Evropský veřejný ochránce práv

Afgørelse i sag 2505/2009/BEH - Údajný nesprávný výklad právních předpisů EU upravujících požadavky na průkaz způsobilosti osvědčujícího personálu pro letadla

Rozhodnutí
Případ 2505/2009/BEH - **Otevřeno dne** 27/10/2009 - **Rozhodnutí ze dne** 08/12/2010

Osvědčující personál odpovídá za uvolňování letadla zpět do provozu po provedení údržby. Stěžovatelem je nezávislá organizace vydávající osvědčení pro horkovzdušné balony, která je držitelem průkazu způsobilosti osvědčujícího personálu pro Spojené království. Agentura EASA stěžovatele informovala, že jedinými letadly, která může nezávislý osvědčující personál, který je držitelem vnitrostátní kvalifikace, uvolňovat do provozu, jsou letadla registrovaná v zemi, která jeho kvalifikaci vydala. Agentura EASA odkázala na článek 66.A.100 přílohy III (části 66) nařízení Komise č. 2042/2003, který zní: „ *Do té doby, než budou touto částí stanoveny požadavky pro osvědčující personál letadel jiných, než letouny a vrtulníky, použijí se odpovídající předpisy členských států.* “ Agentura EASA poukázala na to, že termín „odpovídající předpisy členských států“ se vztahuje ke státu, v němž je letadlo registrováno (stát zápisu do rejstříku). Dle názoru stěžovatele se však termín „odpovídající předpisy členských států“ vztahuje ke státu, který vydal průkaz způsobilosti osvědčujícího personálu. Proto stěžovatel tvrdil, že výklad agentury EASA je příliš restriktivní a není v souladu se svobodou usazování. Požadoval, aby agentura EASA svůj výklad přehodnotila.

Během šetření veřejného ochránce práv agentura EASA na svém výkladu trvala a uvedla, že výklad stěžovatele je tautologický, vzhledem k tomu, že článek 66.A.100 má definovat, který členský stát má právo stanovovat požadavky na vydávání průkazu způsobilosti osvědčujícího personálu. Agentura EASA rovněž uvedla, že ačkoli zákonodárci EU stanovili společné správní postupy, které vyžadují, aby členské státy automaticky uznávaly průkaz způsobilosti vydaný jiným členským státem, týkají se tyto postupy pouze letounů a vrtulníků. V současné době neexistuje žádné ustanovení o vzájemném uznávání v případě průkazů způsobilosti osvědčujícího personálu pro letadla jiná než letouny a vrtulníky. V důsledku toho uznávání zahraničních průkazů způsobilosti pro údržbu letadel v případě horkovzdušných balonů nadále podléhá vnitrostátním předpisům státu zápisu do rejstříku. Agentura EASA vysvětlila, že tento právní stav se má změnit na základě návrhu, který předložila ve věci společných správních postupů pro průkazy způsobilosti pro údržbu letadel, které by měly být zavedeny pro letadla jiná než letouny a vrtulníky.

Protože neexistuje jednotný průkaz způsobilosti osvědčujícího personálu pro letadla jiná než

letouny a vrtulníky, veřejný ochránce práv se domníval, že neexistuje žádný základ pro tvrzení stěžovatele, podle něhož výklad agentury EASA porušuje svobodu usazování. Pokud jde o názor stěžovatele, že článek 66.A.100 odkazuje na stát, který vydává průkaz způsobilosti osvědčujícího personálu, došel veřejný ochránce práv k závěru, že tento výklad by vlastně znamenal, že kvalifikace vydaná jedním členským státem by musela být automaticky uznávána ve všech ostatních členských státech. To však zákonodárce dosud nestanovil. Po zvážení článku 66.A.100 v jeho legislativních souvislostech, a zejména v kontextu Chicagské úmluvy, dospěl veřejný ochránce práv k závěru, že agentura EASA tento článek vykládá správně jako článek odkazující na stát zápisu do rejstříku.

The background to the complaint

1. The present complaint concerns the interpretation of licensing requirements for certifying staff. The requirements are essentially laid down in Regulation 2042/2003 ('the Regulation') [1] , in particular, in Annex III (Part 66) thereof. Certifying staff are responsible for releasing aircrafts or aircraft components into service following maintenance. The complainant acts as an independent certifier for hot-air balloons, and he holds a relevant licence issued by the UK.

