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## **Regional aviation safety organisations: enhancing air transport safety through regional cooperation**

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## Chapter 5

# The Functioning and Evolution of Regional Aviation Safety Organisations

*‘To exist is to change, to change is to mature,  
to mature is to go on creating oneself endlessly.’*

Henri L. Bergson (1859-1941)<sup>1</sup>

### 5.1 INTRODUCTION<sup>2</sup>

Based on the analysis of different types of RASOs and the detailed case study of EASA presented in Chapters 3 and 4, this chapter will offer more general observations and conclusions on the extent to which the various functions of RASOs and the continuing evolution of these organisations contribute to the improvement of global aviation safety and achievement of the objectives of uniformity in regulations, procedures and operations in civil aviation.

More specifically, this chapter will first offer a classification of the different levels of delegation arrangements that States use when creating RASOs (Section 5.2). It will then present, in a systematic way, the different types of safety functions that RASO bodies may exercise and propose a methodology for the setting up of RASOs using a ‘tool-box’ approach (Section 5.3). It will also analyse key trends that can be observed around the world regarding the setting up and functioning of RASOs (Section 5.4), and finally review the functioning of RASOs as international actors (Section 5.5). Where relevant this chapter will also refer to pre-RASOs as defined in Chapter 3.

### 5.2 TYPOLOGY OF DELEGATION ARRANGEMENTS

Some of the RASOs, such as EASA or IAC have been empowered by their Member States to exercise, in a legally binding manner, certain safety functions, normally attributed to States by the Chicago Convention. Such delegation can be a powerful tool, allowing States to simplify exercise a safety function in a uniform manner across the whole region.

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<sup>1</sup> Henri L. Bergson was a French philosopher and 1927 Nobel Prize laureate in literature.

<sup>2</sup> This Chapter is an expanded version of a paper that the author submitted to the 2011 ICAO Symposium on Regional Safety Oversight Organisations. See: Mikołaj Ratajczyk, 'Features and Evolution of Regional Safety Oversight Organisations: Comparative Analysis', ICAO Symposium on Regional Safety Oversight Organizations (Montréal, 2011),

Delegating the exercise of State safety functions can be far reaching, and indeed, as was demonstrated in Section 3.6 of Chapter 3, there is one example today, the ECCAA, where almost all safety functions have been delegated by Member States to a regional body, which has de facto and de lege become a single civil aviation authority for all of them. However such far reaching delegations still remain exceptional.

In the same way that there is no single template for establishing a RASO (see Section 5.4.1), the delegation of State safety functions does not follow a single model and can take place at many levels. The analysis of the different regional bodies shows that this applies both to: (1) the depth of delegation, and (2) legal methods of delegation.

As far as the depth of delegation is concerned, or the extent to which a given function is delegated to a RASO or pre-RASO, three levels of delegations can be identified:

- (1) *Level 1 (Coordination level)*: At the basic level, States may decide to delegate specific competences to individuals not employed by their national civil aviation authorities. Such authorisations then give the underlying authority to inspectors of a regional body to perform audits, inspections and other oversight or investigative work on behalf of the national authority which gave the authorisation. The authorisations given may entail the right to enter the premises of the regulated organisation and to review and inspect its documentation and facilities.

In such cases, although an inspector is employed by a RASO/pre-RASO, he or she will be working under the regulatory authority of the host State. This is for example the case with the AFCAC AFI-CIS, as was demonstrated under Section 3.4.1.2 of Chapter 3, or some services provided by PASO<sup>3</sup> and COSCAP projects.<sup>4</sup>

Under this type of delegation, the beneficiary or host State continues to remain responsible for the issuance of certificates or other approvals on the basis of the technical work conducted by the inspectors of the regional body.

Current State practice indicates that, in addition to envisaging the possibility of such delegation/authorisation in the RASO/pre-RASO founding document, enabling State legislation may be also necessary to give authorisations the necessary legal value in domestic legal orders of host States. For example under the AFI-CIS programme, the State receiving services of the regional inspectors will be obliged to issue them credentials in accordance with a national civil aviation act.<sup>5</sup>

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<sup>3</sup> PASO inspectors, when carrying out their duties on behalf of a PASO Member State, are deemed to be officers of the civil aviation administration of that State, and have rights, privileges and responsibilities no less favourable than those granted to civil aviation officers of that State. See: 'PICASST', *supra* note 81 in Ch.3, Article 8(2).

<sup>4</sup> See for example: 'Model bilateral agreement between COSCAP South Asia and States for obtaining Services of Technical Experts from COSCAP South Asia to perform Safety Oversight functions', *supra* note 15 in Ch.3.

<sup>5</sup> See Appendix 5 'Sample AFCAC AFI-CIS Inspector Credentials' to the AFI-CIS MoU, *supra* note 39 in Ch.3, which provides that: 'The Director General of the [host State] Civil Aviation Authority hereby delegates, in accordance with Article XX of the Civil Aviation Act and paragraph 4

- (2) *Level 2 (Harmonisation level)*: The next level, which goes beyond authorisation of individuals only, is a delegation to a RASO/pre-RASO, as an organisation, of the competence to perform specific technical work on behalf of its Member States or member authorities. In other words, this type of delegation means that a regional body will perform the *technical findings*, such as inspections, tests, examinations, on behalf of all or selected Member States/aviation authorities, and then submit the results, together with recommendations, for further legal action at the national level(s).

One of the most prominent examples of a regional body using this type of delegation has been the European JAA (see Section 3.4.2 of Chapter 3), and its multinational aircraft type certification procedures.<sup>6</sup> Another example of this type of delegation is the process envisaged by the AAMAC States in Africa (see Section 3.4.3.1 of Chapter 3) for the oversight of ANSPs, and in particular ASECNA.<sup>7</sup>

Under this option, States remain legally responsible under their national legislation for the issuance of a certificate or other type of approval. So whilst from a technical point of view, Level 2 delegations provide for efficiencies by virtue of centralisation of technical work, aviation organisations are still holders of multiple approvals and have to meet legal obligations towards multiple civil aviation authorities.

- (3) *Level 3 (Unification level)*: Finally States may want to delegate to a regional body both the conduct of the technical work, and responsibility for the issuance of the certificate/approval confirming that the applicable requirements have been met. Under this option efficiencies are potentially most significant, because it effectively results in centralisation of a given safety function at regional level. There is only one technical process and one approval issued at its end. From the perspective of the aviation industry this is a *one-stop-shop* for obtaining the approvals that they need to provide services on the market.

The most prominent example of a RASO using this type of delegation is EASA in Europe which was addressed in Chapter 4. In 2014 EASA was carrying out the functions and tasks of the State of design, manufacture or registry when related to design approval on behalf of 32 European States, including the competence to perform the technical investigations, as well as to issue type certificates and other aircraft design related approvals. As was demonstrated in the preceding chapter, EASA also has the competence to issue legally binding ADs, as well as to approve certain organisations both in the EU and non-EU countries. It conducts surveillance

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of the Memorandum of Understanding (MoU) signed between the [host State] and the African Civil Aviation Commission (AFCAC) on [Date], to the holder of this credential ....'

<sup>6</sup> JAA would conduct only one technical investigation to establish compliance of an aircraft design with the applicable certification basis. Upon completion of the work, JAA would submit technical recommendations to its member authorities which remained responsible for the issuance of a type certificate, and were also free to add additional technical requirements. For more details see Section 3.4.2 of Chapter 3.

<sup>7</sup> AAMAC is responsible for the 'conduct for the benefit of the Parties, of the technical tasks of certification and surveillance of ASECNA and other providers of air navigation services ... and to provide recommendations for the issuance and follow-up by the Parties of corresponding certificates.' See: 'AAMAC Treaty', *supra* note 62 in Ch.3, Article 6(d).

of approved organisations and can suspend or revoke certificates if their holders are no longer complying with the applicable legislation. Another organisation with similar competences is the IAC (see Section 3.4.3.3 of Chapter 3).

ECCAA is a specific case of a regional body which combines Level 1 and 3 delegations. This is because, although it is a RASO, it is fully empowered to perform the functions of national civil aviation authorities of all its Member States. This is reflected in the civil aviation legislations of ECCAA Member States, which essentially treat it as a national authority and grant to its inspectors the authorisations and powers as if they were national inspectors of each of the States concerned. The main difference between ECCAA and organisations like EASA or IAC is therefore not the *depth* of the delegation but its *breadth* which will be addressed in subsequent paragraphs – while EASA and IAC carry out only *certain* safety functions on behalf of their Member States, ECCAA carries out almost all of these functions, thus effectively becoming a civil aviation authority for all its Member States.

Level 3 delegations currently remain the most important criteria distinguishing the different types of RASOs, as in the internal legal orders of the Member States they shift responsibility for the issuance of certificate / approval or conduct of accident investigation from national to regional level. At the same time it is important to underline, as will be demonstrated in Chapter 6, that from the perspective of the Chicago Convention, States remain ultimately responsible for the carrying out of these safety functions even when Level 3 delegations are used.

