

## **Draft recommendation of the European Ombudsman in her inquiry into complaint 726/2012/(RA)FOR against the European Aviation Safety Agency (EASA)**

Recommendation

**Case** 726/2012/FOR - **Opened on** 22/05/2012 - **Recommendation on** 17/12/2013 -

**Decision on** 06/08/2014 - **Institution concerned** European Union Aviation Safety Agency ( Draft recommendation accepted by the institution ) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

### **Article I. The background to the complaint**

1. The complaint, submitted by an airline (Ryanair) in April 2012, concerns the manner in which the European Aviation Safety Agency (EASA) acted in the context of the process which would lead to the adoption of an EASA Opinion on the modification of flight and duty time limitations and rest requirements for commercial air transport [2] .

2. The Opinion in question was formally adopted by EASA on 28 September 2012 [3] , a number of months after the complaint was submitted to the Ombudsman. The purpose of the Opinion was to propose to the European Commission an update of the current rules on flight and duty time limitations and rest requirements for commercial airplane transport. The Opinion included a proposal for common EU regulations on areas so far regulated at national level, namely on the issues of: a) split duty; b) rest compensating for time zone differences; c) reduced rest arrangements; d) extension of flight duty period due to in-flight rest; and e) standby other than airport standby. The Opinion further proposed safety improvements relating to a) the definition of "acclimatised" (to take better account of the impact of time zone differences); b) cumulative fatigue (through a rolling limit of 1 000 hours of flight time in 12 consecutive months and an additional limit of 110 duty hours per 14 days, through prolonged extended recovery rest periods twice per month, and through additional rest requirements to compensate for disruptive schedules); and c) transient fatigue on night flights. EASA stated in its Opinion that it was finalised after two rounds of extensive public consultation, with the support of a group of experts representing Member States, air operators and flight and cabin crew associations, and in consultation with three independent scientific experts. It added that, although it was not possible to reach full consensus on all issues, this process allowed EASA to state that its proposal reflects the majority view of experts and affected stakeholders.



3. In accordance with the Terms of Reference for this procedure, EASA created a stakeholder group to allow third parties to submit their views throughout the rulemaking procedure. [4] The complainant and other stakeholders were represented in that stakeholder group. An Advisory Group of National Authorities [5] , made up of National Aviation Authority officials, also assisted EASA throughout the rulemaking procedure [6] leading to the EASA Opinion. As a general rule, EASA kept the stakeholder group updated on the work of the Advisory Group of National Authorities, by, for example, providing the stakeholder group with copies of the minutes of Advisory Group meetings. However, according to the complainant, one vital meeting of the Advisory Group of National Authorities, held on 26 October 2011, in which only Member State authorities and EASA officials were present, was not minuted. The stakeholder group was therefore not informed of the issues discussed in that Advisory Group meeting. The complainant argues that the issues discussed in the October 2011 meeting were determinative for the EASA Opinion. It adds that the meeting gave rise to changes that were not based on scientific or medical evidence. The complainant argues that as the process leading to the EASA Opinion should have been more transparent, that process now lacked legitimacy.

4. After a series of contacts with EASA, the complainant turned to the European Ombudsman.

## **Article II. The subject matter of the inquiry**

5. The complainant alleged that EASA's rulemaking process to update flight and duty time limitations and rest requirements for commercial air transport was flawed, notably, it was not transparent.

In support of this allegation, the complainant argued that EASA recommended changes to the rules in question, but did not produce any of the legally necessary scientific or medical evidence to show that these recommendations were required, or to support the recommendations themselves.

6. The complainant claimed that EASA should revoke its Comment Response Document [7] as published in January 2012 and, after conducting an evaluation of the relevant rules based on scientific and medical evidence, resubmit a revised Comment Response Document, if any, to the European Commission.

