

## Decision of the European Ombudsman closing his inquiry into complaint 434/2012/VL against the European Aviation Security Agency

Decision

**Case 434/2012/VL - Opened on 07/05/2012 - Decision on 10/07/2013 - Institutions concerned** European Union Aviation Safety Agency ( No maladministration found ) | European Union Aviation Safety Agency ( Critical remark ) |

### The background to the complaint

1. The complainant is an EU-based company. It acts in the interests of its parent company which is active in the aircraft sales sector and is an authorised dealer for a US aircraft manufacturer ('the manufacturer'). The manufacturer's latest aircraft was certified in the US by the Federal Aviation Authority (FAA) on 25 October 2010. The manufacturer subsequently applied to the European Aviation Safety Agency (EASA) for a European type certificate. At the time when the complaint was lodged, the certification process was pending.
2. The complainant ordered from the manufacturer an aircraft for demonstration purposes.
3. On 8 June 2011, the complainant's parent company applied to EASA for a permit to fly [1] . It appears useful to note that a permit to fly is issued by the national aviation authorities based on the 'approval of flight conditions', issued by EASA.
4. On 12 July 2011, EASA informed the complainant's parent company that it could not provide it with an approval of flight conditions because the certification exercise concerning the aircraft was still ongoing and that it could not make a positive assessment of the flight conditions without carrying out a thorough technical and safety assessment, which would duplicate the work carried out for the purposes of the certification exercise. EASA suggested that the complainant either wait for the outcome of the certification exercise or consider carrying out its activities with an FAA-approved N-registered aircraft.
5. On 27 July 2011, the complainant's parent company wrote to EASA and pointed out that the latter seemed to have doubts about the technical aspects of the hydraulic system of the aircraft undergoing certification. It asked questions on the technical and procedural aspects of the certification process.



6. That same day, EASA replied that the complainant's parent company should refer questions concerning the use of an N-registered aircraft to the national aviation authority, because EASA is not responsible for the approval of flight conditions of such aircraft. The Agency advised the complainant to turn to the manufacturer regarding the technical issues it raised, since EASA could not disclose information to third parties.

7. On 25 October 2011, the complainant's parent company drew EASA's attention to the fact that one year had elapsed since the FAA had certified the aircraft. The complainant reiterated its request to be granted a permit to fly.

8. On 26 October 2011, EASA informed the complainant's parent company that the technical investigation with regard to the hydraulic system of the aircraft was still ongoing and thus, no approval of flight conditions could be issued. EASA also pointed out that its internal rules prevented it from giving details on an investigation to third parties and advised it to request the manufacturer to provide it with a status report.

9. On 27 October 2011, the complainant's parent company sent an e-mail to EASA in which it pointed out that it had received the status report from the manufacturer. According to the complainant, the report substantiated the hydraulic system's compliance with the applicable EU requirements. In view of this, the complainant's parent company demanded an explanation for why the certification process was taking so long. Moreover, it requested EASA to provide it with a binding timetable as regards the certification process.

10. On 23 February 2012, the complainant turned to the European Ombudsman.

## **The subject matter of the inquiry**

11. The Ombudsman opened an inquiry into the following allegations and claims.

### **Allegations:**

(1) EASA worked inefficiently and failed to certify the aircraft concerned within a reasonable time.

(2) EASA failed to communicate correctly with the complainant's parent company, in particular by not having replied to its e-mail of 27 October 2011 and not having provided it with a timetable for certifying the aircraft concerned.

(3) EASA ignored the positive practical experience in relation to the hydraulic system which is used in the aircraft concerned.



## Claims:

- (1) EASA should work efficiently on the certification of the aircraft concerned.
- (2) EASA should recognise the positive practical experience in relation to the hydraulic system which is used in the aircraft concerned.

**12.** In its complaint, the complainant also alleged that EASA failed to provide it and its parent company with a permit to fly and claimed that it should do so. However, the Ombudsman pointed out that that permits to fly appeared to be issued by the competent authority of the Member State and not by EASA. Thus, there were insufficient grounds to open an inquiry into the said allegation and claim.