The majority of the RASOs from the core sample selected for the purpose of this study enjoy Level 1 or 2 delegations and provide mainly advisory and support services to their Member States not resulting in binding legal effects. At the beginning of 2014 there were only three organisations with delegation actually granted at Level 3 (EASA, IAC and ECCAA). In addition two organisations had the necessary mandate to agree Level 3 delegations with their Member States on a bilateral basis (BAGASO and BAGAIA).

Both the type of a safety function to be delegated and local circumstances have to be taken into account when taking a decision about the level of delegation to be used. For example, while centralisation of aircraft certification may make perfect sense for regions with aeronautical production activities, it may make little sense for small States with limited aeronautical activity. Some functions, such as pilot licensing, may be, because of their local nature, better suited to remain at the national level, unless a single regional aviation authority, such as the ECCAA, is envisaged. In such cases the establishment of RASO local offices may be a good solution to ensure the proximity of the service to the applicants. Alternatively, a regional body may be empowered to outsource some of the technical work back to the national authorities, especially for smaller projects, where local proximity and language issues may play a role.<sup>8</sup> Table V gives an overview of the levels of delegation used by some of the RASOs studied.

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<sup>8</sup> In the EU, the EASA is entitled, through a tendering process, to outsource the technical work it is doing to national aviation authorities or ‘qualified entities’ (essentially commercial entities), if they meet specific safety and quality criteria which is confirmed through an accreditation process. In such cases the EASA continues however to be responsible for the issuance of the certificate / ap-

As far as the method of the delegation is concerned, States use various legal tools and combinations thereof. For Level 3 delegations a legally binding international agreement or an equivalent supranational regulation is needed, as it entails the shift of legal responsibility from national to regional level, and in the case of a safety function provided for by the Chicago Convention also results in a relationship of international agency between the RASO and its Member States (see Section 4.3.2 of Chapter 4). All Level 3 RASOs that were in operation in 2014 were based on such legally binding agreements or regulations. This means that in order to use Level 3 delegation a RASO will have to be set up as either an International Regional Aviation Safety Organisation (RASO Type I) or Supranational Aviation Safety Agency (RASO Type II), from the perspective of the typology proposed in Chapter 3.

With the exception of EASA in the EU, whose founding regulation is part of the domestic legal orders of the EU Member States, there may also be a need for implementing national legislation to make the Level 3 delegation effective (ECCAA, IAC).<sup>9</sup>

**Table V: Level of delegation of State safety functions to selected RASOs**

<b>RASO</b>	<b>Level of delegation</b>
Eastern Caribbean Civil Aviation Authority	Level 3 and Level 1 (acting as unique authority for all the Member States)
European Aviation Safety Agency	Level 3
Interstate Aviation Committee	Level 3 (on the basis of a bilateral arrangement)
Banjul Accord Group Aviation Safety Oversight Organisation	Level 2 (Level 3 on the basis of a bilateral arrangement)
Banjul Accord Group Accident Investigation Agency	Level 2 (Level 3 on the basis of a bilateral arrangement)
East African Community Civil Aviation Safety and Security Oversight Agency	Level 2
Les Autorités Africaines et Malgache de l'Aviation Civile	Level 2
Pacific Aviation Safety Office	Level 1 or Level 2

Some RASOs, such as IAC, BAGAIA and BAGASO, have their Level 3 delegations made conditional upon conclusion of additional bilateral agreements. This may result in a patchwork of delegations, making it much more difficult to achieve a homogenous regional system. States may also establish specific condi-

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proval. See: EASA, 'Guidelines for the allocation of certification tasks to National Aviation Authorities and Qualified Entities', (Decision of the EASA Management Board No 01-2011).

<sup>9</sup> Non-EU European countries which participate in the work of EASA on the basis of Article 66 agreements may also need to enact implementing legislation (See Section 4.5 of Chapter 4).

tions under which Level 3 delegation would take place,<sup>10</sup> or give States the possibility of *opting into* a Level 3 delegation if they consider it useful for them.<sup>11</sup>

For Level 2 delegations, a legally binding legal framework can be used as well, but is not absolutely necessary. This means that a Pre-RASO Type II will be sufficient to enable this type of delegation. The JAA for example was based on a non-binding multilateral arrangement concluded at the authority level, but nevertheless managed to successfully conduct its technical work for many years. The weak point of this solution is lack of a legal obligation on the part of Member States to recognise the validity of the recommendations and findings made by the regional body. The States also need to continue to issue multiple certificates, even if the technical work is centralised. In the EU these drawbacks were important reasons behind the establishment of EASA and dissolution of the JAA, as was explained in Chapter 4. International agreement, on the other hand, although providing for delegation of technical work only, may oblige States to give uniform legal value to the work of a RASO and from this perspective is a better solution to ensure uniformity, as is the case for instance under the AAMAC Treaty, which was addressed under Section 3.4.3.1 of Chapter 3.

Finally in the case of Level 1 delegations, that is authorisations of individual inspectors, a combination of a RASO/pre-RASO founding document and national legislation will be necessary. The founding document does not necessarily have to be a binding international agreement, as is the case with the AFCAC AFICIS MoU, but there is nothing which prevents States from using this type of instrument, especially if functions other than sharing of inspectors are envisaged as well, as is the case for instance with PASO. The use of national law will also be necessary, because otherwise the authorisations of the regional inspectors performing tasks for the national authority will not be valid in the national legal systems.

In addition to the *depth* and the *method* of delegation, the *breadth* of the delegation can also be distinguished. This can be looked at from two perspectives: (1) the *subject matter* of the delegation, and the (2) *type of the function*:

- (1) Concerning the *subject matter*, States need to decide in which domains of civil aviation they intend to empower the regional body. This means domains such as airworthiness, flight operations, personnel licensing, aerodromes, ATM, accident investigation, or even aviation security. The level of delegations, that is 1, 2 or 3, does not necessarily have to be the same for each of the domains. Also, the competence of the regional body may be extended over time, as was the case for example with EASA.

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<sup>10</sup> In the EU, the ANSPs are, par default, under the regulatory responsibility of the national authorities. However, under EU law, in case of organisations providing such services on a pan-European basis, the competent authority is EASA. See: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 22a(c).

<sup>11</sup> In the EU production organisations are, par default, under the responsibility of national authorities. However this responsibility may be transferred to EASA on a voluntary basis. This has been the case with the Airbus company which is a multinational consortium involving France, Germany, United Kingdom and Spain. In this case, the States concerned requested EASA to take over the regulatory competence. As a result, a single production organisation approval has been issued by EASA and covers all facilities of Airbus located in the EU and also abroad, such as in China.



- (2) As far as the *type of the function* is concerned, the crucial observation that emerges from the analysis of the available material is that none of the fourteen organisations from the core sample enjoy legislative functions. This shows that States essentially treat RASOs as technical agencies implementing and enforcing the law but not creating it. This is an approach different from that under traditional national set-ups, where aviation authorities may have a competence to enact legally binding rules of general application.<sup>12</sup> Even EASA in the EU, or ECCAA in the Pacific, does not enjoy legislative competences.

The lack of legislative competences of RASOs also stems from the fact that States, as a matter of principle, very rarely vest international organisations with competence to adopt decisions or regulations which are legally binding for individuals.<sup>13</sup> In those limited cases where they do delegate legislative competences, such as in the EU, this is done within the framework of a REIO with appropriate checks and balances put in place, such as a regional parliament and judicial control of the RASO decisions, if Level 3 delegations have been used. In the case of EASA in the EU and ECCAA in the OECS - the only two RASOs which operate within a framework of supranational organisations with legislative powers - the technical proposals developed by these RASOs have first to be submitted to supranational legislators, that is the European Commission, Council and European Parliament in the EU, and the OECS Authority and Assembly in the OECS, for adoption.<sup>14</sup>

In the case of RSOOs, when executive competences are transferred, such as the power to deliver certificates, States should ensure the possibility of independent judicial review of RSOO decisions. The applicants, in case they have been denied rights, should have the possibility of challenging the decision, similarly to the rights that they would enjoy under a traditional national system.<sup>15</sup>

Finally, regardless of the level, method or breadth of the delegation, the fundamental issue that must be ensured by States when setting up a RASO/pre-RASO, is to clearly delineate the boundaries of responsibility between the regional body and the national authorities. There should be no overlap of competences or regulatory loopholes, as this can result in unintended consequences or even

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<sup>12</sup> This is the case for example in the US where the FAA Administrator has an authority to issue regulations. See: 49 USC, Subtitle I, Paragraph 106 at: US House of Representatives, 'US Code' <<http://uscode.house.gov/browse.xhtml>> [accessed 3 April 2014].

