of the flights that will be performed by this operator and even for search and rescue missions where the use of exemptions is not required.

It is recognized that a number of search and rescue operations will require the need to deviate from the requirements as specified in Regulation (EU) No. 965/2012. For those deviations, exemptions in accordance with the requirements as stated in article 71 of the Basic Regulation need to be issued. These exemptions will be issued beforehand, but the operator will only be allowed to apply these exemptions when it is not possible to perform the SAR operation in compliance with the applicable requirements of Regulation (EU) No. 965/2012. At this moment it is expected that a majority of the SAR operations can be performed under normal circumstances and within the limits that are imposed by Regulation (EU) No. 965/2012, the forecasted use of the exemptions is limited. The Netherlands therefore takes the position that the provisions of Regulation (EU) No. 965/2012 can effectively be applied.

The operator contracted to perform helicopter search and rescue operations in the Netherlands, starting November 4th 2022, was issued an EU AOC on October 28th 2022. The AOC includes specific approvals for SPA.LVO (take-off), SPA.NVIS, SPA.HHO, SPA.HERMS and SPA.HOFO. Specific search and rescue procedures are not yet part of the operations manual. ILT has not yet issued exemptions to the operator nor have these exemptions been applied for. In the current situation where the exemptions have not been granted yet, it can happen that the operator will need to go beyond the limits that are set by the AOC in order to perform a rescue mission and save lives. That would be a situation where an exemption would be needed. These situations have been identified by the operator and described in the list of exemptions that was communicated earlier. ILT can perform its regular safety oversight (i.e. inspections, audits) on the operations of the operator. However, whenever the ILT finds that during search and rescue missions the regular limits of the AOC have been exceeded, but the search and rescue mission was carried out within the (future) exemptions that will be requested by the operator and still need to be approved by the ILT, the ILT has been instructed by the minister not to take enforcement action. This instruction to the ILT makes reference to the elements (articles in Regulation (EU) No. 965/2012) that have been identified and that probably will require an exemption

and formulates some conditions that the operator will need to fulfil and that will be part of the exemptions.

Bestuurskern
Dir.Luchtvaart
Afd. Luchtvaartveiligheid

Before the meeting in July a list of articles, where the operator identified a possible need for an exemption, was communicated with EASA. This list included exemptions from articles in the European standardized rules of the air (SERA), most of which are already dealt with in airspace regulations in the Netherlands. As a result, the number of exemptions from Regulation (EU) No. 965/2012 is less than the number included in the list of July. The operator is working on the preparation of the exemptions and will need to take into account the requirements as formulated in article 71 of the Basic Regulation. Since it will not be possible to issue national regulation within eight months, the exemptions will be of a longer duration, although they will be limited in time until the moment that national regulations will replace the opt-in.

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The offer by EASA to support the Netherlands in exploring solutions that can meet the needs of the Netherlands, given the constraints that we have to work with, is very much appreciated. We hope that this offer also includes further discussion on the current decision that has been taken by the Netherlands on the opt-in, in order to bridge the period until the moment that we can issue and apply national regulations for search and rescue operations.

Sincerely,

The Director of Civil Aviation Netherlands,

5.1.2.e

5.1.2.e

Flight Standards Director
EASA

MVE/DDOU/ime/FS.2.1

Mr 5.1.2.e

Director of Civil Aviation Netherlands
Directorate of Civil Aviation Netherlands
Ministry of Infrastructure and Water
Management

****distribution by email only****

Subject: Application of the European rules on air operations for search and rescue activities in the Netherlands

Reference: Your letter (ref. IENW/BSK-2023/12766) dated 13 January 2023 – EASA ref. Ares(2023)342319

Dear Mr 5.1.2.e ,

Thank you for your abovementioned letter in which you express your position on the European Union Aviation Safety Agency's (EASA) concerns as regards the approach taken by the Netherlands to apply Regulation (EU) No 965/2012¹ to aircraft involved in search and rescue (SAR) activities.

EASA takes note of your clarifications on the reasons that led the Netherlands to the decision to apply Regulation (EU) No 965/2012 to national SAR activities in accordance with Article 2(6) of Regulation (EU) No 2018/1139 ('opt-in')². You explain that there is a need for SAR coverage in the Netherlands, and that the opt-in to the EU aviation safety requirements was chosen to provide the time needed to adopt national provisions to regulate SAR in the Netherlands.

Furthermore, you state that the Netherlands can effectively apply the aviation safety requirements of Regulation (EU) No 965/2012 to the majority of the flights while acknowledging at the same time that to enable certain SAR activities to take place a limited number of exemptions under Article 71 of Regulation (EU) 2018/1139 would be needed to permit the operator concerned to exceed some of the operational limits laid down in Regulation (EU) No 965/2012. EASA also notes that the Dutch CAA does not intend to take enforcement actions in relation to non-compliances with the requirements of Regulation (EU) No 965/2012, even in the absence of said exemptions.

¹ Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EU) No 2018/1139 of the European Parliament and of the Council

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

While we feel somewhat reassured by your statement that the operator concerned should be able to perform the majority of its flights, including some of the SAR flights, in compliance with Regulation (EU) No 965/2012, we are still concerned by the fact that, as you indicate in your letter, the opt-in would be applied despite the fact that there are some provisions of Regulation (EU) No 965/2012 that cannot be complied with during certain SAR activities, contrary to what is required by Article 2(6) of Regulation (EU) No 2018/1139.

It is our view that exemptions issued in accordance with Article 71 of Regulation (EU) No 2018/1139 are not the correct legal instrument to address requirements of Regulation (EU) No 965/2012 that cannot be effectively applied to SAR activities. The purpose of Article 71 is to allow a temporary deviation from EU requirements in case of urgent unforeseeable circumstances or urgent operational needs of a limited scope and duration. Exemptions are not to be used in lieu of an approval. What the Netherlands is now proposing is to use this system of exemptions under EU law as a substitute for national rules for SAR activities pending the completion of a national rulemaking process. While EASA understands the difficulties that the Netherlands is facing at national level, we unfortunately cannot support this way of using Article 71 of Regulation (EU) No 2018/1139 as it is inconsistent with its purpose and the criteria meant for its use.

We are also, and more fundamentally, concerned by your statement that the Dutch CAA will not take enforcement actions where certain SAR activities would be exceeding the limits established in Regulation (EU) No 965/2012. Such lack of enforcement undermines the proper functioning of the EU aviation safety system, which is based on the principle of mutual recognition of certificates between Member States in accordance with Article 67 of Regulation (EU) No 2018/1139, itself grounded on compliance with common safety requirements.

Therefore, we would like to again invite you to reconsider your approach to apply Section III ('Air Operations') of Chapter III of Regulation (EU) No 2018/1139, including Regulation (EU) No 965/2012, to SAR activities, as the information you provided in your letter seems to confirm our initial position that the opt-in is not an adequate solution in this case.

EASA, through its standardisation activities, will monitor the implementation of Regulation (EU) No 965/2012 in the Netherlands, also including any operations subject to opt-in, and will be compelled to take the necessary actions should we find deficiencies in the oversight activities performed by the Dutch CAA.

I look forward to your reply and actions addressing EASA's concerns.

Yours sincerely,

5.1.2.e

Copy:

Mr 5.1.2.e (European Commission, DG MOVE)

Ms 5.1.2.e (Director of supervision and investigation of the Inspectie Leefomgeving en Transport)