**13.** Furthermore, the complainant claimed that EASA should recognise the FAA certification, as had been the case prior to the agency's establishment. However, since this claim did not appear to have been brought to EASA's attention beforehand, the Ombudsman decided that it was inadmissible pursuant to Article 2(4) of his Statute which requires complaints to be preceded by appropriate administrative approaches.

## The inquiry

- 14.** On 7 May 2012, the Ombudsman opened an inquiry and asked EASA to submit an opinion.
- 15.** On 29 August 2012, EASA transmitted its opinion to the Ombudsman. The opinion was forwarded to the complainant with an invitation to submit observations. No observations were received from the complainant.

## The Ombudsman's analysis and conclusions

**A. Alleged inefficiency and failure to certify the aircraft concerned within a reasonable time and corresponding claim**

### Arguments presented to the Ombudsman

- 16.** The **complainant** noted that, by the time it submitted its complaint to the Ombudsman, the EASA certification procedure had already been pending for 16 months.
- 17.** It pointed out that the manufacturer has stopped accepting orders from Europe for the moment. Thus, the complainant will not be able to deliver any aircraft before the second half of 2013. It also stated that it sustained considerable damage, since a customer had already



cancelled an order.

**18.** The complainant emphasised that, according to the manufacturer's status report, the hydraulic system in question was already in use in other certified and operating aircraft. Therefore, the length of EASA's investigation into the issue of hydraulic system compliance was unreasonable.

**19.** In its opinion, **EASA** stated that it could understand that it was important for the complainant that the aircraft concerned be certified in the shortest time possible. It stressed, however, that the complainant was not involved in the certification process. Only the manufacturer, EASA and the FAA were. EASA also pointed out that the manufacturer itself had not made any complaint or appeal regarding its procedure to certify the aircraft concerned.

**20.** The Agency observed that the complainant had not specified in what way its work was inefficient and that, as a result, its reply concerning this matter could only be formulated in general terms.

**21.** In addition, the rules and procedures applicable to the certification process do not lay down any fixed deadlines within which to complete it. The specific timing depends on different factors, such as the complexity of the matter, the availability of resources and the level of cooperation of the applicant, in this case, the manufacturer. EASA recognised that the manufacturer was actively engaged in discussions aimed at resolving pending compliance issues.

**22.** EASA emphasised that the applicant for a type certificate has to demonstrate that the aviation product in question complies with all applicable EU airworthiness requirements. It stated that, in order to be fully compliant, some additional clarifications, substantiations and even a degree of re-design might be required. This would inevitably affect the timescale of the process.

**23.** The Agency concluded that the fact that it has not yet been able to issue a type certificate for the aircraft concerned is not the result of inefficient work, but is due to the fact that the manufacturer has not yet been able to demonstrate the aircraft's full compliance with the applicable EU airworthiness requirements. Thus, the certification process depends to a large extent on factors outside EASA's control.

## **The Ombudsman's assessment**

**24.** At the outset, the Ombudsman considers it appropriate to note that the complainant is not a party to the certification procedure. Thus, whilst it is understandable that a long certification procedure can have a negative impact on its business, it nevertheless cannot expect to have the same rights as the manufacturer in relation to the certification procedure. In other words, it cannot, for instance, expect EASA to inform it of the status of that procedure or about any specific details relating to possible issues that need to be clarified. That said, EASA did invite the complainant to refer to and seek explanations in this respect directly from the manufacturer.



25. The Ombudsman notes that the rules and procedures applicable to the certification exercise do not establish any fixed time limit within which EASA must complete the certification process of an aircraft.

26. Nevertheless, the Ombudsman is mindful of the need to ensure that the work of EU agencies is carried out pursuant to the principles of good administration. In this context, it is useful to point out that it constitutes good administrative practice to deal with administrative procedures as rapidly as possible.

27. The Ombudsman notes that EASA explained that the reason for the delay in the certification of the aircraft is that the manufacturer has not yet shown that the aircraft meets all the EU airworthiness requirements. In the Ombudsman's view, this would appear to be a sufficiently convincing reason for the fact that EASA has not yet concluded the certification process. In this context, the Ombudsman notes that the complainant did not submit any observations on EASA's opinion.