<sup>13</sup> Schermers and Blokker, *supra* note 73 in Ch.4, at pp. 831-832

<sup>14</sup> When in the mid-1990s the EU debated the possibility of establishing EASA on the basis of a self-standing international treaty, some of the EU Member States argued that direct applicability of rules adopted outside the EU framework would require a change of their constitutions and possibly also a referendum. As a result the idea of setting up EASA in the form of an international organisation with legislative powers was abandoned (See Section 4.2.2 of Chapter 4).

<sup>15</sup> In the EU the decisions of EASA, if challenged, are reviewed first by an internal appeal body within the Agency, and then if needed also by the CJEU (See: Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Articles 44-51). In the OECS, the decisions of ECCAA can be subject to an appeal in front of the Eastern Caribbean Supreme Court (see: 'Civil Aviation Act of Grenada', *supra* note 244 in Ch.3, at Section 39; 'Civil Aviation Regulations of Grenada', *supra* note 244 in Ch.3, at Section 92).

non-compliances with the international safety requirements of ICAO, as will be demonstrated under Section 5.4.5 below.

### **5.3 THE FUNCTIONS OF RASOs: SETTING UP A RASO USING A ‘TOOL BOX’ APPROACH**

The purpose of this section is to present, using practical experience of various RASOs/pre-RASOs,<sup>16</sup> concrete examples of the safety functions or tasks that these organisations can perform to the benefit of their Member States and the aviation industry.

The information in this section has been structured along the ICAO eight CEs of State safety oversight, which is an internationally recognised method for discussing safety oversight in civil aviation. It should however not be considered as an exhaustive list of all regional safety functions but as an illustration based on selected examples.

Where relevant, the different types of potential RASO/pre-RASO functions are presented taking into account the three levels of delegation as proposed in the preceding section. Attention is also drawn to the specific points which should be given particular consideration from a legal and organisational point of view, and which are based on experience from real life implementation.

The intention of this section is to serve as a ‘tool-box’, which together with the typology of RASOs/pre-RASOs proposed in Chapter 3, the three levels of delegations developed under the preceding section, and the already existing ICAO RSOO and RAIO manuals could be used by States for setting up RASO/pre-RASO type bodies. In this respect, as pointed out by ICAO:

It is important that States wishing to establish an RSOO commit themselves, at the very beginning of the process, to a strategy that is well defined in terms of the intended purpose and objectives of the organization they wish to establish. The strategy should therefore include a comprehensive analysis of the needs of the States involved.<sup>17</sup>

The table below should help States when making such a determination, by providing them with a *menu* of potential options from which they could choose, taking into account that they should normally focus on ‘those activities that demonstrate a higher impact on regional safety oversight and contribute towards developing an effective aviation safety oversight framework.’<sup>18</sup> Such determination will necessarily involve taking into account the local circumstances and specific needs of both States and the industry.

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<sup>16</sup> This section is primarily based on the analysis of material from three RASO conferences, two of which the author attended as a speaker: ICAO RSOO Symposium (2011), *supra* note 2 in Ch.3; ICAO/AFCAC/EASA, ‘Symposium on regional civil aviation agencies’, (Livingstone, Zambia, 2009); ACAC/ICAO, ‘Seminar/Workshop on Regional Safety Oversight Programmes’, (Rabat, Morocco, 2012).

<sup>17</sup> ICAO Doc. 9734 Part B, *supra* note 3 in Ch.1, at Paragraph 2.2.1.

<sup>18</sup> *Ibid.* at Paragraph 2.2.3.

## CE-1. Primary aviation legislation

*The provision of a comprehensive and effective aviation law consistent with the environment and complexity of the State's aviation activity and compliant with the requirements contained in the Convention on International Civil Aviation.*

Possible types of regional safety functions:	Points of attention:
<u>Level 1/Level 2:</u> Harmonised aviation legislation: RASO/pre-RASO develops generic legislation for submission to States for adoption / transposition (e.g. BA-GASOO, COSCAPs, SRVSOP, CASSOA and JAA);	<ul style="list-style-type: none"> <li>- Possibility of filing differences erodes the uniformity of the regulatory framework and should be avoided.</li> <li>- Uniform regulatory framework is a pre-requisite for enabling region-wide recognition of certificates.</li> <li>- RASO/pre-RASO should centrally track amendments to SARPs, in order to keep the regional regulations ICAO compliant.</li> <li>- RASO/pre-RASO should centrally identify eventual differences with SARPs and help States to notify ICAO in a uniform manner.</li> </ul>
<u>Level 3:</u> Common aviation legislation: Regulations can be adopted through a supranational regional mechanism (e.g. REIO) and be directly binding in a uniform manner in all the participating States (e.g. EU/EASA);	

## CE-2. Specific operating regulations

*The provision of adequate regulations to address, at a minimum, national requirements emanating from the primary aviation legislation and providing for standardized operational procedures, equipment and infrastructures (including safety management and training systems), in conformance with the SARPs contained in the Annexes to the Convention on International Civil Aviation.*

Possible types of regional safety functions:	Points of attention:
<u>Level 1/Level 2:</u> Harmonised operating regulations: RASO/pre-RASO develops generic regulations for submission to States for adoption / transposition (e.g. BA-GASOO, COSCAPs, SRVSOP, CASSOA and JAA);	<ul style="list-style-type: none"> <li>- Possibility of filing differences erodes the uniformity of the regulatory the framework and should be avoided.</li> <li>- Uniform regulatory framework is a pre-requisite for enabling region-wide recognition of certificates.</li> <li>- RASO/pre-RASO should centrally track amendments to SARPs, in order to keep the regional regulations ICAO compliant.</li> <li>- RASO/pre-RASO should centrally identify eventual differences with SARPs and help States to notify ICAO in a uniform manner.</li> <li>- A system of 'hierarchy of texts' should be considered to enable operating regulations to be amended more easily than primary legislation.</li> </ul>
<u>Level 3:</u> Common operating regulations: Operating regulations can be adopted through a supra-national regional mechanism and be directly binding in a uniform manner in all the participating States (e.g. EU/EASA);	

### CE-3. State civil aviation system and safety oversight functions

*The establishment of a Civil Aviation Authority and/or other relevant authorities or government agencies, headed by a Chief Executive Officer, supported by the appropriate and adequate technical and non-technical staff and provided with adequate financial resources. The State authority must have stated safety regulatory functions, objectives and safety policies.*

Possible types of regional safety functions:	Points of attention:
<ul style="list-style-type: none"><li>- Development of a regional safety programme/plan (e.g. EASA);</li><li>- Setting up regional aviation safety teams in partnership with industry (e.g. EASA, COSCAPs);</li><li>- Assisting States in preparation for USOAP audits and addressing follow up actions (e.g. BAGASOO, COSCAPs, SRVSOP, PASO);</li><li>- Setting up common examination systems (e.g. CASSOA);</li><li>- Setting up a regional centre for aviation medicine (e.g. CASSOA);</li><li>- Setting up a regional system for collection and analysis of safety information (e.g. EASA);</li><li>- Coordinating replies to ICAO State Letters (e.g. EASA, BAGASOO);</li></ul>	<ul style="list-style-type: none"><li>- Separation, at least at the functional level, of safety oversight and accident investigation functions, and service provision from regulatory functions;</li><li>- Need to take into account the interdependencies between ICAO State safety functions when transferring the exercise of some of them to the regional level (see Section 5.4.5 below for illustration);</li><li>- States remain ultimately responsible under the Chicago Convention for safety oversight (see Chapter 6);</li></ul>

### CE-4. Technical personnel qualifications and training

*The establishment of minimum knowledge and experience requirements for the technical personnel performing safety oversight functions and the provision of appropriate training to maintain and enhance their competence at the desired level. The training should include initial and recurrent (periodic) training.*

Possible types of regional safety functions:	Points of attention:
<ul style="list-style-type: none"><li>- Joint use and sharing of training facilities (e.g. BAGASOO);</li><li>- Establishment of a regional inspector training programme and training criteria for inspectors (e.g. BAGASOO, SRVSOP, ACSA, COSCAP);</li><li>- Common training database and training planning and recording system (e.g. BAGASOO, SRVSOP);</li></ul>	<ul style="list-style-type: none"><li>- Common inspector training and qualifications should be a prerequisite for setting up a regional inspector sharing scheme, or joint surveillance initiatives such as ramp inspection programmes (e.g. SAFA in the EU);</li></ul>

### CE-5. Technical guidance, tools and provision of safety-critical information

*The provision of technical guidance (including processes and procedures), tools (including facilities and equipment) and safety-critical information, as applicable, to the technical personnel to enable them to perform their safety oversight functions in accordance with established requirements and in a standardized manner. In addition, this includes the provision of technical guidance by the oversight authority to the aviation industry on the implementation of applicable regulations and instructions.*

Possible types of regional safety functions:	Points of attention:
<ul style="list-style-type: none"> <li>- Production of harmonised guidance material, handbooks and checklists for safety inspectors (e.g. EASA, SRVSOP, COSCAP, CAS-SOA);</li> <li>- Setting up regional aviation databases of aircraft, AOC holders, approved maintenance or training organisations (e.g. BAGASOO);</li> </ul>	<ul style="list-style-type: none"> <li>- Harmonised guidance material is important to standardise implementation, which in turn may be a pre-requisite for enabling region-wide recognition of certificates</li> </ul>