## **Article III. The inquiry**

7. The Ombudsman received this complaint on 10 April 2012. An inquiry was opened on 22 May 2012 with a request to EASA for an opinion on the complaint and for its response to the following questions:

1. Could EASA comment specifically on the statement in its letter to the complainant, dated 21 December 2011, that there would be no minutes of the special Advisory Group meeting? Could



EASA explain to the Ombudsman if this is standard practice for such meetings and, if so, how such a practice can be reconciled with (i) the Treaty provisions on transparency, [8] (ii) principles of good administration, and (iii) its own rulemaking procedure in force at the time? [9] If it is not standard practice, could EASA explain why it was decided, in this particular case, that there would be no minutes of the meeting?

2. Notwithstanding the fact that it appears to be EASA's position that there were no official minutes of this meeting, could EASA inform the Ombudsman whether EASA staff members took notes at this meeting, even though those notes were not transformed into official minutes?

3. The Ombudsman notes that EASA's rulemaking procedure in force at the time provides, in its Article 7(6), that " *If the comments received from national authorities in the context of article 6.3 of this Decision indicate major objections to the proposed rule, the Executive Director shall consult the Advisory Group of National Authorities to discuss the rule further. In those cases where additional consultation results in continuing disagreement regarding the rule, the Executive Director shall include in the comment response document the results of this consultation and the impact and consequences of his/her decision regarding the issue at stake .* " (emphasis added) Could EASA explain, in detail, to the Ombudsman how this provision was implemented in the case at hand?

4. The Ombudsman notes that EASA's rulemaking procedure was modified on 13 March 2012 by Management Board Decision 01-2012 [10] . Could the Agency explain to the Ombudsman the relevance of the revised procedure to the issues raised by the complainant in this case? In this regard, the Ombudsman notes that EASA's Management Board Decision 01-2012 refers to the " *final report on the review of the Rulemaking Process as presented in WP04 to MB 04/11 and adopted by the Management Board in its meeting of 14 December 2011* ". Could EASA provide the Ombudsman with a copy of this report, indicating whether or not it is confidential? [11]

5. More generally, could EASA provide the Ombudsman with the relevant legal basis for its rulemaking procedure?

8. EASA replied to the Ombudsman with its opinion in this case on 5 October 2012, while the complainant submitted its observations on 7 November 2012 and sent further correspondence in relation to its complaint on 11 October 2012 and 18 April 2013.

9. Furthermore, an inspection of EASA's file in this case took place on 29 May 2013. The Ombudsman's services inspected: (i) the emails relating to the meeting of the Advisory Group of National Authorities on 26 October 2011, sent to and from the EASA staff members who were present at the meeting; (ii) the notes drawn up by the EASA staff members who were present at the meeting; and (iii) the report referred to in question 5 above, which EASA identified as confidential. A copy of the Ombudsman's inspection report was forwarded to EASA and to the complainant on 25 June 2013. The complainant submitted observations on that report on 31 July 2013.



## **Article IV. The Ombudsman's analysis and conclusions**

### **Section 4.01 A. Allegation that EASA's rulemaking process was flawed, notably, it was not transparent and the related claim**

#### **(a) Arguments presented to the Ombudsman**

**10.** In its opinion, EASA explained that an Advisory Group [12] , composed of representatives from Member State National Aviation Authorities, assists it in rulemaking. The Advisory Group of National Authorities has, EASA insists, a purely advisory role. It does not encroach on EASA's independent decision-making powers.

**11.** EASA further pointed out that, as an independent group, the Advisory Group of National Authorities decides on its own Rules of Procedure. It is free to decide when to meet and how those meetings should take place.

**12.** During the rulemaking procedure in question, EASA received a request from some Member States to plan a special meeting of the Advisory Group of National Authorities, in order to have a constructive exchange of views on a few specific points on which Member States had concerns. EASA confirmed that there were no official minutes of that Advisory Group meeting of 26 October 2011. In its view, however, the relevance of the meeting had to be looked at in the wider context of the rulemaking process. EASA stated that it could not accept the allegation that this single meeting undermined the work and time invested by interested stakeholders in the process. On the contrary, the meeting and the way the meeting was conducted was a key success factor in bringing the discussions forward at a critical moment, by allowing Member State representatives to openly provide input on important features of the proposed new rules.

