

Decision of the European Ombudsman closing his inquiry into complaint 407/2010/(FS)BEH against the European Aviation Safety Agency

Decision

Case 407/2010/BEH - Opened on 24/03/2010 - Decision on 23/11/2010 - Institution concerned European Union Aviation Safety Agency (Settled by the institution) |

The complainant is a German company active in the aeronautics sector. One of its activities is repairing and checking safety belts and cargo nets. In order to ensure the continuing airworthiness of an aircraft, EASA issues airworthiness directives with which aircraft operators have to comply. In January 2010, EASA published a proposed airworthiness directive ('the PAD') and invited comments from all interested parties. The PAD, which essentially applies to safety belts and torso restraint systems, stated that EASA had been made aware that certain maintenance organisations were maintaining or repairing safety belts and torso restraint systems in contravention of applicable rules. The PAD foresaw, among other things, a prohibition on installing equipment which is incompatible with the directive, once it entered into force. In February 2010, the complainant, who was expressly mentioned in the PAD, turned to the Ombudsman. It alleged that, in deciding to issue the PAD, EASA acted unlawfully, unfairly, and arbitrarily. In support of its allegation, the complainant submitted the following: EASA disadvantaged German companies; the reasoning it used was incorrect and unfounded; and there was a suspicion that the decision was the result of successful lobbying. The complainant claimed that EASA should withdraw the PAD or, alternatively, exempt the complainant from the PAD's application. On 24 March 2010, the Ombudsman opened an inquiry into the complainant's allegation and claim.

In its opinion, EASA submitted that when it issued the PAD it had followed standard procedure, which included submitting the PAD to stakeholders for comments. EASA could not, therefore, be considered to have acted unlawfully, unfairly, or arbitrarily. EASA further explained that it had withdrawn the PAD in April 2010, and stated that it therefore considered the complainant's request to have been satisfied. In a telephone conversation with the Ombudsman's services, the complainant's representative confirmed that he considered the matter to have been settled to the complainant's satisfaction.

In view of EASA's withdrawal of the PAD, and bearing in mind the complainant's view that the matter was settled to its satisfaction, the Ombudsman considered that EASA had settled the matter, and he closed the case.



The background to the complaint

1. The complainant is a company active in the aeronautics sector. One of its activities is repairing and checking safety belts and cargo nets, in accordance with an authorised release certificate issued by the European Aviation Safety Agency ('EASA'), and approved by the German aviation authority, the Luftfahrtbundesamt ('LBA'). Its complaint relates to a notification of a proposal to issue an airworthiness directive ('PAD') applicable to certain aeronautic products.
2. Airworthiness Directives ('ADs') are issued by EASA on the basis of Regulation 216/2008 [1]. In accordance with Part M.A.301 of Annex I of Regulation 2042/2003 [2], the continuing airworthiness of an aircraft shall be ensured by complying with all applicable ADs. As a consequence, any aircraft to which an AD applies may only be operated in accordance with the requirements of that AD, unless otherwise specified by EASA, or agreed with the competent authority of the State in which the aircraft is registered.
3. On 13 January 2010, EASA published PAD 10-010 ('the PAD') and invited all interested persons to submit their comments before 10 February 2010. The PAD applies to "[a] *ll safety belts and torso restraint systems, all part numbers, installed on any aircraft, if maintained or repaired* " and concerns a number of manufacturers which are authorised (E)TSO [3] approval holders.
4. The background to the PAD was that EASA became aware that some of the organisations maintaining or repairing safety belts and torso restraint systems did not hold approved maintenance data [4]. According to the PAD, this was contrary to Article 145.A.45 of Part 145 of Annex II to Regulation 2042/2003. Failure to hold such data could lead to (E)TSO approval losing its validity and the installation of certain products in aircrafts being prohibited, since improper maintenance or repair of safety belts could result in system failure, and jeopardise safety during turbulence or emergency landing conditions.
5. The PAD provides that an inspection shall be carried out, at the latest three months after the issue date of the AD, in order to verify whether safety belts and torso restraint systems are maintained or repaired in line with the applicable rules. This provision applied to the complainant's equipment. The PAD also foresees the possibility of replacing relevant systems with serviceable parts. Moreover, after the effective date of the AD, any equipment installed must comply with the requirements of the said AD.
6. On 1 February 2010, the complainant, who is expressly mentioned in the PAD, turned to the Ombudsman and raised a number of objections. The arguments it submitted are reflected in an undated letter entitled " *Comments of Deutscher Aero Club to EASA PAD No: 10-010* ". A copy of the letter was enclosed with the complaint.



