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Private Operations

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GENERAL

Jersey Aviation Circulars are issued to provide advice, guidance and information on standards, practices and procedures necessary to support Jersey Aviation Requirements. They are not in themselves law but may amplify a provision of the Air Navigation (Jersey) Law or provide practical guidance on meeting a requirement contained in the Jersey Aviation Requirements.

PURPOSE

This Jersey Aviation Circular provides guidance on the type of operations that constitute Commercial Air Transport operations and those that can be classified as Private operations under the Air Navigation (Jersey) Law 2014.

RELATED REQUIREMENTS

This Circular relates to JAR Parts 61, 39, 91 and 125.

CHANGE INFORMATION

Third issue, which introduces changes arising from the Air Navigation (Jersey) Law 2014, including article numbers, definitions of crew, task specialist and operator, and an additional exception for the carriage of persons on aerial work flights.

ENQUIRIES

Enquiries regarding the content of this Circular should be addressed to the Director of Civil Aviation at www.cidca.aero or <https://www.gov.je/Travel/MaritimeAviation/CivilAviation/pages/officedirector.aspx>

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1 Introduction

- 1.1 This Circular is intended to increase awareness and understanding of legislation as it relates to commercial air transport.
- 1.2 There is often a general perception that if an aircraft is carrying passengers who are not making any payment this constitutes a private flight and is not subject to any of the requirements in the Air Navigation (Jersey) Law 2014 (“the Law”) relating to commercial air transport. This is far from being the case, particularly if the aircraft concerned is normally operated under an Air Operator Certificate (AOC) and/or under the control of an air transport undertaking.
- 1.3 The distinction between commercial air transport and private aviation is based on expectations and the ability to accept risk. Where a person is in substance paying another to carry him as a passenger on that aircraft, he is entitled to expect the highest standards. The law provides for this by requiring the operator to have an AOC and to comply with the relevant commercial air transport requirements.
- 1.4 An individual is entitled to take risks that he can understand and appreciate. These principles are reflected in aviation law by focusing on the pilot and the operator. It is the pilot and the operator who can be taken to understand the risks associated with a flight; the passenger may not.
- 1.5 If someone, who does not hold an AOC, uses their own aircraft to take some friends for a free ride then such a flight may be considered to be private. It is possible even for those passengers to contribute to the actual costs of the flight under certain circumstances without it becoming a commercial transport flight (see 4.2 Exception 3 below). However, the situation is complex and each case merits careful consideration.
- 1.6 This Circular contains a summary of the law; it is the text of the legislation that must be relied upon and only a Court can provide an authoritative interpretation.

2 Meanings of Commercial Air Transport and Aerial Work

The general rules relating to commercial air transport and aerial work are defined in Part 23 Article 156 and Part 13 Article 96 of the Law. Seven exceptions to those general rules are then established in articles 157 to 163.

2.1 Aerial Work (Part 13 Article 96 (1) Part 23 Article 156)

A flight is for the purpose of aerial work if payment or valuable consideration is given or promised in respect of the flight or for the purpose of the flight, unless the flight is in fact for the purpose of commercial air transport (see 2.2 below).

Under Part 23 Article 156, if the only payment involved is the payment to the pilot, the flight is deemed to be private for airworthiness purposes, although it will still be aerial work for other purposes, e.g. flight crew licensing. This enables a private aircraft owner to pay a flying instructor for a flying lesson in his own aircraft.

3 How to decide whether a flight is commercial air transport

- 3.1 To determine whether or not a flight is for the purpose of commercial air transport of passengers, the first question is **whether or not there are any passengers on board**. This is not always entirely straightforward as an occupant may claim to be a member of the crew or an employee of the aircraft operator.
- 3.2 Having determined that there is at least one passenger on board, the next question is **whether any payment has been given or promised which, if it had not been given or promised would mean that the passenger(s) would not have been carried**. If there is any payment which could fall into this category, consider what would have happened if the passenger had presented himself for carriage and announced that such a payment would not now be made. Would he still be carried?
- 3.3 If passengers are carried but there appears to be no payment for their carriage, it will be necessary to consider whether the operator is an air transport undertaking. If it is, even gratuitous carriage will be commercial air transport, subject only to the exceptions referred to in article 156 (1b), i.e. for employees of the operator and authorised persons making inspections or carrying out tests.
- 3.4 Even if no passenger is carried or there is no payment for the carriage of passengers or cargo (and the operator is not an air transport undertaking) a flight may of course still be aerial work (see paragraph 2.1 above).