**13.** EASA further explained that the Advisory Group of National Authorities meets on a regular basis. Information relating to its work, including the agenda and minutes of the regular discussions, are publicly available on EASA's website. In accordance with paragraph 1 of the Advisory Group's Rules of Procedure [13] , additional meetings may be convened at the request of the Advisory Group's members. In the case at hand, a special meeting was convened, at the request of Member States [14] , who saw it as the best forum to openly provide further input on some technical and contentious elements of the EASA proposals. A list of topics reflecting the areas of concern, as expressed by the Member States, was addressed to the Group's members. Since the purpose of the special meeting was to allow for an open " *tour de table* " discussion on specific topics, the Member State representatives agreed that the list of topics would serve as the agenda for the meeting and that no official minutes would be taken and issued. EASA took note of this agreement and acted accordingly. EASA underlined that it was the Member States' decision not to have minutes — EASA, as secretary to the Advisory Group of National Authorities, took due account of this. This is not, EASA said, an uncommon



occurrence in similar discussion forums, where the objective is not to reach agreement or take decisions, but merely to express opinions and provide input. Neither is it inconsistent with the Treaty provisions on transparency, said EASA. These provisions act as general principles and are not meant to directly regulate the detailed mechanisms of how to conduct meetings or under which conditions a working meeting may be held and whether or not minutes are needed.

**14.** EASA further argued that its rulemaking procedure may be one of the most transparent regulatory processes in Europe. With regard to the present case, the points discussed at the meeting of the Advisory Group of National Authorities were made known to stakeholders, as they were included in the Comment Response Document. This enabled any interested party to react on the substance. Such reactions were received and processed in accordance with the rulemaking procedure.

**15.** EASA further argued that, in order to safeguard the independence of both the stakeholder group and EASA itself, no agreements were reached nor decisions taken at this special Advisory Group meeting. Member States' input was reflected in the Comment Response Document and, in this way, all stakeholders were informed about the content of the discussions at the meeting.

**16.** By way of conclusion on this point, EASA argued that the fact that the Advisory Group meeting of 26 October 2011 was held in a manner requested by the Member States is something that (i) was outside EASA's direct influence; (ii) successfully helped the process to continue to the benefit of all stakeholders; (iii) did not violate any rules or principles of transparency, as the points discussed were reflected in the Comment Response Document. The decision not to produce and publish minutes was the result of an agreement between members of the Advisory Group of National Authorities based on the specific objective and nature of the meeting, which was to allow for an unhindered and open exchange of views on specific issues.

**17.** In response to the Ombudsman's second question, namely, whether staff members took notes at the meeting, EASA stated that it assumes that taking personal notes during a meeting is common practice. It confirmed that its staff members present at the meeting took personal notes of the points discussed and the opinions expressed for "*personal use*", as part of work duties. As such, EASA considers that these notes are personal staff notes that have not been validated officially by EASA. As such, they are not documents or information that shall be released to the public.

**18.** In response to the Ombudsman's third question about Article 7(6) of EASA's rulemaking procedure, EASA confirmed that this provision foresees a specific consultation mechanism in case of comments raised by Member States in order to allow for further discussion. In these cases, the Advisory Group of National Authorities is convened to discuss the issues and, where possible, resolve disagreements. The second part of this provision sets out that, if there is still disagreement after the consultation has taken place, this will be reflected in the Comment Response Document, with an assessment of the impact and consequences of the decisions taken. As, in the case at hand, Member States expressed no "*continuing disagreement regarding the rule*", there was no need to apply the second part of Article 7(6). The Comment



Response Document reflected the points discussed but there was no need to specifically address the impact and consequences of the decisions taken in addition to what was already clear from the explanations in the Comment Response Document.

**19.** In response to the Ombudsman's fourth question about EASA's recently revised rulemaking procedure, EASA explained that the key elements driving the modification of the procedure were to improve it, in particular with regard to efficiency and effectiveness. EASA stated that the revised procedure has no bearing on the issues raised in this case since the Notice of Proposed Amendment in this case was dealt with entirely under the former procedure. With regard to the final report on the review of the procedure, which the Ombudsman requested a copy of, EASA confirmed that it is confidential [15] .