#### CE-6. Licensing, certification, authorization and/or approval obligations

*The implementation of processes and procedures to ensure that personnel and organizations performing an aviation activity meet the established requirements before they are allowed to exercise the privileges of a licence, certificate, authorization and/or approval to conduct the relevant aviation activity.*

Possible types of regional safety functions:	Points of attention:
<u>Level 1:</u> <ul style="list-style-type: none"> <li>- Regional inspector sharing schemes (e.g. AFI-CIS, COSCAPs);</li> </ul>	States need to pay attention to the legal status of the RASO/pre-RASO inspectors, which may also be coming from a national aviation authority, during the conduct of safety oversight activity in a Member State. Typical issues to be addressed are: legal authority, credentials and the liability protection of the inspectors.
<u>Level 2:</u> <ul style="list-style-type: none"> <li>- Perform technical tasks of certification on behalf of pre-RASO/RASO States (e.g. JAA, AAMAC, SRVSOP);</li> <li>- Provide certification/surveillance assistance and advice to RASO/pre-RASO States (e.g. PASO, COSCAPs);</li> </ul>	
<u>Level 3:</u> <ul style="list-style-type: none"> <li>- In addition to performing the technical tasks of certification/licensing, RASO can also be authorised to issue the approvals/certificates on behalf of RASO States (e.g. EASA, IAC);</li> <li>- States can delegate to a RASO all their safety oversight functions, effectively creating a regional civil aviation authority (e.g. ECCAA);</li> </ul>	

#### CE-7. Surveillance obligations

*The implementation of processes, such as inspections and audits, to proactively ensure that aviation licence, certificate, authorization and/or approval holders continue to meet the established requirements and function at the level of competency and safety required by the State to undertake an aviation-related activity for which they have been licensed, certified, authorized and/or approved to perform. This includes the surveillance of designated personnel who perform safety oversight functions on behalf of the CAA.*

Possible types of regional safety functions:	Points of attention:
<u>Level 1:</u> Regional inspector sharing schemes (e.g. AFI-CIS,	States need to pay attention to the legal

COSCAPs);	status of the RASO/pre-RASO inspectors, which may also be coming from a national aviation authority, during the conduct of safety oversight activity in a Member State. Typical issues to be addressed are: legal authority, credentials and the liability protection of the inspectors.
<u>Level 2:</u> <ul style="list-style-type: none"> <li>- Perform technical surveillance tasks on behalf of RASO/pre-RASO States (e.g. JAA, AAMAC, SRVSOP);</li> <li>- Provide safety oversight advice to RASO/pre-RASO States (e.g. PASO, COSCAPs);</li> <li>- Setting up regional ramp inspection programmes (e.g. EASA, SRVSOP);</li> <li>- Development of regional safety oversight support tools/software (e.g. EASA, SRVSOP, ACSA);</li> </ul>	
<u>Level 3:</u> <ul style="list-style-type: none"> <li>- In addition to performing the technical surveillance tasks, RASO can also be authorised to issue the approvals/certificates on behalf of RASO States (e.g. EASA, IAC);</li> <li>- States can delegate to a RASO all their safety oversight functions, effectively creating a regional civil aviation authority (e.g. ECCAA)</li> </ul>	

#### **CE-8. Resolution of safety concerns**

*The implementation of processes and procedures to resolve identified deficiencies impacting aviation safety, which may have been residing in the aviation system and have been detected by the regulatory authority or other appropriate bodies.*

<b>Possible types of regional safety functions:</b>	<b>Points of attention:</b>
<u>Level 1/Level 2:</u> <ul style="list-style-type: none"> <li>- Advise and make recommendations to States on actions to be taken in the event that a license or certificate holder fails to correct deficiencies within specified deadlines (e.g. COSCAP, PASO);</li> </ul>	In the absence of a harmonised or common regulatory framework RASO/pre-RASO inspectors may need to be familiar with the enforcement procedures and means of each of the Member States.
<u>Level 3:</u> <ul style="list-style-type: none"> <li>- States may want to delegate to a RASO the authority to take enforcement action. This will be necessary in particular where a RASO is empowered to take legally binding certification decisions (e.g. EASA, IAC);</li> <li>- The RASO may also rely on the enforcement competences already vested in a supranational regional organisation (e.g. EASA/EU);</li> <li>- Where States set up a regional civil aviation authority, the RASO will take over enforcement competences normally exercised by the national authorities (e.g. ECCAA);</li> </ul>	

## **5.4 MAIN TRENDS IN RASO FUNCTIONING AND EVOLUTION**

### **5.4.1 THERE IS NO ‘ONE SIZE FITS ALL’ APPROACH TO RASO ESTABLISHMENT**

The first conclusion that can be reached as regards the overall trends in the establishment of regional aviation safety bodies is that there is no single template that States use in this respect. Although RASOs/pre-RASOs can be classified into certain general types as proposed in Chapter 3, overall the legal and organisational frameworks of these organisations are far from being uniform.

This diversity results in the first place from the fact that the needs of States differ in terms of strengthening their safety oversight and accident investigation capabilities, as well as providing efficiencies for the industry. As a result the RASO/pre-RASO has to be tailored to the circumstances of a particular situation. For example, if there is little aeronautical manufacturing industry in a region, it may make little sense for the States to use their limited resources on establishing an expensive type-certifying agency, and instead to focus on a RSOO which would help them in the oversight of airlines and AMOs.

The solutions chosen by States when setting up a RASO/pre-RASO do not depend on safety considerations alone. Regulating aviation can be a highly political issue, as it is often associated with national sovereignty and strategic interests.<sup>19</sup> So although from a purely technical point of view a solution calling for a safety agency with legal personality and strong executive powers could have a lot of advantages, this may not always be possible because of lack of political will. This reluctance of States to delegate the exercise of competences to an external body is an issue which is brought up quite often by RASOs as an example of practical problems they experience – the 2011 ICAO symposium on RSOOs identified the ‘presence of strong sovereignty issues that could impede regional cooperation’ as one of the obstacles to RSOO establishment.<sup>20</sup> As a result, where a RASO has a mandate to act on behalf of its Member States, in the majority of cases today this is dependent on an additional bilateral arrangement (BAGASOO, BAGAIA, or IAC). Only EASA and the ECCAA have general mandates to act on behalf of their Member States.

RASOs or regional civil aviation safety cooperation schemes more generally also have a clear tendency to evolve over time, as Section 5.4.2 below will demonstrate. Thus an organisation which today has legal personality and exercises safety related competences on behalf of Member States, yesterday could have been only an informal network of civil aviation safety regulators. This evolution has to be taken into account when comparing different organisations at a given moment in time.

Most of the RASOs which were reviewed for the purpose of this study deal only with aviation safety issues. However some of them, in addition to aviation safety, also deal with aviation security, as is the case for instance with PASO, ECCAA and CASSOA.

Finally, so far RASOs have not replaced the national authorities but supplement them. In 2014 there was only one example of a RCAA common for all its Member States, namely the ECCAA.

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<sup>19</sup> Erwin von den Steinen, *National interest and international aviation*, (2006), pp. 1-25.

<sup>20</sup> Outcomes of 2011 RSOO Symposium (C-WP/13810), *supra* note 4 in Ch.1, at Paragraph 2.3.1.

#### 5.4.2 RASOs TEND TO EVOLVE INTO ‘INSTITUTIONALISED’ STRUCTURES

The concept of a regional aviation safety body is not new, with JAA dating back to the 1970s or IAC to 1991. However, the last twelve years can be seen as real boom years for these organisations, especially on the African continent where five of them have been established between 2008 and 2014 (BAGASOO and BAGAIA in 2009, CASSOA in 2007/2008, AAMAC in 2009, and ASSA-AC in 2012).

Overall, nine organisations have been established in the last twelve years (2003-2014), as table VI demonstrates. Even taking into account that some of them evolved from other organisations, this still means that six were established after 2004 (ENCASIA, BAGASOO, BAGAIA, CASSOA, PASO, and ASSA-AC). Overall RASOs/pre-RASOs in existence today are therefore still relatively young organisations.

In addition, in 2014 a number of additional RASO type bodies were planned by States and ICAO. In particular six additional RASOs - two RSOOs and four RAIOS – were planned for the African region,<sup>21</sup> and at least one RSOO and one RAIO were being considered for the States of the ACAC.<sup>22</sup> There were also discussions about a RAIO for Latin America.<sup>23</sup>

Although the institutional frameworks and legal basis of RASOs/pre-RASOs are very varied, it is clear that there is a strong tendency for these organisations to evolve over time into more formal entities. This is especially true for the young organisations. Of the nine RASOs/pre-RASOs established since 2003, six have already undergone an evolution from a less formal into a more formal structure (Table VI).