4 Exceptions

4.1 Costs

Articles 157 to 161 set out seven exceptions to the general rules and these are summarised below, but first there are two important definitions. Direct costs and annual costs are defined in Part 1 Article 1 of the Law but in summary:

Direct costs means the costs actually and necessarily incurred in connection with a flight without a view to profit but excluding any remuneration payable to the pilot for his services as such

Annual cost means in relation to the operation of an aircraft means the best estimate reasonably practicable at the time of a particular flight in respect of the year commencing on the first day of January preceding the date of the flight of the costs of keeping and maintaining, and the indirect costs of operating, the aircraft, such costs in either case excluding direct costs and being those actually and necessarily incurred without a view to profit;

There must be no element of profit in either direct or annual costs.

4.2 The 7 Exceptions

Exception 1 – Flying displays (Article 157)

the flight is –

- (i) wholly or principally for the purpose of taking part in an aircraft race, contest or flying display,

- (ii) for the purpose of positioning the aircraft for such a flight as is specified in clause (i) and is made with the intention of carrying out such a flight, or
 - (iii) for the purpose of returning after such a flight as is specified in clause (i) to a place at which the aircraft is usually based; and
- (b) the only valuable consideration in respect of the flight or the purpose of the flight other than –
- (i) valuable consideration specified in Article 156(1)(c), or
 - (ii) in the case of an aircraft jointly owned in accordance with Article 161(2), valuable consideration which falls within Article 161(3),
- falls within paragraph (2)(a) or (2)(b) or both.
- (2) Valuable consideration falls within this Article if it either is –
- (a) given or promised to the owner or operator of an aircraft taking part in such a race, contest or flying display does not exceed the direct costs of the flight and a contribution to the annual costs of the aircraft, such contribution bearing no greater proportion to the total annual costs of the aircraft than the duration of the flight bears to the annual flying hours of the aircraft; or
 - (b) one or more prizes awarded to the pilot-in-command of an aircraft taking part in an aircraft race or contest to a value which shall not exceed £500 in respect of any one race or contest except with the permission in writing of the Director granted to the organizer of the race or contest, such permission being granted subject to such conditions as the Director thinks fit.
- (3) Any prize falling within paragraph (2)(b) shall be deemed for the purposes of this Law not to constitute remuneration for services as a pilot.

Exception 2 – Charity flights (article 197)

- (1) A flight is deemed to be a private flight if the only valuable consideration given or promised in respect of the flight or the purpose of the flight other than –
- (a) valuable consideration specified in Article 156(1)(c); or
 - (b) in the case of an aircraft owned in accordance with Article 161(2), valuable consideration which falls within Article 161(3),
- is given or promised to a charity which is not the operator of the aircraft and the flight is made with the permission in writing of the Director and in accordance with any conditions therein specified.
- (2) If valuable consideration specified in Article 156(1)(c) is given or promised the flight is, for the purposes of Part 3 (other than for Articles 16(2) and 17(2)), deemed to be for the purposes of commercial air transport.