**20.** Finally, in response to the Ombudsman's fifth question asking for the legal basis for EASA's rulemaking procedure, EASA explained that the internal procedure to be followed in the issuing of Agency measures is the rulemaking procedure established in accordance with Article 52 of the Basic Regulation [16] .

**21.** In its observations on EASA's opinion, the complainant contested EASA's statement that no agreements were reached nor decisions taken at the meeting of the Advisory Group of National Authorities on 26 October 2011. This is, it said, at odds with EASA's position that, after the meeting, there was no continuing disagreement regarding the rules. The complainant further argued, in this regard, that one of the national aviation authorities that attended the meeting, told the complainant that it agreed with the complainant's position. The complainant thereby claimed that EASA's statement that there was no continuing disagreement must be incorrect.

**22.** On the issue of minutes of the meeting, the complainant argued, in response to EASA's reference to the important input from national aviation authorities, that it is impossible to know what this input entailed.

**23.** In response, specifically, to EASA's statement that "*the representatives from the Member states agreed (...) that no official minutes would be taken and issued*", the complainant pointed out that EASA is claiming that the national authorities did not want their airlines to know what was said or decided. This is not credible, it said — national aviation authorities are public bodies and do not operate in this manner. With regard to the issue of EASA staff members taking notes, the complainant insisted that, as EASA chaired the meeting, the notes its staff took cannot be deemed to be "*personal notes*" and must be disclosed.

**24.** With regard to the relevance of EASA's new rulemaking procedure, the complainant insisted that, contrary to EASA's claim, the new elements in the procedure are relevant to this complaint as the new procedure provides for greater transparency and efficiency than the previous procedure. If EASA were to re-evaluate flight time limitations under the new rulemaking procedure, it is unlikely that its investigation would be as flawed and lacking in transparency as the current procedure.

**25.** Finally, the complainant argued that EASA has acted in violation of Article 52 of its Basic



Regulation in that it did not "*involve appropriate experts from relevant interested parties*" and did not "*consult widely with interested parties*".

**26.** In further correspondence, dated 18 April 2013, the complainant informed the Ombudsman that, in its draft review of EASA's rulemaking process, dated 9 September 2011, EASA identified as a concern "*final developments in the positions of the Member States' representatives late in the process, including on occasions overruling the positions of experts during the drafting process, resulting in a negative position of the delegations in the committee*". The complainant insisted that this occurred in the case at hand. As a result, it argued that the Ombudsman should recommend EASA to: (i) allow Ryanair to operate under the existing regulations, (ii) revoke its Comment Response Document as published in January 2012, and (iii) conduct an evaluation of the rules in question based on scientific and medical evidence. Upon conducting such an evaluation, EASA should resubmit a revised Comment Response Document, if any, to the European Commission.

**27.** After a careful analysis of EASA's opinion and the complainant's observations, the Ombudsman concluded that it would be appropriate to inspect EASA's file in this case. That inspection took place on 29 May 2013 and covered the following documents:

1. The emails relating to the special Advisory Group of National Authorities meeting of 26 October 2011 sent to and from the EASA staff members who were present at that meeting.
2. The notes drawn up by staff members who were present at the special Advisory Group of National Authorities meeting.
3. A consolidated summary of the meeting, with conclusions, produced on 27 October 2011.
4. A draft of the consolidated summary of the meeting.
5. Letter from the UK Representation to the EU to EASA, dated 18 March 2011 (document enclosed with EASA's opinion).
6. Letter from the Ministry of Infrastructure and the Environment of the Netherlands to EASA, dated 16 March 2011.
7. Letter from the UK Representation to the EU to EASA, dated 30 June 2011.
8. Letter from the Permanent Representation of Malta to the EU to EASA, dated 16 May 2011.
9. The report referred to in question 5 of paragraph 12 above, which EASA identified as confidential.
10. Minutes of the Meeting of the Comment Review Group OPS.055 of 9-10 November 2011.
11. Minutes of the Meeting of the Comment Review Group OPS.055 of 29 November 2011.