Some of these organisations, such as CASSOA, are considering further evolution in the future. ICAO also supports and encourages the transition of COSCAPs into RASO type bodies, although this process is still ongoing, as was demonstrated in Section 3.4.1.1 of Chapter 3

Identified examples of the types of evolutions involve: moving from a technical cooperation project (Pre-RASO Type I) into an international regional safety organisation with legal personality (RASO Type I), which was the case for BAGASOO or ASSA-AC; or a network of aviation safety authorities (pre-RASO Type II) evolving into an international regional safety organisation with legal personality (RASO Type I), which was the case for AAMAC. Older organisations demonstrate similar patterns of evolution – for example the JAA (pre-RASO Type II) evolving into EASA (RASO Type II) in Europe.

States establishing RASOs/pre-RASOs generally seem to consider it necessary, or at least useful, for these organisations to have some form of legal personality. In the case of pre-RASOs, a useful way of granting legal personality is to establish an association or foundation under the law of one of the Member States. Out of the fourteen organisations from the core sample, four were established, at a certain point in time, as an association or foundation under private law or evolved from such an association or foundation (JAA/EASA, AAMAC, EUROCONTROL, and Caribbean Aviation Safety and Security Oversight System (CAS-

<sup>21</sup> AFI Plan Steering Committee Report, AFI SC/2013/12, *supra* note 3 in Ch.2, at Appendix B.

<sup>22</sup> ACAC/ICAO seminar on regional safety oversight programmes (2012), *supra* note 16, at 'Summary of Conclusions'.

<sup>23</sup> A38-WP/232, *supra* note 193 in Ch.3.



SOS)/Association of Civil Aviation Authorities of the Caribbean (ACAAC)). In 2014, at least eleven organisations studied had some sort of legal personality.<sup>24</sup>

**Table VI: RASOs /pre-RASOs established since 2003 and their predecessors**

Name of the organisation	Predecessor organisation (if any)
European Network of Civil Aviation Safety Investigation Authorities (2010/2011)	Council of European Air Safety Investigation Authorities (2008)
Banjul Accord Group Aviation Safety Oversight Organisation (2009)	COSCAP - BAG (2004)
Banjul Accord Group Accident Investigation Agency (2009)	none
East African Community Civil Aviation Safety and Security Oversight Agency (2007/2008)	none
Les Autorités Africaines et Malgache de l'Aviation Civile – <i>international organisation</i> (2009)	Les Autorités Africaines et Malgache de l'Aviation Civile – <i>association of regulators</i> (2001)
Pacific Aviation Safety Office (2004/2005)	none
Eastern Caribbean Civil Aviation Authority (2003/2004)	Directorate of Civil Aviation - Eastern Caribbean States (1957)
Caribbean Aviation Safety and Security Oversight System (2008)	Regional Aviation Safety Oversight System of the Caribbean (2001)
Agence de Supervision de la Sécurité Aérienne en Afrique Centrale (2012)	COSCAP-CEMAC (2008)

ICAO supports the transition of less formalised RASOs or pre-RASOs, to more institutionalised regional safety bodies established on the basis of formal legal agreements. According to ICAO, the more formalised types gain better commitment from their Member States, enable better delegation of tasks and functions and provide better for sustainability.<sup>25</sup>

#### **5.4.3 EFFICIENCIES STEMMING FROM A RASO SHOULD NOT BE TAKEN FOR GRANTED**

The primary purpose of this study is not to quantify the efficiencies gained by States as a result of the establishment of a RASO, but to identify the legal and institutional features of RASOs which make these organisations more efficient and allow them to best contribute to the improvement of aviation safety and uniformity of regulations and procedures in civil aviation. Nevertheless, based on a review of experiences involved in establishment and functioning of these organisations, some general observations can also be formulated in respect of their overall effectiveness.

As explained in Chapter 2, the main reason behind the current RASO *boom* is the strong conviction of the international aviation community that these organisations provide a good way of addressing the difficulties experienced by States, in particular those with weak safety oversight systems. RASOs are in par-

<sup>24</sup> For a more detailed overview of the question of RASO legal personality see Chapter 6.

<sup>25</sup> ICAO Doc. 9946, *supra* note 3 in Ch.1, at Forward.

ticular supposed to enable more efficient use of limited resources and be in a better position than national aviation authorities to attract and retain qualified aviation personnel.

Yet, the real life experiences of some of the RASOs and their Member States indicate that such efficiencies and benefits should not be taken for granted. As was demonstrated above, in the vast majority of cases a regional organisation does not replace the national authorities. This means that States may have to finance a regional body in addition to their national aviation authorities. There may even be a need to create new functions, which did not exist before the RASO establishment, such as a regional inspection-standardisation scheme. Where a regional body has not completely taken over at least some of the safety functions from States, both the RASO and the national authorities may be competing to attract similar safety experts from the market.

A technical and legal review of PASO conducted by external auditors in 2007 concluded that:

It should not be assumed that the engagement of PASO's services will result in a reduction in the resources required by the States. On review of some States' responses to USOAP audit findings it was noted that this assumption formed the basis of many of the individual finding responses. There could actually be significant additional resource implications for each of the States in order to achieve the improved safety and security outcomes intended to be achieved.<sup>26</sup>

Similarly, a study conducted by the European Parliament (EP) in 2012 on the impact of the establishment of EASA on the EU's and national budgets, offers, somewhat surprisingly, the following observation:

[T]he centralisation of tasks impacted the national budget in different ways according to the nature of the transferred task. The expected effect of shifting both the responsibility and the execution of some tasks is usually a budget reduction. However, ..., all in all, the impact of the task transfer at national level has been toward an increase in budget pressure with very few exceptions.<sup>27</sup>

The EP study further clarifies that this has been in particular due to the fact that '[t]o comply with the new standard defined by EU regulations ..., some Member States had to invest more in the area of aviation safety.'<sup>28</sup> This is a similar observation to that which was formulated in respect to PASO.

The above indicates that if the additional costs resulting from establishment of a RASO are not offset by efficiencies stemming from its operations, or additional revenues, States may actually be worse off in terms of their overall budgets. If States cannot reduce their costs, whilst at the same time they will need to contribute to the financing of a RASO, this may actually lead to lack of sustainable funding of the latter and putting in danger its operations. This has been the case for example with PASO, which experienced serious financial difficulties due to the lack of contributions from its Member States, as was presented in Section 3.4.3.2 of Chapter 3. Similarly CASSOA reported in 2012 that the lack of a sus-

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<sup>26</sup> PASO Legal and Technical Review Report, *supra* note 86 in Ch.3, at p. 70.

<sup>27</sup> The impact on the EU and national budgets of EU agencies, *supra* note 125 in Ch.4, at p. 75.

<sup>28</sup> *Ibid.* at p. 76.

tainable funding mechanism was affecting its ability to 'execute the planned activities and recruitment and retention of technical personnel'.<sup>29</sup>

The above can be especially true for RASOs which depend on donor support for functioning. As pointed out in 2011 by a representative of the U.S. Department for Transport responsible for the 'Safe Skies for Africa' programme: 'RSOs can be a solution, but much remains to be done to prove that the regional oversight model provides value for donor expenditures and sustainable results for the regions and States that wish to implement them.'<sup>30</sup>

An interview conducted with an official of BAGASOO characterises the problems of African RASOs in the following way:

The main challenge facing RSOs is financing. In most cases it is contributions from States, yet this contribution is left to CAAs to pay. For RSO to attract and retain qualified, skilled personnel, the remuneration must be significantly higher than that of CAAs, otherwise it would be better to work in the CAA as there, the job is more guaranteed. To the extent that the CAAs are the ones paying the contributions directly to sustain the RSOs ... that puts RSOs and its Member States in competition for limited resources.<sup>31</sup>

A similar opinion was expressed by ECCAA, which is, from an organisational point of view, a very efficient form of RASO:

The main challenges facing the ECCAA are managing the increasing costs of providing effective oversight and the recruitment of qualified personnel.<sup>32</sup>

Due to the above, this study recommends that RASOs should be vested, to the largest extent possible, with the competence to exercise safety functions on behalf of States. Only this solution guarantees lack of duplication between the national and regional levels and the desired economies of scale. As pointed out by ICAO:

[T]he major benefits of establishing an RSO can be achieved only if the RSO is enabled to act on behalf of Member States, to the highest possible extent, and if States maintain supervisory control so that the RSO can succeed in enabling them to effectively meet their international obligations.<sup>33</sup>

Strong delegation arrangements are also preferable from a legal point of view, because they are more likely than informal arrangements to ensure uniformity of standards and operating procedures required by the Chicago Convention. Where States just *endeavour* to harmonise their regulations and procedures this will most likely result in national differences and will subsequently make standardisation and cross border recognition of certificates and approvals more

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<sup>29</sup> Regional cooperation for the enhancement of safety oversight: obstacles and lessons learnt, *supra* note 155 in Ch.3.