The subject matter of the inquiry

7. In its complaint to the Ombudsman, the complainant submitted the following allegation and claim:

In deciding to issue the PAD, EASA acted unlawfully, unfairly, and arbitrarily. In support of its allegation, the complainant submits that EASA disadvantaged German companies; the reasoning it used was incorrect and unfounded; and there was a suspicion that the decision was the result of successful lobbying [5] .

EASA should withdraw the PAD or, alternatively, exempt the complainant from the PAD's application.

8. Article 2(4) of his Statute requires complaints to the Ombudsman to be preceded by appropriate prior approaches. In his letter requesting EASA's opinion (see paragraph 14 below), the Ombudsman noted that the complainant did not appear to have contacted EASA. However, given that the comments submitted by 'Deutscher Aero Club', which refer to the complainant by name, appear to set out the substantive concerns raised by the complainant in its present complaint, the Ombudsman considered the said condition to be fulfilled. In the same letter, the Ombudsman further noted that EASA's attention had not been drawn to all of the complainant's arguments in support of its allegation before he received the complainant's complaint. The Ombudsman considered it appropriate, however, that EASA should be given the possibility to provide an opinion on the complaint in its entirety, rather than requiring the complainant to contact EASA with regard to some of these arguments.

9. In its opinion (see paragraph 14 below), EASA took the view that the condition laid down in Article 2(4) of the Ombudsman's Statute had " *not been completely fulfilled* " in the complainant's case. In support of its view, it pointed out that the complainant did not give EASA the opportunity to respond to its comments. The complainant turned to the Ombudsman before 12 April 2010, which was the date on which EASA published its reply to the comments it received on the PAD. EASA moreover submitted that the complainant did not make use of the complaints procedure foreseen in its Code of Good Administrative Practice ('EASA's Code') [6] . According to EASA, the purpose of consultation relating to a PAD is to give addressees, as well as potentially affected parties, the possibility to comment. It does not, however, replace the complaints procedure. In view of the fact that the complainant did not follow the complaints procedure foreseen in EASA's Code, EASA considered that it did not have the opportunity to deal with the complainant's allegation before the latter filed its complaint with the Ombudsman. In EASA's view, the complainant thus did not make appropriate administrative approaches, as required by Article 2(4) of the Ombudsman's Statute, before turning to the Ombudsman.

10. The Ombudsman understands EASA to be objecting to two issues: (i) the timing of the complaint to the Ombudsman, which preceded the publication of EASA's reply to the comments received on the PAD, and (ii) the fact that the complainant did not make use of the complaints procedure, as foreseen in EASA's Code.



11. As regards the **first issue**, the Ombudsman considers that Article 2(4) of his Statute implicitly requires a body to be given enough time to react to a grievance brought to its attention before he may consider a relevant complaint. Given that the closing date for consultation indicated in the PAD was 10 February 2010, it could be argued that EASA did not have to adopt a position on the grievance raised by the complainant before the expiry of that deadline. However, in its complaint, the complainant not only objected to the substance of the PAD, but also argued that issuing the PAD itself constituted maladministration. With this in mind, and subject to the proviso set out in the Ombudsman's letter to EASA (see paragraph 8 above), the Ombudsman considers that, as regards the timing of the complaint, the conditions set out in Article 2(4) of his Statute have been met.

12. As regards the **second issue**, the Ombudsman takes note of the complaints procedure foreseen in Article 27 of EASA's Code. Pursuant to that procedure, any alleged breach of the rules and principles set out in EASA's Code may be the subject of a complaint to which EASA shall reply within two months of receipt. Within one month of receiving EASA's reply, a complainant may submit a request for review to EASA's Executive Director. The Executive Director shall reply within one month of receiving such a request. Article 27(6) of the Code stipulates that "[m]embers of the public are also entitled to lodge those complaints with the European Ombudsman ...". The Code thus expressly recognises that complainants have a choice between submitting their complaint to EASA, or to the Ombudsman.