28. In its observations on the Ombudsman's inspection report, the complainant pointed out that the Ombudsman's confirmation of the existence and exchange of emails and notes from EASA staff relating to the unminuted meeting of the Advisory Group of National Authorities belies EASA's claim that such notes were "*for personal use*". Moreover, the Ombudsman's discovery of a "*consolidated summary of the [Advisory Group] meeting*", dated the day after the meeting, disproves EASA's claim that there were "*no official minutes*" of the meeting.

29. The complainant further drew the Ombudsman's attention to a recent EASA decision to reopen certain sections of its Opinion No 04/2012 of 28 September 2012. The complainant argued that this decision resulted from a similarly opaque process.

## **(b) The Ombudsman's assessment**

### **(i) Preliminary remarks**

30. Article 11(1) TEU provides that the Union institutions "*shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.*" Article 11(2) TEU states that "[t]he institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society."

31. In his draft recommendation in case 2558/2009/(TN)DK [17], the Ombudsman pointed out that "[p]articipatory democracy, based on the principles of equality and transparency, improves citizens' trust in the EU and the EU administration. Increased trust in the EU and the EU administration is a key element in increasing the effectiveness of the EU and its administration."

<[18]

32. The Ombudsman notes that even if there is no subjective legally enforceable right to be consulted in a rulemaking process, such as that conducted by EASA, the principle of participatory democracy is of particular importance in an area that has such a direct impact on citizens' daily lives, namely, the safety of air travel. While EASA has a very wide margin of discretion in terms of how it engages in dialogue with "*representative associations and civil society*", principles of good administration would suggest that it consult as widely as possible. It should also seek to explain clearly, and justify, how it gives effect to the principle of participatory democracy.

33. EASA's rulemaking process should, moreover, be underpinned by the very highest level of transparency. This process is, it should be recalled, designed to lead to new legislation on an issue of major public importance. The Court of Justice of the EU has underscored the importance of transparency as far as the work of the legislator is concerned [19]. The views of Advocate-General Cruz Villalón in *Council v Access Info Europe*, provide a clear and convincing perspective on the importance of this case law. He states that "*'Legislating' is, by definition, a*





*law-making activity that in a democratic society can only occur through the use of a procedure that is public in nature and, in that sense, 'transparent'. Otherwise, it would not be possible to ascribe to 'law' the virtue of being the expression of the will of those that must obey it, which is the very foundation of its legitimacy as an indisputable edict. In a representative democracy, and this term must apply to the EU, it must be possible for citizens to find out about the legislative procedure, since if this were not so, citizens would be unable to hold their representatives politically accountable, as they must be by virtue of their electoral mandate."* [20] While EASA is not the legislator, it nonetheless plays an important role in the legislative process, as it prepares the ground for the Commission, which has the exclusive right to propose legislation and also plays a role in conciliating the possibly divergent positions of Parliament and Council, as co-legislators. The Commission, and the co-legislators thus rely heavily on the scientific work of EASA. EASA's work therefore impacts significantly on the interests of all EU citizens since it can be decisive in terms of the eventual content of legislation. Trust in EASA's work, which is underpinned by ensuring a sufficient degree of transparency as regards its work, is vital to ensuring trust in the overall legislative process leading to new air safety rules.

**34.** Against this background, the Ombudsman considers that the public interest is best served by making publicly accessible as much information as possible pertaining to EASA's rulemaking processes. She recalls that such openness allows citizens to scrutinise all the relevant information which is used in the formulation of future legislative acts. Citizens are thus given the knowledge and understanding necessary to contribute to informed public debate on the various considerations underpinning new legislation [21] . This leads to better legislative outcomes. It also enhances the democratic legitimacy of the legislation [22] .

**35.** EASA itself has underlined the importance it attaches to transparency and input from civil society stakeholders. Indeed, it sees transparency as a strength [23] . The Ombudsman strongly commends EASA for taking this general approach.