<sup>30</sup> Cornelia Wilson-Hunter, 'Remarks', ICAO Symposium on Regional Aviation Safety Organisations 2011),

<sup>31</sup> 'Interview No 6', (2014), *supra* note 133 in Ch.3.

<sup>32</sup> 'Interview No 7', (2014), *supra* note 232 in Ch.3.

<sup>33</sup> ICAO Doc. 9734 Part B, *supra* note 3 in Ch.1, at Paragraph 4.1.35.

difficult. This problem was demonstrated in the case of EASA and its predecessor, the JAA, in Chapter 4.

Another reason why regional safety bodies may not provide the desired benefits can be due to duplication between different aviation safety improvement initiatives. For example in Africa some States have multiple memberships in COSCAPs and RASOs, and additional RASO projects are planned which involve overlapping membership, as was demonstrated in Section 3.4.1.1 of Chapter 3. This situation, instead of focusing limited resources spreads them further amongst a number of similar initiatives. In mid-2013 several African States which had been members of RASOs for some years, were also subject to review by ICAO's Monitoring and Assistance Review Board (MARB) which is a body set up to consider the situation in States experiencing serious safety oversight problems.<sup>34</sup> As admitted by AFCAC, this very fact means that 'these regional bodies are not yet as effective as they could be.'<sup>35</sup>

Duplication of structures and inefficiencies resulting from this fact are also evident in Europe, where multiple regional aviation organisations exist in parallel, most of them with overlapping membership, and to a certain extent mandates, as was demonstrated in Chapter 4.

The above does not mean however that delegation should be considered as the *ultimate panacea*, and used by States without prior assessment as to where this would yield maximum benefits. Such assessment is always necessary and its result should primarily depend on a particular situation of States in a given region. As pointed out by an official of BAGASOO: 'RSOO should identify and concentrate its efforts on those activities that are better handled at a regional level.'<sup>36</sup> This has been the case in Europe, where due to the presence of a large aeronautical manufacturing industry, the main impetus behind the establishment of EASA has been the regionalisation of certification and oversight functions incumbent upon a 'State of Design', as was demonstrated in Chapter 4.

#### **5.4.4 IMPLICATIONS OF INSTITUTIONAL CHOICES FOR THE FUNCTIONING OF RASOs**

Legal issues, while important in their own right, generally prove not to be an obstacle in the process of establishing a RASO/pre-RASO. At the same time it is crucial that, when States consider establishing such an organisation, or undertake its evolution, they fully understand the consequences of their legal and institutional choices.

Reaching such an understanding can be greatly assisted by organising the whole process of establishing a regional body in a structured way. The *tool-box* approach proposed under Section 5.3 above could help to achieve the most appropriate combination, given the specific needs of States. A similar approach was used in the EU during the initial EASA establishment process, in which States first created a list of potential functions and tasks, such as rulemaking, certifica-

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<sup>34</sup> In march 2013 these were: Benin, Cameroon, Central African Republic, Chad, Comoros, Congo, Equatorial Guinea, Gabon, Guinea Bissau, Madagascar, Mali, Mauretania (Member States of AAMAC); Guinea, Liberia, Sierra Leone (Member States of BAGASOO); and Rwanda (Member State of CASSOA). See: ICAO, 'ICAO plans of action for States under the review of the MARB', AFI Plan-SC/2013/11-DP/02, (11th AFI Plan Steering Committee, 2013).

<sup>35</sup> A37-WP/166, *supra* note 220 in Ch.2, at Paragraph 2.2.

<sup>36</sup> 'Interview No 6', (2014), *supra* note 133 in Ch.3.

tion, standardisation, and then considered the implications of the different institutional solutions on each of them.<sup>37</sup>

In terms of legal tools used to establish a RASO, the tendency that can be observed is that States are inclined, more and more often, to use legally binding instruments - mainly international agreements. This can be associated with the overall tendency of the regional safety bodies to evolve into more formal structures, as was demonstrated under Section 5.4.2 above.

As a consequence of the trend to use legally binding instruments, organisations based on MoUs, working arrangements or private law associations have almost completely disappeared. In 2014 only one of the fourteen organisations from the core sample was based on a non-binding legal instrument, namely the SRVSOP, as opposed to six in the previous decade.<sup>38</sup> Non-binding instruments continue to be used for specific cooperation projects such as regional inspector schemes. Table VII gives an overview of the legal instruments which were used to establish the presently functioning RASOs/pre-RASOs.

**Table VII: Legal instruments used to establish RASOs/pre-RASOs**

Supranational regulation	International agreement	Working Arrangement - MoU
<ul style="list-style-type: none"> <li>- European Aviation Safety Agency (EU regulation of 2002);</li> <li>- European Network of Civil Aviation Safety Investigation Authorities (EU regulation of 2010 combined with a private law association);</li> </ul>	<ul style="list-style-type: none"> <li>- The European Organisation for the safety of air navigation: EUROCONTROL (agreement of 1963, as variously amended);</li> <li>- InterState Aviation Committee (agreement of 1991);</li> <li>- Banjul Accord Group Aviation Safety Oversight Organisation (agreement of 2009);</li> <li>- Banjul Accord Group Accident Investigation Agency (agreement of 2009);</li> <li>- East African Community Civil Aviation Safety and Security Oversight Agency (Agreement of 2007);</li> <li>- Les Autorités Africaines et Malgache de l'Aviation Civile (agreement of 2009) ;</li> <li>- Pacific Aviation Safety Office (agreement of 2004);</li> <li>- Eastern Caribbean Civil Aviation Authority (agreement of 2003)</li> <li>- Caribbean Aviation Safety and</li> </ul>	<ul style="list-style-type: none"> <li>- Regional Cooperation System on Safety Oversight in Latin America (ICAO – LACAC MoU of 1<sup>st</sup> October 1998)</li> </ul>

<sup>37</sup> Working papers tabled at the aviation working group of the Council in the context of the discussions on the establishment of EASA in the years 1996-1998 (Archives of the EU Council, Brussels).

<sup>38</sup> In addition, ENCASIA is based on a combination of a legally binding EU regulation and an association established under Belgian law (*supra* note 219 in Ch.3).

	Security Oversight System (agreement of 2008); - Agencia Centroamérica para la Seguridad Aeronáutica (agreement of 1960, and a ministerial decision of 2000); - Agence de Supervision de la Sécurité Aérienne en Afrique Centrale (protocol adopted by chiefs of CEMAC States in 2012)	
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This study also recommends the use of legally binding instruments, such as appropriately internalised international agreements, or supranational acts creating direct legal effects, due to the fact that they are essential to enable Level 3 delegations, and by providing for legal personality of RASOs eliminate the need for establishing additional associations or foundations under private law.

As was demonstrated in the preceding chapter, in Europe, the EU developed a special legal method for associating non-EU countries into its aviation safety framework, including EASA. Under this method, international agreements are used to extend the EU aviation safety legislation to neighbouring countries, as well as to enable the delegation of safety functions by those countries to EASA. Upon transposition of the EU aviation safety legislation into their national legal systems, the partner countries acquire status similar to EU Member States. This means that their certificates benefit from recognition in the EU system, they can participate in the work of EASA, albeit without the right to vote, and are subject to EASA standardisation inspections. In 2014 four non-EU States had already been fully associated in such a manner, while a number of others were on the way to acquiring a full association status, as was explained in Section 4.5 of Chapter 4.

#### **5.4.5 RASOs AS PART OF THE CIVIL AVIATION SAFETY SYSTEM OF THEIR MEMBER STATES**

A RASO should be considered, similar to a national civil aviation authority or aviation accident investigation body, as part of the civil aviation safety system of its Member States, and RASO functions should be fully integrated into that system. This is not always obvious, as at the national level all State safety functions envisaged under the system of the Chicago Convention are maintained within a single regulatory framework and under the responsibility of one government. When one or more of those functions is *taken out* of the national framework and transferred to the regional level some essential links may be lost.

For example, even after establishing a RASO, States will continue to be subject to ICAO USOAP, which is of a universal character. In this respect, States have to be mindful that even though the ICAO findings will be formally raised against them, it may be up to a RASO to address these findings from a practical point of view, which will require close coordination between States and their RASO. This coordination can sometimes be a complex undertaking, as a single State may not necessarily have full control over the way remedial actions are developed and put into effect. For example, if ICAO findings require a change in legislation, a collective action of all the States may be needed, or, as is the case in the EU, the

additional involvement of the supranational legislator acting on the basis of EASA's technical recommendation.

