What's public, what's private?

EASA officials have said they do not see why fractional ownership should be regulated differently from group ownership. ***Guy Facey*** *of KSB Law LLP looks at the issues*

There is a European-level debate going on as to whether EASA will create a private category for fractional ownership similar to the American FAR Part 91 in the near future. Some people have suggested that fractional jet ownership company Net Jets is currently operating on the boundaries of the law, and there are also suggestions that reform would serve to increase NetJets' market dominance in Europe, as well as negatively affecting charter operators.

The CAA's view is simple – if a passenger is paying to be carried in the aeroplane then it is public transport. Many variations of this are possible, depending on questions such as who is the owner of the aircraft, who is being carried and what is being paid for. Many brokers would suggest that there are simple devices that can be used to avoid the effect of the current rules, but many of these are fraught with difficulty. From the aviation lawyer's perspective, reform would be welcome since it would at least afford some clarification.

It is perhaps timely to draw attention to the requirements for operating under an AOC rather than privately, and to look at the arguments surrounding fractional ownership in the aviation industry, the issues of private and public operation, and potential effects of a future reform.

When is an operator not an operator? When is a corporate jet private transport, and when is it public transport? The answers to these questions can be far from clear. Let's start, for example, with a private jet owned by a private company whose founder is a wealthy individual, with an employed pilot. Obviously, you would say, this is not a public transport operation.

All the more obvious, you would say if you knew that in the US – where we all assume that corporate jets are more common – privately owned corporate jets are dry leased all the time and their operation is recognised as private under, among other things, Section 91 of the Federal Aviation Regulations. US lawyers will advise that you can do a dry lease of an aircraft, and provided the lessee is the operator, this will not be regarded as public transport.

In the UK, our dear old CAA does not regard the situation with anything like the same equanimity. The public policy rule they are seeking to uphold is that if anybody pays to be carried as a passenger, that is public transport, and the operator needs an Air Operator's Certificate (AOC) with all the attendant cost and bureaucracy that involves.

Worse, "paid" is widely defined under our Air Navigation Order like this: under Article 130, if "valuable consideration is given or promised for the carriage of passengers" then you are into public transport. Picture the scene – millionaire's wife and estate suing after the accident for lack of AOC etc… You can hear the prosecution barrister now. "Your honour, Article 130 does not say that the payment had to be made by [millionaire passenger], but by anybody, and moreover even if [unlucky defendant operator] has not actually received any money, it appears that certain promises were made which amount to valuable consideration…" Dangerous stuff!

Aviation lawyers in the UK who advise on corporate jets have the unenviable task of quizzing their clients about exactly which company is operating the aircraft, which company is leasing it, which company is employing the pilot and so on. Did the lessee under the dry lease operate the aircraft, or was it somehow the offshore company which is the registered owner of the aircraft? Who hired the pilot? Who paid what, and what was it for exactly? Even if there wasn't a payment, was something else promised in return for being carried on the plane?

What you want to avoid is the unfortunate case where the hapless pilot is regarded as the operator carrying passengers, and he should have had (but didn't) an Air Operator's Certificate with everything that entails. Applying for an AOC probably costs about £20,000, but the key thing is having the organisational structure – operations manager, chief pilot and probably an administrative person. Other members of the team will have to be "on the books" although not necessarily employed by the company, for example a line training captain qualified on type who does the initial training and subsequent checks. In addition, the organisation will have to have an operations manual which could take someone six months to write from scratch or one month to copy and adapt if you can find another organisation happy to let you have a copy of their manual. Then, (apart from writing the manual) the company will need agreements dealing with maintenance, leasing the aircraft, insurance for public liability, etc. etc. Bear in mind this is regarded as a public transport operation, after all…

There was a case many years ago where a pilot was prosecuted for exactly this. The facts of that case do not really help us with the modern corporate jet problem because it was the case of a club pilot accepting payment for flying a couple in a club aircraft, a much more blatant breach of the ANO.

We know that EASA is looking at this area. In my humble opinion the growth in the corporate jet market means that the regulators ought to look at the rules not only through the spectacles of the protector of the innocent public, but also with a view to promoting aviation (remembering that, from an English perspective, under the Civil Aviation Act 1982 one of the functions of the Secretary of State has been to encourage both measures for the development of civil aviation and the promotion of safety. Ha! I hear the GA community say…) Apparently some regulators think that the only fractional ownership you can have is for a group of pilots. If the only way of allowing private owners of corporate jets to have access to this market is an AOC, this will force them into the hands of NetJets and will reinforce NetJets' market dominance.

It is true that the air charter operators say that there is no need for such a reform, along the lines of FAR Section 91, because it would just make things even easier for the likes of NetJets. The truth is, however, that the market is already going in the direction of corporate jets. Why not lower the barriers to entry for competitors to NetJets? This might actually promote civil aviation and GA, a sector which needs some assistance.

**KSB Law LLP is a London-based commercial firm which provides legal services to businesses and private clients throughout the UK and around the world. You can contact Guy Facey through* www.ksblaw.co.uk ■

Guy Facey: "Regulators should also look at promoting aviation"