Exception 3 – Cost sharing (article 159)

- (1) A flight is deemed to be a private flight if the only valuable consideration given or promised in respect of the flight or the purpose of the flight falls within paragraph (2) and the criteria in paragraph (3) are satisfied.
- (2) Valuable consideration falls within this Article if it is –
 - (a) valuable consideration specified in Article 156(1)(c).
 - (b) in the case of an aircraft owned in accordance with Article 161(2), valuable consideration which falls within Article 161(3); or
 - (c) a contribution to the direct costs of the flight otherwise payable by the pilot-in-command.
- (3) The criteria for the purposes of paragraph (1) are that –
 - (a) no more than 4 persons (including the pilot) are carried on such a flight.
 - (b) the proportion which the contribution referred to in paragraph (2)(c) bears to the total direct costs of the flight does not exceed the proportion which the number of persons carried on the flight (excluding the pilot) bears to the number of persons carried on the flight (including the pilot);
 - (c) no information concerning the flight has been published or advertised prior to the commencement of the flight other than, in the case of an aircraft operated by a flying club, advertising wholly within the premises of such a flying club in which case all the persons carried on such a flight who are aged 18 years or over must be members of that flying club; and
 - (d) no person acting as a pilot on such a flight shall be employed as a pilot by or be a party to a contract for the provision of services as a pilot with the operator of the aircraft being flown on the flight.
- (4) If valuable consideration specified in Article 156(1)(c) is given or promised the flight is, for the purposes of Part 3 (other than for Articles 16(2) and 17(2)), deemed to be for the purposes of commercial air transport.

Exception 4 – Recovery of direct costs (Article 160)

- (1) A flight is deemed to be a private flight if the only valuable consideration given or promised in respect of the flight or the purpose of the flight other than –
 - (a) valuable consideration specified in Article 156(1)(c); or
 - (b) in the case of an aircraft owned in accordance with Article 161(2), valuable consideration which fails within Article 161(3),

is the payment of the whole or part of the direct costs otherwise payable by the pilot-in-command by or on behalf of the employer of the pilot-in-command, or by or on behalf of a body corporate of which the pilot-in-command is a director, provided that neither the pilot-in-command nor any other person who is carried is legally obliged, whether under a contract or otherwise, to be carried.

(2) If valuable consideration specified in Article 156(1)(c) is given or promised the flight is, for the purposes of Part 3 (other than for Articles 16(2) and 17(2)), deemed to be for the purposes of commercial air transport.

Exception 5 - Jointly owned aircraft (Article 161)

(1) A flight is deemed to be a private flight if the aircraft falls within paragraph (2) and the only valuable consideration given or promised in respect of the flight or the purpose of the flight falls within paragraph (3).

(2) An aircraft falls within this Article if it is owned –

(a) jointly by persons (each of whom is a natural person) who each hold not less than a 5 per cent beneficial share and –

(i) the aircraft is registered in the names of all the joint owners, or

(ii) the aircraft is registered in the name or names of one or more of the joint owners as trustee or trustees for all the joint owners, and written notice has been given to the Director of the names of all the persons beneficially entitled to a share in the aircraft; or

(b) by a company in the name of which the aircraft is registered and the registered shareholders of which (each of whom is a natural person) each hold not less than 5 per cent of the shares in that company.

(3) Valuable consideration falls within this Article if it is either –

(a) in respect of, and is no greater than, the direct costs of the flight and is given, or promised by one or more of the joint owners of the aircraft or registered shareholders of the company which owns the aircraft; or

(b) in respect of the annual costs and given by one or more of such joint owners or shareholders.

Exception 6 – carriage of persons (Article 162)

A flight is an aerial work flight if it is a flight in respect of which valuable consideration has been given or promised for –

(a) the conduct of an aerial work operation during which, excluding crew members, no more than 6 persons indispensable to that aerial work operation are carried in the aircraft: and

(b) flights immediately before and after an aerial work operation, provided that such flights are connected with that aerial work operation and the persons carried are as specified in paragraph (a).

Exception 7 – parachuting (Article 163)

Notwithstanding Article 162, a flight is an aerial work flight if it is a flight in respect of which valuable consideration has been given or promised for –

(a) the dropping of persons by parachute and which is made in accordance with the terms of a parachuting permission granted by the Director under Article 101; and

(b) associated positioning and return flights on which the persons carried are those who may be carried on such a flight in accordance with the terms of a parachuting permission granted by the Director under Article 101.