In the case of certain Level 3 delegations, ICAO may have to audit a RASO, in addition to its Member States. In this case, if there are any findings raised against the RASO, ICAO will link them with the States' USOAP reports, based on the understanding that they ultimately remain responsible for compliance with ICAO requirements.<sup>39</sup>

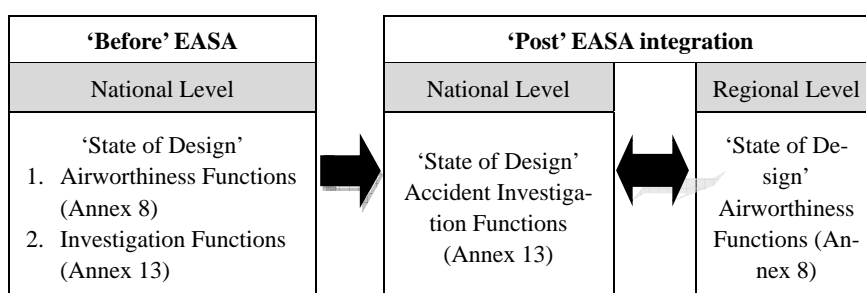
Another aspect that States have to bear in mind is the notification of differences to ICAO in case of non-compliance with SARPs. Such notification is an obligation of every State party to the Chicago Convention, as Chapter 2 explained. If a regional system is based on a harmonised or single set of regulations, such notifications will only make sense if they are done in a uniform manner for all the States concerned. In such case, States should ensure that their RASO plays a co-ordinating role, reviewing ICAO SARPs on a regular basis and providing Member States with recommendations for notification.

#### 5.4.5.1 UNINTENDED CONSEQUENCES RELATED TO THE ESTABLISHMENT OF A RASO

The necessity to look at RASOs holistically and as an integral part of States' civil aviation safety system can be very well illustrated with a practical example taken from the EU, and which is related to the functions assigned by ICAO Annexes to the 'State of Design'.

With the establishment of EASA in 2003, EU Member States delegated to this agency the functions and tasks of the 'State of Design' as envisaged under the system of the Chicago Convention.<sup>40</sup> This was however not a complete transfer of all the functions of the 'State of Design', but only of those related to aircraft airworthiness, including aircraft design approval and follow up of its continuing airworthiness, as addressed in Annex 8 to the Chicago Convention. Given the fact that EASA is not an air accident investigation agency, the functions of the 'State of Design' associated with air accident investigations, which are covered by Annex 13 to the Chicago Convention, remained at the national level. This relationship is illustrated by Figure XIV.

**Figure XIV: Transfer of State safety functions from a national to a regional level**



<sup>39</sup> See for example: ICAO USOAP report on EASA (2008), *supra* note 92 in Ch.4, at Paragraph 1.1.9.

<sup>40</sup> Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 20(1).

When in 2008 ICAO assessed EASA under USOAP it raised a finding against the agency in respect to lack of formal agreements with EU Member States regarding:

[T]he modalities and status of participation of representatives of EASA and representatives of Member States' bodies in accident and serious incident investigations involving aircraft whose type certificate is delivered by EASA.<sup>41</sup>

This finding was resolved only after the adoption by the EU of a regulation defining the rights and obligations of EASA as a participant in air accident investigations.<sup>42</sup> The regulation was adopted following unsuccessful attempts by EASA and EU Member States to address this issue through non-legislative measures, and in the wake of a number of cases where EASA had been denied the right to participate in an investigation by some of the EU air accident investigation authorities.<sup>43</sup>

Follow-up of safety recommendations resulting from air accident investigations is yet another example where a vital link may be lost when State safety functions are moved from a national to regional level. This is because when a RSOO, such as EASA, has been vested with actual regulatory competences, accident investigation bodies should consider it as a potential addressee of safety recommendations, and the RSOO should be bound by Annex 13 responsibilities applicable to such addressees, including as regards the obligation to analyse and reply to a safety recommendation within a prescribed deadline.<sup>44</sup>

At the same time, the implementation of safety recommendations coming from air accident investigation bodies may become more complex at the regional level. This is because where States have agreed that their rulemaking competences will be exercised collectively, they may need to activate the regional machinery in order to address a particular recommendation.<sup>45</sup>

## 5.5 RASOs AS INTERNATIONAL ACTORS

RASOs actively participate in international aviation relations, including ICAO sponsored activities, international conferences and symposia.<sup>46</sup> Especially after the adoption by ICAO of its new policy on cooperation with regional organisations and bodies, the international aviation community has become well aware of RASOs' existence. At the same time RASOs cannot, at present, be parties to the Chicago Convention which is open for membership of States only.<sup>47</sup>

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<sup>41</sup> ICAO USOAP report on EASA (2008), *supra* note 92 in Ch.4, Audit Finding ORG/01.

<sup>42</sup> Regulation (EU) No 996/2010, *supra* note 180 in Ch.3, Article 8.

<sup>43</sup> EC Impact Assessment COM(2009) 611 final, *supra* note 171 in Ch.3, at Paragraph 3.4.1.1.

<sup>44</sup> Annex 13 to the Chicago Convention, at Paragraph 6.10.

<sup>45</sup> For example on 1 April 2011 EASA initiated a rulemaking task concerning airworthiness and operational aspects for maintenance check flights (Task No MDM.097 (a)&(b)), which results from recommendations issued by Bureau d'Enquêtes et d'Analyses in the aftermath of an accident of Airbus A320-232 aircraft operated by XL Airways Germany and which occurred on 27 November 2008 off the coast of Canet-Plage (France). See: EASA, 'Terms of Reference (ToRs) and Group Compositions (GCs)' <<http://www.easa.europa.eu/document-library/terms-of-reference-and-group-compositions/rmt0589>> [accessed 10 August 2014].

<sup>46</sup> *Supra* note 16.

<sup>47</sup> 'Chicago Convention', Articles 92-93.



From an international law point of view, as was demonstrated under Section 5.4.4, the majority of RASOs are set up by international agreements or supranational law. Even though not all the treaties explicitly provide for it, those RASOs that are created by international agreements can be considered as international organisations, or in some cases as treaty organs,<sup>48</sup> as they are governed by international law. EASA is a specific case of an EU agency, and is not considered as an international organisation but as a body governed by public EU law, as was explained in Chapter 4.<sup>49</sup>

The international agreements establishing RASOs are not always clear whether the organisation in question is vested with international legal personality. This is not a unique situation, as 'constitutions of most international organizations lack explicit provisions on the legal status of the organization under international law.'<sup>50</sup> In the core sample of RASOs, only two out of eleven international agreements, that is the AAMAC Treaty and PICCAST, explicitly provide that the RASO has international legal personality. In practice this may not be a significant problem as 'many organisations can be seen to perform international legal activities despite the absence of an explicit grant of personality.'<sup>51</sup> What is important therefore is to analyse internationally relevant RASO activities, which means activities which derive their origin or have consequences under international law.

The first observation that has to be made in this respect is that some RASOs enjoy a limited degree of treaty making powers, which are functionally oriented. Most often RASOs are authorised to conclude headquarters agreements.<sup>52</sup> In addition, as was already explained above, some RASOs, such as IAC, BAGASOO or BAGAIA can conclude delegation agreements with their Member States.

Only organisations enjoying 'Level 3' delegations are designated by their Member States for the purpose of executing international agreements. Two examples can be given in this respect: (1) Agreement between the Government of the Russian Federation and the Government of the United States of America for the Promotion of Aviation Safety of 1998,<sup>53</sup> and (2) the Agreement between the United States of America and the European Community on cooperation in the regulation of civil aviation safety.<sup>54</sup> Under these agreements the IAC and EASA were designated as technical agents of the Russian Federation and of the EU respectively, for the purpose of the implementation of these agreements. In the first case, the

<sup>48</sup> This is the case for example with IAC, which is a 'standing executive body' of the 'Minsk Agreement', *supra* note 103 in Ch.3, Article 8. IAC considers itself as an international organisation, see: AIG/08-WP/22, *supra* note 189 in Ch.3, at Paragraph 2.1. In practice the distinction between an international organization and a treaty organ is not so important, as demonstrated by: Klabbers, *supra* note 73 in Ch.4, at p.9.

<sup>49</sup> Regulation (EU) No 216/2008, *supra* note 81 in Ch.2, Article 28.

<sup>50</sup> Schermers and Blokker, *supra* note 73 in Ch.4, at p. 988.

<sup>51</sup> Klabbers, *supra* note 73 in Ch.4, at p. 51.

<sup>52</sup> The conclusion of headquarters agreements are explicitly envisaged in the constituent documents of BAGASOO, BAGAIA, AAMAC and CASSOS. However headquarters agreements can be sometimes concluded also by RASOs which do not have this competence explicitly envisaged in their founding documents, which is the case for example with IAC.

<sup>53</sup> 'Agreement between the government of the Russian Federation and the Government of the United States of America for the promotion of aviation safety', (Moscow, 1998), <[www.faa.gov/aircraft/air\\_cert/international/bilateral\\_agreements/baa\\_basa\\_listing/media/RussiaEA.pdf](http://www.faa.gov/aircraft/air_cert/international/bilateral_agreements/baa_basa_listing/media/RussiaEA.pdf)> [accessed 10 August 2014].