**36.** The Ombudsman has, moreover, carefully examined the general structure of the EASA rulemaking process. She notes that EASA consults a broad range of stakeholders throughout its rulemaking processes and divulges extensive information to them. In her experience, few public bodies can demonstrate the level of engagement and openness embraced by EASA in conducting its work. As such, as a general observation, the Ombudsman is of the view that EASA merits the highest praise, and she praises it accordingly.

**37.** While the above comments reflect the general practice of EASA, the present inquiry seeks to determine whether these high standards were maintained in the case at hand.

## **(ii) Alleged lack of transparency**

**38.** As noted above, it is EASA's normal practice to minute meetings of the Advisory Group of National Authorities and to make those minutes public. The Ombudsman considers this practice to be an example of good administration. This transparency enhances trust in and the legitimacy of the EASA rulemaking process.



**39.** With regard to the case at hand, EASA justifies its decision not to make formal minutes of the meeting of the Advisory Group of National Authorities on 26 October 2011 on the basis that no decisions were taken at that meeting . As a result, it goes on to argue, the fact that the meeting was not minuted did not affect its rulemaking process.

**40.** The Ombudsman notes, first, that the fact that a meeting might not reach conclusions on specific issues is not a reason, of itself, not to minute a meeting.

**41.** The Ombudsman notes, in any case, that this argument is not supported by the facts. She notes that EASA stated, in a letter to the complainant, that "*consensus was reached [at the Advisory Group meeting of 26 October 2011] that additional requirements should be introduced*". EASA further stated, in its opinion in this case, that "*the aim of the meeting was successfully achieved. The Member States expressed 'no continuing disagreement regarding the rule'*".

**42.** EASA also argues that the purpose of the meeting of the Advisory Group of National Authorities on 26 October 2011 was to allow for an open "*tour de table*" discussion on specific topics. EASA underlined that it was the Member States' decision not to have minutes. EASA states that it simply "took note" of this agreement and acted accordingly. EASA went on to say that this is not an uncommon occurrence in similar discussion forums, where the objective is not to reach agreement or take decisions, but merely to express opinions and provide input. Neither is it, it argued, inconsistent with the Treaty provisions on transparency. These provisions act as general principles and are not meant to directly regulate the detailed mechanisms of how to conduct meetings or under which conditions a working meeting may be held and whether or not minutes are needed.

**43.** Having carefully examined the documents in EASA's file, including the personal minutes of the EASA staff members present at the meeting, the Ombudsman can find nothing to suggest that the Member States decided not to have minutes of the meeting. There is no record of any request from a Member State prior to the meeting. Further, the EASA staff members present at the meeting did not take any note of any such request from the Member States. The Ombudsman also notes that, after the meeting, two national authorities even requested copies of the minutes of the meeting. This suggests that at least these Member States expected official minutes to be produced and circulated.

**44.** The only conclusion the Ombudsman can draw is therefore that the initiative not to produce official minutes of the meeting came from EASA rather than the Member States.

**45.** Indeed, having carefully inspected the file, the Ombudsman notes that it was in fact anticipated that detailed minutes would be taken at the meeting of the Advisory Group of National Authorities on 26 October 2011. Further, having inspected the file, the Ombudsman notes that the EASA staff members present at the meeting did in fact make high quality and complete notes of the meeting which enabled them to produce a detailed account of the meeting. As a result, a "*consolidated summary of the meeting, with conclusions, produced on 27*



October 2011', as well as comments received by email from the Hungarian delegation which did not attend the meeting, was subsequently circulated to the independent advisor of the stakeholder group and to the Commission.

**46.** In the Ombudsman's view, the inevitable consequence of not releasing an account of the meeting of the Advisory Group of National Authorities on 26 October 2011 is that trust in EASA's rulemaking procedure, and indeed in the draft rules that constituted the outcome of that procedure, is weakened. This is all the more unfortunate, given that, as the Ombudsman pointed out above, EASA's rulemaking procedure merits the highest praise.