2. On 24 March 2009, he turned to EASA and asked about the validity in other Member States of national qualifications for certifying staff issued by a Member State. By letter dated 27 March 2009, EASA essentially informed him that, according to the Regulation, national qualifications relating to hot-air balloon certifiers are not recognised by other Member States. As a consequence, the only aircraft which independent certifiers who hold a national qualification can release back into service are those which are registered in the country which issued the certifier's qualification.

3. On 22 May 2009, the complainant turned to the Ombudsman (complaint 1353/2009/NM). He expressed his disagreement with EASA's interpretation of the Regulation and asked the Ombudsman to carry out a review. Article 2(4) of the Statute of the European Ombudsdman requires complainants to make appropriate administrative approaches to the body concerned before they can submit a complaint to the Ombudsman. The complainant contacted EASA, but he did not inform EASA that he disagreed with the substance of its reply. The Ombudsman, therefore, considered that the complainant had not made all the appropriate prior administrative approaches, and he advised him to turn again to EASA.

4. In a letter to EASA dated 30 June 2009, the complainant criticised EASA's interpretation of the relevant rules. In its reply dated 16 July 2009, EASA referred to Article 66.A.100 of Part 66, which reads as follows:

" *Until such time as this Part specifies a requirement for certifying staff of aircraft other than aeroplanes and helicopters, the relevant Member State regulation shall apply.* "

5. EASA pointed out that, in its view, the term 'relevant Member State' refers to the state

responsible for overseeing the activities performed by certifying staff. EASA further stated that, pursuant to Part M (annex I to the Regulation), Article M.1(1), the competent authority of the Member State of registration is responsible for overseeing the continuing airworthiness of an individual aircraft.

6. In EASA's view, the consequences of this legal situation are as follows:
- A maintenance organisation located in country X must use certifying staff qualified under the regulations of country X. As a consequence, an individual holding a certifying qualification valid in country X can only be nominated as certifying staff in organisations located in that country.
- An individual holding a certifying staff qualification valid in country X can, when acting as an independent certifier, only release aircraft registered in country X.

EASA noted that its position was also reflected in its Decision 2008/013/R [2] .

7. EASA finally pointed out that it was about to issue Comment Response Document ('CRD') 2008-03, which would, among other things, propose a Part 66 "L" licence that would cover maintenance of hot-air balloons. A final opinion on the CRD was expected for the end of 2009. EASA stated that the Part 66 "L" licence would be recognised in all the Member States, since the requirements to obtain it would be the same in all the Member States.

8. On 7 October 2009, the complainant submitted the present complaint.

The subject matter of the inquiry

9. In his complaint to the Ombudsman, the complainant submitted the following allegation and claim:

EASA's interpretation of the meaning of 'relevant Member State' in Article 66.A.100 of Part 66 is (i) too restrictive in light of the wording of Article 66.A.100, and (ii) not in conformity with the freedom of establishment.

EASA should reconsider its interpretation of the meaning of 'relevant Member State' in line with the complainant's submissions.

The inquiry

10. The complaint was forwarded to EASA's Executive Director for an opinion. EASA's opinion was forwarded to the complainant with an invitation to make observations, which he sent on 17 February 2010. In light of these observations, further inquiries by the Ombudsman proved necessary. Thus, in a letter dated 20 April 2010, the Ombudsman requested EASA to provide him with further information concerning the complainant's allegation. EASA's reply was forwarded to the complainant, who sent his observations on 10 June 2010.

The Ombudsman's analysis and conclusions

Preliminary remarks

11. Given their factual connection, it is appropriate to consider the complainant's allegation and claim together.

A. Allegation of incorrect interpretation and related claim

Arguments presented to the Ombudsman

12. In support of his allegation and claim, the complainant argued that EASA's position was not explicitly mandated by the Regulation. According to him, EASA implicitly recognised this, given that it referred to its interpretation as being " *its view* ". He submitted that the term 'relevant Member State' should be interpreted as referring to the Member State which issues the licence.

13. The complainant also took the view that EASA's interpretation conflicts with the freedom of establishment. He further submitted that the recognition in one Member State of licences issued by another Member State would not impair safety, since services performed by any certified staff under the authority of a maintenance organisation, within the meaning of subpart F of the Regulation, are universally recognised.

14. In its opinion, EASA submitted that the word 'relevant' in the expression 'relevant Member State regulation' contained in Article 66.A.100 of Part 66 could be interpreted as referring either to the relevant Member State, or the relevant regulation. Whichever alternative is chosen, EASA stated that it is its firm understanding that the context of Article 66.A.100 of Part 66, as well as the general system established by Regulation 216/2008 [3] and the implementing rules, lead to an unambiguous interpretation. EASA pointed out that the Regulation establishes continuing airworthiness requirements for aircrafts. To this end, it requires all maintenance to be carried out either by *appropriate certifying staff on behalf of an approved maintenance organisation* , by *independent certifying staff* , or by the *pilot owner* .