<sup>54</sup> 'EU-US BASA', *supra* note 97 in Ch.2.

agreement explicitly States that 'the IAC shall act under the authority and on behalf of the Government of the Russian Federation.'<sup>55</sup>

Under both of the above mentioned agreements, EASA and IAC are authorised to conclude with the FAA more detailed implementation procedures. Under these implementation procedures 'the IAC designates the Aviation Register of the IAC as its executive agent to carry out these Implementation Procedures.'<sup>56</sup> This was possible because of the independent legal standing of the different IAC committees under the Minsk Agreement, which in this case extends to international law.<sup>57</sup>

As was demonstrated on the case of EASA in Chapter 4, where States grant to a RASO Level 3 delegations in respect of aviation safety functions which are governed by the Chicago Convention, this will result in the establishment of an international agency relationship between a RASO and its Member States. As a consequence, Level 3 RASOs will enjoy a degree of international legal personality which is necessary to exercise these delegations.

In addition to executing international agreements, RASOs can also be authorised to conclude, within the scope of their competence, technical working arrangements. Such working arrangements are of a technical nature only and do not create legally binding effects for third parties. As a result, their scope of application is limited to issues which concern the working procedures of the RASO. The 2004 working arrangement between IAC and EASA can be given as an example of an arrangement concluded by two RSOOs carrying out executive tasks on behalf of their Member States.<sup>58</sup>

## 5.6 GENERAL CONCLUSIONS

It is clear that States do not follow a *one-size-fits-all* approach to establishing RASOs. This results from the fact that the needs of States in terms of strengthening their safety oversight or accident investigation capabilities differ, and therefore regional cooperation initiatives have to be tailored to the circumstances of a particular situation.

Political considerations also play a role when decisions are taken by States regarding the form of the RASO to be set-up.

Although the RASO concept is not entirely new, based on the analysis of the latest information, it is evident that the last twelve years have been real boom years for these organisations. Of the core sample of fourteen RASOs reviewed for the purpose of this study, nine have been established in the last twelve years. Even taking into account that some of them evolved from other organisations, this still

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<sup>55</sup> US-Russian Federation BASA, *supra* note 53, Article 1.D.

<sup>56</sup> 'Implementation procedures for design approval, production activities, export airworthiness approval, post design approval activities, and technical assistance between authorities, done under the Agreement between the Government of the United States of America and the Government of the Russian Federation for Promotion of aviation safety', (1998), <[https://www.faa.gov/aircraft/air\\_cert/international/bilateral\\_agreements/baa\\_basa\\_listing/media/RussiaIPA.pdf](https://www.faa.gov/aircraft/air_cert/international/bilateral_agreements/baa_basa_listing/media/RussiaIPA.pdf)> [accessed 10 August 2014], Section I (1.0).

<sup>57</sup> See Section 3.4.3.3 of Chapter 3.

<sup>58</sup> EASA, 'Working Arrangement on Airworthiness between the European Aviation Safety Agency and the Interstate Aviation Committee', (St. Petersburg, 2004), <[http://www.easa.europa.eu/system/files/dfu/intl\\_appro\\_IAC\\_EASA.pdf](http://www.easa.europa.eu/system/files/dfu/intl_appro_IAC_EASA.pdf)> [accessed 10 August 2014].

means that six of the fourteen were only established after 2004. In addition, based on the available information about the projects which were being considered in 2014 by States and ICAO, more of such organisations can be expected to be set up in the coming years. According to ICAO, in Africa alone it is envisaged to have an additional six RASO type organisations established in the coming years.

This clear trend towards increasing regionalisation of civil aviation safety oversight and accident investigation functions is a demonstration of the strong conviction of the international civil aviation community about RASOs' contribution to the improvement of civil aviation safety, worldwide harmonisation of standards, and cost-effectiveness of regulatory functions.

This study argues that, because of the above mentioned trend, it is important to collect and analyse the experience coming from RASO functioning so that it can be used to optimise their performance and help future organisations in avoiding some of the mistakes made by their predecessors. In this respect, whilst the findings of this chapter in principle confirmed that RASOs can bring benefits expected from them by the international aviation community, it is also clear from the existing experience that such benefits should not be taken for granted. Some of the RASOs experienced problems related to their sustainability and this aspect of RASOs functioning clearly requires further research in the future.

One of the principal reasons why RASOs which are in operation today are probably not as efficient as they could be is the fact that, in a vast majority of cases, they do not replace national authorities but supplement them. In 2014 there was only one example of a true RCAA, which acts as an aviation authority for multiple States.

The fact that RASOs generally do not replace national authorities, means that there may be additional costs for States deriving from their establishment which need to be offset by economies of scale and more efficient regulatory processes. Existing experience also shows that RASOs may be competing with States for aviation experts, especially if State safety functions continue to be exercised by the national authorities with parallel support of a RASO. This chapter identified at least two sources stating that 'these regional bodies are not yet as effective as they could be'.

Whilst it would not be realistic to expect that many RASOs be set up in the form of a RCAA due to the strong sovereignty issues which States associate with civil aviation oversight and regulatory functions, existing State experience and ICAO guidance shows that RASO efficiencies are strongest when safety functions are pooled at a regional level. This is because such pooling allows duplication with the national level to be avoided and makes functions such as certification or rulemaking more cost efficient through economies of scale. At the same time, regulatory centralisation at regional level is not an obstacle to local implementation, as the example of ECCAA, which operates with a network of local outstations, shows.

In order to assist States in choosing the best method and type of delegation, this chapter proposed to classify delegation arrangements into three levels:

- (1) *Level 1* (Coordination level), under which States authorise individual inspectors of a regional body to perform audits, inspections and other oversight or investigative work on their behalf;
- (2) *Level 2* (Harmonisation level) which goes beyond authorisation of individuals only, and entails a delegation to a regional body, as an organ-

isation, of the competence to perform specific technical work on behalf of its Member States or member authorities;

- (3) *Level 3* (Unification level) under which States delegate to a regional body both the conduct of the technical work, and responsibility for the issuance of the certificate/approval confirming that the applicable requirements have been met.

This chapter found that, despite the benefits of centralisation of safety functions at RASO level, the delegation of not only technical work but also legal responsibility (Level 3) is still quite rare. In 2014 there were only three RASOs which enjoyed such a level of delegation, while the majority of the RASOs studied provided mainly advisory and support services to their Member States which do not result in legally binding legal effects.

At the same time a tendency can be observed of RASOs gradually evolving into more institutionalised structures, which means towards organisations set up on the basis of international agreements and having legal personality. In 2014, twelve of the fourteen RASOs studied had some sort of legal personality, and only one of the fourteen organisations was based on a non-binding legal instrument as opposed to six in the previous decade.

The fact that RASOs evolve over time into organisations based on international law and having legal personality strengthens their mandate and allows them to accept more advanced levels of delegations of safety functions from their Member States. This is an important trend from the point of view of civil aviation safety and regulatory efficiency, given the identified correlation between the level of delegation of safety oversight tasks to RASOs and the resulting dividends for States in terms of efficiency of the regulatory processes and the effective use of resources. From the perspective of the main proposition of this study, that is the proposal for a GASON, this evolution also means that RASOs are overall moving towards forms which make them better suited to take the role of effective GASON building blocks.

In order to assist States in setting up RASO type bodies, this chapter reviewed practical examples of the different safety functions that these bodies perform and structured them along the eight ICAO CEs of State safety oversight. This *tool-box* approach provides States with a menu of potential options from which they could choose, taking into account that, as advocated by ICAO, when setting up RASOs, States should focus on ‘those activities that demonstrate a higher impact on regional safety oversight and contribute towards developing an effective aviation safety oversight framework’.<sup>59</sup>

When analysing the different safety functions exercised by RASOs, this chapter also found that none of the organisations enjoy legislative functions. This demonstrates that States essentially treat RASOs as technical agencies implementing and enforcing the law but not creating it.

Another finding of this chapter was that a RASO should be considered as part of the overall civil aviation safety system of its Member States, and that RASO functions should be fully integrated into that system. This is because when one or more State safety functions is *taken out* of the national framework and transferred to the regional level, some essential safety links may be lost, as was

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<sup>59</sup> ICAO Doc. 9734 Part B, *supra* note 3 in Ch.1, at Paragraph 2.2.1.

demonstrated by the example of the transfer of ‘State of Design’ functions in the context of EASA in the EU.

Finally this chapter addressed the role of RASOs as international actors. In this respect it was found that RASOs are now well-established and recognised on the international level, and that some of them may enjoy competences to act under international law. In particular RASOs can have treaty-making powers, including the competence to conclude headquarters and delegation agreements with their Member States. In addition, organisations enjoying Level 3 delegations can be authorised to act as authorised representatives of States for the purpose of executing international aviation safety agreements.

The legal standing of RASOs under international law and the delegation of the exercise of State safety functions to RASOs may also have consequences in terms of international responsibility and civil liability for wrongful acts in relation to the Member States of the RASO, third countries, as well as the regional body itself. This issue will be the subject matter of the following chapter of this study.