**47.** In light of the foregoing, the Ombudsman concludes that, by not drafting " *official* " minutes of the meeting of 26 October 2011, EASA committed an instance of maladministration. As a result, the Ombudsman has decided to issue a draft recommendation, with a view to increasing transparency.

### (iii) The complainant's claim

**48.** The complainant claims that EASA should revoke its Comment Response Document as published in January 2012 and resubmit a revised Comment Response Document after conducting an evaluation of the relevant rules based on scientific and medical evidence.

**49.** The defect in the case relates to a lack of transparency. The procedural error identified above does not, however, imply that the end result, namely, the Comment Response Document, was wrong in substance. The Ombudsman does not consider, as regards the validity of the overall procedure, that the error she identified is sufficient to merit withdrawal of the Comment Response Document. EASA, after all, confirmed that the comments of the national aviation authorities, put forward at the Advisory Group meeting of 26 October 2011, were reflected in the Comment Response Document. As such, the complainant had the opportunity, subsequent to the publication of the Comment Response Document and prior to the publication of EASA's Opinion No 04/2012, to acquaint itself with and comment on these points.

**50.** As the Ombudsman cannot therefore uphold the complainant's claim, she concludes that no useful purpose would be served by proposing a friendly solution in this case.

**51.** However, the fact that EASA did not produce official minutes of the meeting of the Advisory Group of National Authorities on 26 October 2011 rendered it all the more difficult for the complainant, and other interested stakeholders, to follow the procedure in detail. As outlined above, transparency is a vital means by which EASA can ensure participation and, ultimately, trust in its important work for citizens. The very fact of not publicly disclosing official minutes of the meeting undermined the procedure from the point of view of the complainant and, possibly, other interested stakeholders. Thus, while EASA seems to consider that producing and disclosing official minutes of the Advisory Group meeting would have undermined the rulemaking procedure in question, the Ombudsman's view is that the reverse is, in fact, true. By not producing and disclosing official minutes, it was not possible for stakeholders to verify, for



themselves, that there were no issues discussed that were of such a nature as to undermine the validity of the entire process.

**52.** The Ombudsman recalls that EASA officials in this case diligently took notes of the meeting of the Advisory Group of National Authorities (see paragraph 48 above) and that a consolidated summary of the meeting, with conclusions, was subsequently drawn up and sent to the independent advisor of the stakeholder group and the Commission. This consolidated summary was therefore understood by EASA as sufficient to inform relevant parties as regards the content of the meeting.

**53.** Having inspected both the notes taken by EASA staff and the consolidated summary, the Ombudsman considers that this latter document constitutes the functional equivalent of minutes of the meeting. Moreover, on the basis of the inspection, the Ombudsman considers that the consolidated summary should be publicly disclosed in the interests of transparency.

**54.** In light of the above, the Ombudsman makes a draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman. In making her draft recommendation, the Ombudsman also seeks to ensure that EASA avoids similar errors in future cases.

**55.** With regard, finally, to the complainant's argument that it was not included in the 2007 Flight Time Limitations Advisory Group, the Ombudsman notes that, in emails sent in September and October 2006, EASA invited the complainant's own interest group, the European Low Fares Airline Association, to participate in the group. The European Low Fares Airline Association failed to respond. Moreover, the complainant enclosed a letter that was sent from the European Low Fares Airline Association to EASA, dated 7 January 2010, in which the European Low Fares Airline Association confirmed that it welcomed membership of the group and was committed to working constructively with its members. The Ombudsman therefore finds that there are no grounds to further pursue the complainant's claim.

## Section 4.02 B. The draft recommendation

On the basis of her inquiries into this complaint, the Ombudsman makes the following draft recommendation to EASA:

**EASA should publicly disclose the consolidated summary of the meeting of the Advisory Group of National Authorities produced on 27 October 2011.**

**EASA should, with a view to assisting interested parties fully to understand and participate in its decision-making process, in future, produce official minutes of meetings, such as the meeting at issue in this case [24] .**

EASA and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, EASA shall send a detailed opinion by



31 March 2014. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

Emily O'Reilly

Done in Strasbourg on 17 December 2013

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] EU flight and duty time limitations are currently governed by Regulation 1899/2006 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation; OJ 2006 L 377, p. 1.