15. EASA stated that independent certifying staff, such as the complainant, can issue certificates of release to service (Article M.A.801(b)(2)), subject to the requirements of Part 66. The latter establishes requirements for the issue of aircraft maintenance licences, and the conditions of their validity and use. Article 66.A.100 of Part 66 applies to certifying staff for aircraft other than aeroplanes and helicopters. Given the reference to the 'relevant Member State regulation' in Article 66.A.100 of Part 66, the situation at present is that certifying staff for hot-air balloons are certified in accordance with *national* legislation.

16. EASA noted that, in the complainant's view, the 'relevant Member State' pursuant to Article

66.A.100 of Part 66 is the state which issued the certifying staff licence. However, this interpretation amounted to a circular reasoning, given that Article 66.A.100 of Part 66 seeks to define the state which may establish requirements for issuing the licence, and the conditions of its validity and use.

17. EASA maintained its view that the 'relevant Member State' is the state in which the aircraft on which the certifying staff is working is registered. According to EASA, this was established in the Chicago Convention [4] which was implemented in the EU by means of Regulation 216/2008, and the Regulation to which the present complaint refers, including its Part 66. As a basic principle, the Chicago Convention provides that it is the state where the aircraft is registered ('the **State of registry** ') which has overall responsibility for overseeing the safety of an aircraft. In keeping with this principle, the Regulation, therefore, designates the State of registry as the state responsible for ensuring that an aircraft recorded in its register complies with continuing airworthiness requirements. The State of registry exercises this responsibility in different ways, depending on whether an aircraft is released for service (i) by certifying staff on behalf of an approved maintenance organisation; (ii) by independent certifying staff; or (iii) by the pilot owner.

18. EASA pointed out that the only way the State of registry can meet its overall responsibility is by checking that the work performed by **independent certifying staff** complies with the Regulation before the aircraft is released back into service after maintenance. EASA submitted that the legal situation is different for staff working for approved maintenance organisations where the State of registry transfers the supervision of their work to the State which approved the maintenance organisations. The 'relevant Member State regulation' was, therefore, the regulation of the State which approved the maintenance organisation. Given that maintenance organisation approvals issued in accordance with Article 4 of the Regulation and its Annex II are automatically recognised in all Member States (Article 11(1) of Regulation 216/2008), certifying staff who work for an approved maintenance organisation could, therefore, release aircraft registered in any Member State, even if their licence had been issued by a national authority. In the case of independent certifying staff, the State of registry has to be able to verify the work they perform, as well as assess and supervise their certifying qualifications.

19. EASA also pointed out that its interpretation of expression 'relevant Member State regulation' had been subject to a wide consultation of all interested parties. Its interpretation was part of its Acceptable Means of Compliance [5] (AMC) M.A.502(b) and (c). On 20 March 2007, EASA published its intention, for the purposes of maintenance performed by independent certifying staff, to interpret 'relevant Member State regulation' as meaning the State of registry. The relevant notice was open for comments until 20 June 2007, but no comments contesting EASA's interpretation were received. EASA, therefore, considered its view to be widely accepted among all stakeholders, and it published its final interpretation in the above AMC.

20. The complainant took the view that his UK certifying licence should automatically be recognised in all EU Member States. EASA, however, pointed out that, unlike the case of approved maintenance organisations, there was no automatic recognition of licences of certifying staff for aircraft other than aeroplanes and helicopters. The reason for that was that,

for the time being, the only common administrative procedures which the EU legislator had established were for certifying staff for aeroplanes and helicopters (Article 5(1) of the Regulation in conjunction with Part 66). Member States were required to recognise a licence issued by another Member State in accordance with the said provisions, without further evaluation (Article 11(1) of Regulation 216/2008).

21. For aircraft other than aeroplanes and helicopters, such as hot-air balloons, however, the legislator had taken the deliberate decision not to establish common administrative procedures, for the time being. In so doing, the legislator, therefore, also chose not to apply the principle of mutual recognition to national licences, as provided for by Article 11(1) of Regulation 216/2008.

22. As a consequence, the recognition of foreign aircraft maintenance licences for hot-air balloons remained subject to the national regulations of the State of registry. This was not to say that mutual recognition was not possible, but rather, that such recognition was governed by national legislation, and not by EU law. The complainant could, therefore, exercise the privileges of his UK licence, provided that it was recognised by the respective State of registry.