13. In view of the above, the Ombudsman maintains his view that the present complaint is admissible.

The inquiry

14. The complaint was forwarded to the Executive Director of EASA for an opinion. EASA's opinion was forwarded to the complainant with an invitation to make observations by 31 August 2010. No observations were received by that date or thereafter. In a telephone conversation with the Ombudsman's services on 1 October 2010, the complainant's representative gave its view on EASA's opinion.

The Ombudsman's analysis and conclusions

Preliminary remarks

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

A. The complainant's allegation and claim



Arguments presented to the Ombudsman

16. In its complaint, the complainant essentially submitted the following arguments in support of its allegation and claim:

- Products maintained and repaired pursuant to national rules up until 1 April 2009, the date on which Regulation 2042/2003 entered fully into force in Germany, should be exempted from the PAD;
- EASA did not substantiate its claim, which the complainant considers to be unjustified and arbitrary, that it does not possess approved maintenance data. The complainant stated that it holds a valid Authorised Release Certificate EASA Form 1, approved by the LBA, as well as an approval certificate pursuant to Part 145. Furthermore, there had never been any complaints about the quality of the products in question, and EASA's assertions would have to be confirmed by an independent expert;
- The PAD relates exclusively to German maintenance companies and therefore discriminates against them. Relevant companies based in other Member States, which might not possess approved maintenance data, are not listed in the PAD;
- The PAD would have an important economic impact on German operators, and would lead to a possible loss of up to EUR 1 million, and many jobs.

Against this background, the complainant alleged that, in deciding to issue the PAD, EASA acted unlawfully, unfairly, and arbitrarily. The complainant claimed that EASA should withdraw the PAD or, alternatively, exempt it from the PAD's application.

17. In its opinion, EASA stated that, by issuing the PAD, it had followed the standard procedure, which included submitting the PAD to stakeholders for comments. EASA could not, therefore, be considered as having acted unlawfully, unfairly, or arbitrarily. EASA also pointed out that the PAD does not constitute a binding decision. Intended addressees were, therefore, not obliged to comply with it. Neither did it create any obligations for other affected parties. The purpose of the consultation procedure was to allow EASA to give due consideration to the views of external parties affected, and to modify its approach accordingly, if considered justified.

18. EASA furthermore explained that it withdrew the PAD by means of the "*PAD 10-010 Withdrawal Statement*", dated 12 April 2010. The PAD was replaced by a 'Safety Information Bulletin' which highlights the illegal nature of certain maintenance. EASA concluded by stating that it considered that the withdrawal of the PAD satisfied the complainant's request.

19. In a telephone conversation with the Ombudsman's services on 1 October 2010, the complainant's representative stated that he considered that the matter had been settled to the complainant's satisfaction.

The Ombudsman's assessment

20. The Ombudsman considers that, by withdrawing the PAD, EASA satisfied the



complainant's claim. In view of the withdrawal of the PAD, and bearing in mind the complainant's view that the matter has thus been settled to its satisfaction, the Ombudsman considers that EASA has settled the case.

B. Conclusions

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

EASA has settled the case to the complainant's satisfaction.

The complainant and EASA will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 23 November 2010

[1] 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).

[2] 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).

[3] (E)TSO stands for 'European Technical Standard Order'.

[4] Article 145.A.45(b) of Part 145 (Annex II to Regulation 2042/2003) gives the following definition of maintenance data: "*For the purposes of this Part, applicable maintenance data shall be any of the following:*

- 1. Any applicable requirement, procedure, operational directive or information issued by the authority responsible for the oversight of the aircraft or component;*
- 2. Any applicable airworthiness directive issued by the authority responsible for the oversight of the aircraft or component;*
- 3. Instructions for continuing airworthiness, issued by type certificate holders, supplementary type certificate holders, any other organisation required to publish such data by Part-21 and in the case of aircraft or components from third countries the airworthiness data mandated by the authority responsible for the oversight of the aircraft or component;*



4. Any applicable standard, such as but not limited to, maintenance standard practices recognised by the Agency as a good standard for maintenance;

5. Any applicable data issued in accordance with paragraph (d). "

[5] The Ombudsman understands that, by referring to lobbying, the complainant suggests that EASA acted wrongly, at the instigation of a third party which might have an interest in the PAD.

[6] For the text of EASA's Code, see:

[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%20Code%20of%20Practice)
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