28. The Ombudsman also points out that, as explained in more detail below (see points 46-49 below), EASA has put forward convincing explanations for not taking into account the previous practical experience relating to the hydraulic system used in the aircraft concerned.

29. In light of the foregoing, the Ombudsman finds that no maladministration has been established with regard to the first allegation and related claim.

30. The Ombudsman notes that, whilst the certification procedure was still ongoing, EASA advised the complainant that it could, in the meantime, obtain an 'N-registration' which would have allowed it to fly the aircraft in question within the EU. This would suggest that it is possible to use an aircraft in the EU despite the fact that EASA has not yet confirmed its airworthiness. At first sight, this seems somewhat surprising. The Ombudsman considers, however, that there is no need to pursue this issue further in the present case.

## B. Alleged failure to communicate correctly with the complainant's parent company

### Arguments presented to the Ombudsman

31. The **complainant** alleged that EASA failed to communicate correctly with its parent company. More specifically, it failed (a) to reply to its e-mail of 27 October 2011, and (b) to provided the complainant with a timetable for certifying the aircraft concerned.

32. In its opinion, **EASA** emphasised that, since June 2011, it has been in constant contact with the complainant's parent company in order to discuss various administrative and technical aspects, concerning both its application for approval of flight conditions and, more generally, the



ongoing certification of the aircraft concerned. In this regard, there has been an extensive exchange of e-mails and telephone calls between the complainant and EASA.

**33.** According to EASA, the e-mail of 27 October 2011 did not raise any new arguments or concerns which had not been addressed in the previous correspondence with the complainant's parent company. EASA took the view that this e-mail should not be seen in isolation, but must be considered in light of the previous correspondence.

**34.** However, EASA recognised that the issue of providing a detailed timetable for the certification process had not been previously addressed or considered.

**35.** According to EASA, this issue is not, however, directly related to the individual application for approval of flight conditions submitted by the complainant's parent company, but rather to the certification of the aircraft concerned.

**36.** In view of the above, EASA concluded that the setting of even an indicative timetable for the certification process is a matter between the certifying authority (EASA) and the applicant (the manufacturer) only. However, following the request for information submitted by the complainant's parent company, EASA indeed provided information on the status of the certification process even before the above-mentioned e-mail of 27 October 2011 had been sent.

**37.** As a final remark, EASA underlined that it is not in a position to provide any binding timetable for complex certification processes in which several parties are involved and where technical issues are still under discussion.

## **The Ombudsman's assessment**

### **(a) As regards EASA's alleged failure to communicate correctly with the complainant**

**38.** It is not contested that EASA did not reply to the e-mail of 27 October 2011.

**39.** In its observations, EASA justified its failure to do so by arguing that the complainant did not raise any new arguments or concerns which had not been addressed in previous correspondence with it.

**40.** The Ombudsman does not find this argument convincing. First, as EASA itself admitted during the inquiry (see point 34 above), the issue of a binding schedule for certification, mentioned in the said e-mail, had not been addressed previously. Second, the European Code of Good Administrative Behaviour [2], as well as EASA's Code of Good Administrative Practice, [3] explicitly mention the situations in which correspondence does not need to be replied to. However, EASA did not invoke any of them. In this context, it is useful to add that, in any event,



any exception to the general duty of the EU institutions, bodies, offices and agencies to reply to interested parties should be narrowly construed [4] . Third, EASA suggested that the complainant did not raise any new arguments or concerns in its e-mail of 27 October 2011. However, even if this had been so, it is not easy to see what could have prevented EASA from simply referring the complainant to its position as explained in previous correspondence.

41. The Ombudsman therefore considers that EASA's failure to reply constitutes an instance of maladministration.

### (b) As regards the alleged failure to provide a binding timetable for certifying the aircraft concerned

42. As mentioned in point 24 above, the complainant was not a party to the certification process. Therefore, even though EASA provided it with general information on the status of the certification process, the complainant was not entitled to request, and EASA could not be expected to provide it with, a binding timetable concerning the certification procedure. The Ombudsman therefore finds no maladministration in relation to this aspect of the case.