23. EASA added that the legal situation was about to change. It explained that it had submitted an opinion to the European Commission concerning an amendment to Part 66. Once this proposal entered into force, there would be common administrative procedures for aircraft maintenance licences for aircraft other than aeroplanes and helicopters.

24. In his observations, the complainant asserted that, according to a standard German dictionary, the word "relevant" (" *einschlägig* " in German) meant "relating to a particular field". He submitted that Part 66 contained rules on the issue of licences to certifying staff. However, it did not contain rules on responsibility over aircraft, which were addressed in Part M (annex I to the Regulation). The complainant invoked Article 5(1) of the Regulation, which reads as follows: " *Certifying staff shall be qualified in accordance with the provisions of Annex III, except as provided for in points M.A.606(h), M.A.607(b), M.A.801(d) and M.A.803 of Annex I and in point 145.A.30(j) of Annex II (Part 145) and Appendix IV to Annex II (Part 145).* " The complainant submitted that the said provision did not mention restrictions for independent certifying staff in line with Article M.A.801(b)2.

25. The complainant also referred to Article 11(5) of Regulation 216/2008, which reads as follows: " *Pending the entry into effect of the measures referred to in Article 8(5) and the expiry of any transition periods provided for by those measures, and without prejudice to Article 69(4), certificates which cannot be issued in accordance with this Regulation may be issued on the basis of the applicable national regulations.* " He furthermore invoked Article 3(e) of Regulation 216/2008, which reads as follows: " *'certification' shall mean any form of recognition that a product, part or appliance, organisation or person complies with the applicable requirements including the provisions of this Regulation and its implementing rules, as well as the issuance of the relevant certificate attesting such compliance;* ". Against this background, he submitted that, as long as no uniform licence for independent certifying staff exists, a national licence would have to be considered as the equivalent of a Part 66 licence.

26. The complainant pointed out that EASA had insinuated that safety would be at risk if hot-air balloons were maintained by certifying staff licensed in another Member State. He contradicted this view by pointing out that if a national authority issued a licence to independent certifying staff, it would have to ensure that the staff satisfied the relevant standards. He also submitted that the competent authority of the State of registry could, in case of doubt, verify whether independent certifying staff charged with releasing an aircraft hold an appropriate licence. The same would apply if the competent authority were to check the licence of a maintenance organisation approved by another country, if an aircraft were maintained by that organisation.

27. As regards the AMC to which EASA referred, the complainant submitted that it was not applicable in his case. He referred to Article M.A.502(b) of Regulation 1056/2008 amending the Regulation. Pursuant to Article M.A.502(a), the maintenance of components shall be performed by appropriately approved maintenance organisations. Article M.A.502(b) reads as follows: " *(b)* **By derogation from paragraph (a), maintenance of a component in accordance with aircraft maintenance data** *or, if agreed by the competent authority, in accordance with component maintenance data,* **may be performed** *by an A rated organisation approved in accordance with Section A, Subpart F of this Annex (Part M) or with Annex II (Part-145) as well as* **by certifying staff referred to in point M.A.801(b)2 only whilst such components are fitted to the aircraft. Nevertheless** *, such organisation or* **certifying staff may temporarily remove this component for maintenance, in order to improve access to the component, except when such removal generates the need for additional maintenance not eligible for the provisions of this paragraph** *. Component maintenance performed in accordance with this paragraph is not eligible for the issuance of an EASA Form 1 and shall be subject to the aircraft release requirements provided for in point M.A.801.* " [6] He pointed out that gas bottles carried by hot-air balloons were fitted to the balloon only during operation, but removed from the balloon after landing. He also asserted that the AMC apparently only covered the maintenance of components, but not of entire aircraft. Thus, his situation was not covered by the AMC, given that no permission of the competent authority was required in relation to the maintenance of gas bottles.

28. While welcoming the fact that the legislator aimed to convert national licences into Part 66 licences, the complainant asserted that nothing was yet known about the relevant conditions, nor the date on which the relevant amendment would enter into force. Finally, he pointed out that the basic question was whether a national licence would be recognised as equivalent to a Part 66 licence until such time as the matter was decided by legislation.

29. In his request for additional information, the Ombudsman put a number of questions to EASA. He asked why it considered its AMC M.A.502(b) and (c), which appears to cover component maintenance, to be relevant with respect to the applicable legislation for the licensing of certifying staff for aircraft. He also asked EASA to comment on the other arguments raised in the complainant's observations. Finally, he asked EASA to inform him of the progress, if any, that had been achieved towards the proposed adoption of common administrative procedures for maintenance licences for aircraft other than aeroplanes or helicopters.