[3] Available at

<http://www.easa.europa.eu/agency-measures/docs/opinions/2012/04/EN%20to%20Opinion%2004-2012.pdf>  
[Link]

[4] According to Article 4(2) of EASA's rulemaking procedure, terms of references for each of the Agency's rulemaking tasks are drawn up by the Executive Director, after consultation of the [Safety Standards Consultative Committee \[Link\]](#) (SSCC) and the [Advisory Group of National Authorities \[Link\]](#) (AGNA). The terms of reference in this case are Terms of Reference OPS.055 (a) & (b) of 20 November 2009 and are available at:

[http://www.easa.europa.eu/rulemaking/docs/tor/ops/EASA-ToR-OPS.055\(a\)\\_OPS.055\(b\)-00-20112009.pdf](http://www.easa.europa.eu/rulemaking/docs/tor/ops/EASA-ToR-OPS.055(a)_OPS.055(b)-00-20112009.pdf)  
[Link]

[5] This group was referred to by the Agency as the 'AGNA'.

[6] The term 'rulemaking procedure' is used herein to refer to the structured process applied by EASA for issuing the EASA Opinion.

[7] The Comment Response Document is a consultation document, which preceded EASA's Opinion No 04/2012. The Comment Response Document was itself preceded by a Notice of Proposed Amendment, which EASA also issued for the purposes of broad consultation.

[8] Article 1 of the Treaty on European Union and Article 15(1) of the Treaty on the Functioning of the European Union.

[9] The Ombudsman noted in this regard that, according to Article 10(5) of the rulemaking procedure then in force for EASA: "[A] *ll aspects of the (AGNA's) work, including membership,*



*procedures, meeting agendas, minutes and related documentation, shall be published in the Agency's official publication. " (emphasis added)*

[10] See

<https://easa.europa.eu/management-board/docs/management-board-meetings/2012/01/EASA%20MB%20Decision>

[11] The Ombudsman noted that, in the event the document were classified as confidential, it would be treated as a document obtained during an Ombudsman inspection.

[12] The 2012 revision of EASA's rulemaking procedure saw AGNA replaced by a Regulatory Advisory Group (RAG) and Thematic Advisory Groups (TAGs).

[13] The weblink provided by EASA for the Advisory Group's Rules of Procedure no longer works.

[14] For instance, EASA enclosed with its opinion a letter dated 18 March 2011 from the UK Permanent Representation to the EU to EASA's Rulemaking Director. The UK highlighted three areas where it had major objections which it wanted to be discussed by the Advisory Group in accordance with Article 7(6) of EASA's rulemaking procedure. It goes into detail on these issues.

[15] This document was inspected as part of the Ombudsman's inspection of 29 May 2013.

[16] Regulation (EC) No 216/2008 of the European Parliament and of the Council 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.

[17] Available on the Ombudsman's website at:

<http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/11621/html.bookmark>  
[Link]

[18] Idem, at paragraph 9.

[19] See, notably, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, and Case T-233/09 *Access Info Europe v Council* [2011] ECR II-1073.

[20] See the Opinion of Advocate General Cruz Villalón of 16 May 2013 in Case C-280/11 P *Council v Access Info Europe*, at paragraph 63.

[21] See Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 46.

[22] See the Opinion of Advocate General Cruz Villalón of 16 May 2013 in Case C-280/11 P *Council v Access Info Europe*, at paragraph 64.



[23] See EASA's 'Draft Report on Review of Rulemaking Process', dated 9 September 2011.

[24] The Ombudsman notes, from footnote 13 above, that the Advisory Group in question has been replaced by a Regulatory Advisory Group (RAG) and Thematic Advisory Groups (TAGs). EASA should therefore draw the necessary conclusions from the Ombudsman's draft recommendation for these groups.