4.3 Applying the exceptions to hired aircraft or jointly owned aircraft

4.3.1 The four exceptions relating to flying displays etc, charity flights, cost sharing and recovery of direct costs are so defined that they are still available to an aircraft which has been hired, or to a group owned aircraft operated in accordance with the group aircraft exception of Article 161.

4.3.2 The four exceptions provide that flights coming within them will be deemed to be private flights for the purposes of one or more parts of the Law if the only payment in respect of the flight falls within the specified category of payment, e.g. in the case of flying displays the costs of the flight and prize money. However, if an aircraft has been hired then there will be another form of payment in respect of the flight, i.e. the payment for the hire of the aircraft. Similarly, if the aircraft is group owned, there may well be some payment by the group member to the group for the use of the aircraft. Thus two types of payment (group and hire) are discounted when applying the four exceptions (although if the aircraft is hired it will still need to be maintained as a commercial air transport aircraft).

5 Valuable consideration

In this Circular, the question of whether a flight is commercial air transport or aerial work is discussed in terms of whether “payment” has been given or promised in respect of the flight. In the Law itself, instead of “payment”, the term “valuable consideration” is used. This term is defined at Article 1 to include “means any right, interest, profit or benefit, forbearance, detriment, loss or responsibility accruing, given, suffered or undertaken under an agreement, which is of more than a nominal nature;”. In this context, “forbearance” means giving up something that you have a right to or to receive, so that, for example, if you are owed money and agree to write it off in return for a flight in the debtor’s aircraft that would constitute valuable consideration in that the aircraft operator has received a benefit that he would otherwise not have received.

6 Who is the operator?

6.1 The term 'operator' is defined in Article 1 for the purposes of the Law. That article provides as follows:

For the purposes of the application of any provision of this Law in relation to any particular aircraft, "Operator" means:

- (a) Subject to paragraph (3), the person who at the relevant time has the management of that aircraft.
- (b) for the purposes of Paragraph 3¹, when a person other than an air transport undertaking or an aerial work undertaking has chartered, hired, leased or borrowed the aircraft for a period not exceeding 14 days that person is not considered to be the operator.

6.2 The operator of an aircraft must be the organisation or person who exercises operational control of the aircraft. Operational control means the exercise by the operator, in the interest of safety, of responsibility for the initiation, continuation, termination or diversion of a flight. It should be noted that this is a matter of substance, i.e. the operator is the person who actually undertakes such matters.

6.3 The operator's management of an aircraft will typically involve some or all of the following activities:

- maintenance management;
- employment of flight crew;
- preparation and maintenance of operations manual;
- responsibility for entering into contracts for particular operations.
- flight planning, fuelling and repairing the aircraft;
- keeping the required aircraft etc log books;
- briefing the flight crew;
- control of the operation in the sense of deciding when the aircraft will take off, where it will go, and what it will carry;
- the ability to abort the operation.

In the event that any supporting functions are contracted out the operator still retains overall responsibility: operational control cannot be contracted out.

6.4 In summary therefore, where an aircraft is under the management of an AOC holder any flights operated with it that carry passengers (unless they fall within the exception noted in 2.2 above for employees of the operator or authorised persons) or cargo are commercial air transport flights.

7 Use of a non-AOC operated aircraft

7.1 Unfortunately, there is a temptation on the part of private operators to seek to make use of slack time in the aircraft's operations by making the aircraft available for operation for hire and reward and thereby accepting payment, in cash or in kind, for the carriage of passengers and/or cargo. Such operations, if they involve the operator receiving payment (or other valuable consideration or benefit) other than in the circumstances outlined above, are illegal. Not only does the operator run the risk of prosecution, which could lead to a substantial fine and/or imprisonment for up to 2 years, but also the insurance on the aircraft is likely to be rendered invalid in the event of an accident.

¹ Part 1 Article 3 of the Law.

- 7.2 A private (general aviation) aircraft, even if it has the benefit of an approval under Part 14 Article 104 of the Air Navigation (Jersey) Law 2014, may not therefore be operated for commercial air transport purposes unless the operator holds an AOC. |