30. In its reply, EASA stated that the provisions of Part 66 could not be read in isolation. The

provisions were, instead, just one building block established by the legislator in order to ensure the continuing airworthiness of aircraft. Part 66 was interrelated and connected with other building blocks, such as Part M (Annex I), Part 145 (Annex II), and Part 147 (*Annex* IV), all of which pursue the same objective. EASA submitted that Article 66.A.100 of Part 66 had to be read against this background, including Article M.A.801(b) of Part M. EASA also pointed out that, contrary to the complainant's view, all the provisions contained in the Annexes to the Regulation concerned the " *responsibility for the (safety of the) aircraft* ".

31. EASA went on to state that Article 66.A.100 of Part 66 refers to a " *requirement for certifying staff* " and not to a " *licensing requirement* ". It followed that holding a licence is not sufficient to exercise certification privileges. Rather, licence holders also had to comply with the requirements set by the legislator for exercising such privileges. **In the case of aeroplanes and helicopters** , certifying staff are required not only to hold a Part 66 licence, but they also have to comply with Article 66.A.20(b), which in turn refers to Part M and Part 145. **In the case of aircraft other than aeroplanes and helicopters** , the relevant requirements for certifying staff of the Member States apply. According to EASA, this means that not only must certifying staff hold a licence, if required to do so by the applicable legislation, but they also have to comply with other requirements for the exercise of licence privileges, which are set by applicable legislation.

32. EASA commented on Article 11(5) of Regulation 216/2008, to which the complainant referred in his observations, and submitted that it applies to air operations (Article 8 of Regulation 216/2008) only. The complainant's case, however, relates to an airworthiness issue (Article 5 of Regulation 216/2008). EASA stated that Article 11(4) of Regulation 216/2008 contains a provision applicable to airworthiness issues, which is similar to the one mentioned by the complainant. However, Article 11(4) of Regulation 216/2008 only stated that, in the absence of a personnel licence issued under Regulation 216/2008, these licences are issued on the basis of applicable national legislation. EASA emphasised that Article 11(4) by no means states that national licences are the equivalent of Part 66 licences, or that they are converted into Part 66 licences. Moreover, EASA submitted that Article 11(4) of Regulation 216/2008 is not applicable to the complainant's case.

33. EASA also emphasised that, contrary to the complainant's apparent understanding of its position, aircraft could be maintained by independent certifying staff licensed in other Member States. However, such maintenance was subject to the legislation of the State of registry. If the legislation of the State of registry requires independent certifying staff to hold a licence, that licence could either be (i) a licence issued by the State of registry or (ii) a licence issued by another state, and recognised by the State of registry.

34. As regards the applicability of the AMC M.A.502(2) to the complainant's case, EASA submitted that it was relevant for Article 66.A.100 of Part 66, given that Part M is part of the overall system of ensuring aviation safety (see paragraph 30 above). Given that Part M and Part 66 are interlinked and interdependent annexes to the same regulation, the considerations of the AMC, namely, that the Member State of registry is responsible for maintenance performed by independent certifying staff, are also relevant for the interpretation of Article 66.A.100 of Part 66.

35. EASA further stated that the complainant was correct in pointing out that the said AMC is related to component maintenance and, therefore, not applicable in his case. At the same time, EASA recalled that the AMC deals with component maintenance **by independent certifying staff** . EASA stated that, in its opinion submitted to the Ombudsman, it was referring to the principles underlying this AMC as regards the responsibilities for independent certifying staff.

36. In reply to the Ombudsman's question concerning the progress of the proposed adoption of common administrative procedures for aircraft maintenance licences for aircraft other than aeroplanes or helicopters, EASA explained that the Commission and the Member States had discussed EASA's opinion during a meeting of the EASA Committee on 29 and 30 April 2010. On the basis of the discussions, it was agreed that the Commission would submit a new legislative proposal to be debated during an EASA Committee meeting which was to be held in October 2010.

37. In his observations, the complainant submitted that the central question was whether a national licence could be considered to constitute the equivalent of a Part 66 licence and could, therefore, be converted into such a licence without further examination. Noting that EASA had answered this question in the negative, he objected to EASA's view. In support of his position, he proceeded to quote Article 66.A.70(a) of Part 66, which reads as follows:

" *66.A.70 Conversion provisions*

(a) The holder of a certifying staff qualification valid in a Member State, prior to the date of entry into force of this Part shall be issued an aircraft maintenance licence without further examination subject to the conditions specified in 66.B.300. "

38. According to the complainant, the above provision gives rise to the following:
- A national qualification could be converted into a Part 66 licence without any further examination. Such a conversion had already taken place in relation to aeroplanes and helicopters.
- Through the conversion without further examination, EASA recognises a national qualification, which, therefore, has to be considered the equivalent of a Part 66 licence. If this were otherwise, (i) the holder of a national licence would have to pass a further examination, and (ii) EASA could not recognise maintenance performed by certifying staff who hold a national licence and who are entitled to release aircraft into service.