## C. Allegation that EASA ignored the positive practical experience relating to the hydraulic system used in the aircraft concerned and corresponding claim

### Arguments presented to the Ombudsman

43. According to the **complainant** , the hydraulic system used in the aircraft in question constitutes the main safety concern. However, the hydraulic system installed in the aircraft is the same as the one used in a previous version of the aircraft, which had been certified for the EU. The complainant emphasised that the system has been used for 12 years without any problems reported. Furthermore, it drew attention to the fact that this system has already been used in 4 682 certified and operating aircraft.

44. In its opinion, **EASA** stressed that the aircraft concerned is a new aircraft. Therefore, the basis for its certification is different from that concerning previous models of the aircraft which were certified in the early 1990s. EASA also pointed out that the latter models were transferred into the EASA system on the basis of Commission Regulation 1702/2003 [5] and the Agency had no obligation or right to re-assess them. Therefore, the two models were subject to different certification procedures. Furthermore, the certification of the aircraft concerned in the present case is under the direct responsibility of EASA, which has to establish whether the aircraft complies with more recent EU airworthiness requirements.

45. EASA stressed that in order to assess the aircraft's compliance with the applicable EU airworthiness requirements, it has to examine all the technical issues involved, and not simply



the practical experience relating to the hydraulic system.

## **The Ombudsman's assessment**

**46.** The Ombudsman considers it appropriate to stress that he is not an aviation expert and that, thus, his review in relation to technical issues in the context of this complaint is necessarily limited to assessing whether EASA has put forward a reasonable and convincing explanation for its position or whether the complainant has shown that EASA committed a manifest error of assessment. Furthermore, the Ombudsman deems it useful to state that public safety in aviation is, in his view, a fundamental concern, and thus should be considered with utmost diligence.

**47.** In this context, the Ombudsman notes that EASA put forward that: (i) the hydraulic system of the aircraft concerned has to be assessed in accordance to a different certification procedure from the one applicable to earlier versions of the aircraft, and (ii) it has to make sure that all technical issues involved, that is, not only those concerning the hydraulic system, are properly examined.

**48.** The Ombudsman considers EASA's explanations to be reasonable and convincing, in particular, bearing in mind the need to guarantee public safety in aviation. The fact that a particular hydraulic system had in the past met one set of requirements within the context of a certification process involving a different type of aircraft does not mean that the same hydraulic system, when used in a different type of aircraft, would automatically meet the safety requirements foreseen. Likewise, EASA's statement that it needs to ensure that an aircraft satisfies all the applicable airworthiness requirements, and not only those relating to a specific technical aspect, appears to be reasonable. The Ombudsman notes that the complainant did not put forward any arguments that would call these explanations into question.

**49.** In light of the foregoing, the Ombudsman finds that no instance of maladministration was established in relation to the third allegation and the related claim.

## **D. Conclusions**

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

**It constitutes good administrative practice for the EU administration to reply to correspondence addressed to it by citizens or other members of the public. In the present case, EASA failed to reply to the e-mail which the complainant's parent company sent it on 27 October 2011. This constitutes an instance of maladministration.**

**The Ombudsman finds no maladministration in relation to the remainder of the**





**complaint.**

The complainant and EASA will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 10 July 2013

[1] For more information see: <http://www.easa.europa.eu/certification/permit-to-fly.php> [Link]

[2] See Article 14(3) of the European Code of Good Administrative Behaviour, which can be consulted at:

<http://www.ombudsman.europa.eu/resources/code.faces#hl26> [Link]

[3] See Article 16(3) of the Code of good administrative practice for the staff of the European aviation safety agency in their relations with the public, available at:

[http://easa.europa.eu/ws\\_prod/g/doc/Agency\\_Mesures/Agency\\_Decisions/2009/ED%20Decision%202009\\_078\\_E%](http://easa.europa.eu/ws_prod/g/doc/Agency_Mesures/Agency_Decisions/2009/ED%20Decision%202009_078_E%20)  
[Link]

[4] See to that effect the decision of the European Ombudsman on complaint 1437/2006/(WP)BEH, paragraph 86, available at:

<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/3666/html.bookmark> [Link]

[5] Commission Regulation (EC) No 1702/2003 of 24 September 2003 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations, OJ 2003 L 243, p. 6.