The fact that it was not possible, for the time being, to convert a national licence (in relation to aircraft other than aeroplanes and helicopters) into a Part 66 licence should not be to the detriment of holders of a national licence.

The Ombudsman's assessment

39. The present complaint concerns the interpretation of Article 66.A.100 of Part 66. The

Ombudsman notes that, according to the complainant, EASA's interpretation of Article 66.A.100 of Part 66 is merely " *its view* " and not explicitly mandated by the Regulation. Before examining the substance of the complainant's allegation, it is, therefore, useful to set out the Ombudsman's approach to assessing the complainant's allegation and claim concerning EASA's interpretation.

40. In so doing, the tasks entrusted to EASA by virtue of Section 1 of Chapter III of Regulation 216/2008 should be recalled. These tasks include, among other things, issuing certification specifications (including airworthiness codes and AMCs, as well as any guidance material for the application of this Regulation and its implementing rules), and taking appropriate decisions for the application of certain provisions of Regulation 216/2008, for instance, in relation to airworthiness and environmental certification (Articles 18(c) and (d) of Regulation 216/2008). Moreover, EASA's tasks encompass the submission of opinions to the Commission, and the development of certification and guidance material (Article 19 of Regulation 216/2008).

41. It is apparent from these examples that, in order to fulfil its tasks, EASA needs to interpret and apply the legal framework which it is entrusted to administer. In the course of this exercise, it has to take a view on the interpretation of this legal framework. At the same time, the Ombudsman recalls that, pursuant to Article 19 of the Treaty on European Union, the Court of Justice shall ensure that the law is observed in the interpretation and application of the Treaties. There can thus be no doubt that the Court is the highest and ultimate authority as regards the interpretation of EU law. EASA's interpretative choices are, therefore, in principle, subject to the Court of Justice's review.

42. Mindful of the Court's authority as regards the interpretation of EU law, the Ombudsman will, in what follows, give his own assessment of EASA's interpretation of Article 66.A.100 of Part 66.

43. The complainant's allegation relates to two separate, yet interrelated issues, namely, (i) the correctness of EASA's interpretation of the expression ' *relevant Member State regulation* ' as referring to the Member State of registry, and (ii) the conformity of this interpretation with the freedom of establishment. In relation to the second issue, the complainant objected to EASA's view that, at present, national certifying staff licences for the maintenance of hot-air balloons in other Member States are not automatically recognised. In the following, the Ombudsman will consider both aspects of the complainant's allegation.

44. At the outset, the Ombudsman notes that Article 5(1) of the Regulation provides that certifying staff shall be qualified (certain exceptions are explicitly provided for), in accordance with the provisions of Annex III (Part 66). It follows that Part 66 contains rules on the qualifications certifying staff are required to hold.

45. The parties to the dispute disagree about the correct interpretation of Article 66.A.100 of Part 66. The Ombudsman considers that it is not possible firmly to conclude from the wording of Article 66.A.100 of Part 66 alone, which Member State regulation is designated as being the ' *relevant Member State regulation* '. What is clear from the reference to ' *relevant Member State regulation* ', however, is that, for a transitional period of time (" *Until such time as this Part specifies* ..."), it is **national** legislation that governs the qualifications required of certifying staff

of aircraft other than aeroplanes and helicopters. The complainant himself submitted that the ' *relevant Member State regulation* ' should be the legislation of the Member State which issues the licence.

46. Before addressing the issue of the identity of the Member State to whose regulation Article 66.A.100 refers (the **first aspect** raised by the complainant), the Ombudsman considers it useful to consider whether licences issued pursuant to the law of a given Member State are subject to automatic mutual recognition, and, therefore, have to be recognised in all the other Member States (the **second aspect** raised by the complainant). In the course of the inquiry, EASA explained that, while Regulation 216/2008 provides for a mutual recognition of qualifications for licensing staff for aeroplanes and helicopters, the legislator decided not to establish, for the time being, uniform administrative procedures in relation to aircraft other than aeroplanes and helicopters. At the same time, EASA pointed out that the introduction of a uniform licence for certifying staff in relation to aircraft other than aeroplanes and helicopters was foreseen for the near future.

47. The Regulation, including its Annexes, provides for common technical requirements and administrative procedures to ensure the continuing airworthiness of aeronautical products, parts, and appliances (see recital (3) of the Regulation). Subpart A of Part 66 of the Regulation (Articles 66.A.1 to 66.A.70) establishes the requirements for issuing an aircraft maintenance licence, and the conditions of its validity and use in relation to specified categories of **aeroplanes and helicopters** . In relation to **aircraft other than aeroplanes and helicopters** , however, Part 66 does not establish any requirements for issuing the relevant maintenance licences, and the conditions of their validity and use, but instead refers to the ' *relevant Member State regulation* '.

48. Article 11(1) of Regulation 216/2008 requires Member States to recognise, without further technical requirements or evaluation, certificates **issued in accordance** with that Regulation. Given that, in view of the above, licences for the maintenance of aircraft other than aeroplanes and helicopters are licences **issued in accordance with national law** , in the Ombudsman's view, Article 11(1) of Regulation 216/2008 does not apply to those licences. Likewise, the Ombudsman considers that, since neither Article 11(4) nor Article 11(5) of Regulation 216/2008 provide for automatic recognition of licences issued in accordance with national law, there is no need to examine whether these provisions could apply to the complainant's situation.

49. The complainant submitted that national licences have to be considered to be the equivalent of a Part 66 licence until such time as a Part 66 licence is provided for in relation to aircraft other than aeroplanes and helicopters. However, given the lack of a relevant legal basis, and the fact that the legislator appears to have deliberately decided not to establish, for the time being, uniform licensing conditions in relation to aircraft other than aeroplanes and helicopters, the complainant's view is not convincing. It is true that, in his observations, the complainant invoked Article 66.A.70 of Part 66 and submitted that, on this basis, national licences could be converted into Part 66 licences. However, it should be noted that Article 66.A.70 forms part of Subpart A of Part 66, entitled ' *Aircraft Maintenance Licence Aeroplanes and Helicopters* ', but not of subpart B of Part 66, entitled ' *Aircraft other than Aeroplanes and Helicopters* '. As seen above, Article

11(1) of Regulation 216/2008, in conjunction with Part 66, provides for a mutual recognition of qualifications for certifying staff for aeroplanes and helicopters, but not for aircraft other than aeroplanes and helicopters. It follows that the complainant's argument cannot succeed.

50. In the absence of a uniform licence for certifying staff for aircraft other than aeroplanes and helicopters, the Ombudsman sees no basis for the complainant's allegation that EASA's interpretation infringes the freedom of establishment. At the same time, he recalls that, as submitted by EASA, the absence of automatic mutual recognition does not prevent Member States from recognisinig certifying staff licences for aircraft other than aeroplanes and helicopters issued by another Member State. It appears useful to add that the freedom of establishment, as such, does not provide for automatic recognition of professional qualifications issued by one Member State in other Member States [7] . At the same time, even in the absence of secondary legislation providing for mutual recognition of certifying staff licences, Member States are required to take into account, and must examine, to what extent the qualifications obtained in another Member State correspond to those required by their own rules [8] .

51. For the above reasons, the Ombudsman considers that EASA's view, according to which there is, at present, no automatic mutual recognition of qualifications for certifying staff in relation to aircraft other than aeroplanes and helicopters, is correct. It follows that the second aspect of the complainant's allegation cannot be sustained.

52. Turning to the **first aspect** of his allegation, the complainant, challenged EASA's interpretation of the formulation ' *relevant Member State regulation* ' as referring to the State of registry, and submitted that this expression should, instead, be interpreted as referring to the regulation of the Member State which issued the licence. During the inquiry, EASA submitted that the complainant's interpretation would amount to circular reasoning, given that Article 66.A.100 of Part 66 seeks to define the state which may establish requirements for issuing the licence, as well as the conditions of its validity and use. The Ombudsman considers that the complainant's interpretation would indeed mean that only the Member State which issues the licence could stipulate requirements for certifying staff. Therefore, a licence issued in accordance with UK legislation would have to be recognised in Germany, as well as in all other Member States, without further technical requirements or examination. The complainant's interpretation would thus require automatic mutual recognition of a qualification issued by one Member State in all other Member States. However, as has been seen above, the legislator did not provide for such automatic recognition, but instead referred to the relevant Member State regulation. The Ombudsman, therefore, considers that the interpretation advocated by the complainant would indeed appear to be circular, and thus unconvincing. The Ombudsman takes note of the complainant's view that safety would not be at risk if hot-air balloons in a given Member State were maintained by certifying staff licensed in another Member State. However, even if this were to be the case, it would not provide a basis for automatic mutual recognition of relevant qualifications, which will only come into practice once a Part 66 licence in relation to aircraft other than aeroplanes and helicopters has been adopted.

53. In view of the above, while the complainant's own interpretation of the formulation 'relevant

Member State regulation' cannot call into doubt EASA's interpretation, the Ombudsman, in assessing the first aspect of the complainant's allegation, also has to consider whether EASA's interpretation is correct. In EASA's view, 'relevant Member State regulation' refers to the State of registry.

54. According to recital (3) of Regulation 216/2008, the Chicago Convention provides for minimum standards to ensure the safety of civil aviation and environmental protection relating thereto. " *Community essential requirements and rules adopted for their implementation* " should ensure that Member States fulfil the obligations created by the Chicago Convention. Recital (4) of Regulation 216/2008, moreover, stipulates that "[t] *he Community should lay down, in line with standards* and recommended practices set by the Chicago Convention, essential requirements applicable to ... persons and organisations involved in the operation of aircraft ... The Commission should be empowered to develop the necessary implementing rules." It therefore appears that Regulation 216/2008 aims to implement the standards set by the Chicago Convention, for instance, in relation to safety in the EU.

55. Chapter V of the Chicago Convention gives a detailed description of the " *conditions to be fulfilled with respect to aircraft* ". It stipulates that certificates of airworthiness for aircraft engaged in international navigation shall be issued or rendered valid " *by the State in which it is registered* " (Article 31 of the Chicago Convention). In relation to licences of personnel, Article 32 of the Chicago Convention provides that the pilot of every aircraft, and the other members of the operating crew of every aircraft engaged in international navigation, shall be provided with certificates of competency, and licences issued or rendered valid " *by the State in which it* [the aircraft] *is registered* ". It therefore emerges that the Chicago Convention designates the State of registry as being responsible for overseeing the airworthiness of the aircraft, and the compliance of the aircraft operator with the applicable rules. Therefore, a general principle underlying the Chicago Convention appears to be that the State of registry shall be responsible for maintenance performed by independent certifying staff. In keeping with this legal situation, Article M.1 of Annex I (Part M) to Regulation 216/2008 provides that the competent authority for overseeing the continuing airworthiness of individual aircraft, and for issuing airworthiness review certificates, shall be the authority designated by the Member State of registry. The Ombudsman also considers that EASA's interpretation of the formulation ' *relevant Member State regulation* ', as meaning the State of registry, was not contested in its consultation of stakeholders leading to the adoption of AMC M.A.502(b) and (c). While the complainant submitted that this particular AMC was not applicable to his situation, the Ombudsman considers that it confirms the general principle that the Member State of registry is responsible for maintenance performed by independent certifying staff, even if that AMC itself applies only to the maintenance of components.

56. In view of the above, the Ombudsman considers that EASA is correct in its interpretation that Article 66.A.100 refers to the Member State of registry.

57. Given that the complainant's allegation cannot be sustained, his claim cannot succeed either.

B. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

There has been no maladministration in EASA's interpretation of the formulation referred to in the complainant's allegation and claim.

The complainant and the EASA will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 8 December 2010

[1] Commission Regulation (EC) No 2042/2003 of 20 November 2003 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks (OJ 2003 L 315, p. 1).

[2] Decision No 2008/013/R of the Executive Director of the European Aviation Safety Agency of 12 December 2008, available at: http://www.easa.europa.eu/ws_prod/g/doc/Agency_Mesures/Agency_Decisions/2008/Decision%20No%202008-013 [Odkaz].

[3] Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC (OJ 2008 L 79, p. 1).

[4] Convention on International Civil Aviation, signed at Chicago on 7 December 1944, (1994) 15 U.N.T.S. 295.

[5] AMC stands for 'Acceptable Means of Compliance'. EASA explained that AMCs are technical materials which serve as means by which an applicant can meet the requirements of Regulation 216/2008 and its implementing rules, including the Regulation. They are subject to EASA's rulemaking process and are, therefore, published for consultation.

[6] Emphasis added by the complainant in the German language version of Article M.A.502(b).

[7] This follows from Article 53(1) of the Treaty on the Functioning of the EU, which reads as follows: " *In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and*

other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as selfemployed persons. "

[8] Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraphs 9-21; Case 222/86 *Heylens* [1987] ECR 4094, paragraphs 10-13.