



## Decision in case 1171/2013/TN on the work of the European Aviation Safety Agency (EASA) on the EU rules on flight and duty time limitations and rest requirements for commercial airline transport

Decision

**Case** 1171/2013/TN - **Opened on** 18/07/2013 - **Recommendation on** 05/09/2014 - **Decision on** 05/11/2015 - **Institutions concerned** European Union Aviation Safety Agency ( No maladministration found ) | European Union Aviation Safety Agency ( Draft recommendation partly accepted by the Institution ) | European Union Aviation Safety Agency ( No further inquiries justified ) |

The complaint, which was submitted by the British Air Line Pilots' Association, relates to *the EU rules on flight and duty time limitations and rest requirements for commercial airlines. More specifically, it concerns the manner in which EASA had conducted its process to update these rules. The complainant contended (i) that scientific advice should have had a more prominent role in the rulemaking process; (ii) that EASA had failed to provide evidence of the qualifications of the members of the rulemaking group; and (iii) that EASA did not deal adequately with conflict of interest issues.*

*The Ombudsman found no maladministration by EASA as regards the role of scientific advice in the rulemaking process. As regards the issue of how EASA manages possible conflicts of interest in the rulemaking groups, the Ombudsman found that its policy for mitigating such conflicts in the case of its own staff had been changed and that this revised approach is now being applied also to experts in the rulemaking groups. On this basis the Ombudsman concluded that she did not have to inquire further into that issue. Finally, EASA accepted the Ombudsman's recommendation to provide the complainant with anonymised information about the members of the rulemaking group. The Ombudsman therefore closed the case, encouraging EASA to adopt a more proactive approach to disclosing information available to it about the qualifications and expertise of members of the rulemaking group. She also flagged that she is considering looking into issues related to the work done by external experts for certain EU agencies.*

The background

- 1.** The complaint, submitted by the British Air Line Pilots' Association (the Pilots' Association), related to the EU rules on flight and duty time limitations and rest requirements for commercial airline transport. More specifically, the complaint was about the manner in which the European Aviation Safety Agency (EASA) conducted the work leading to an opinion [1] to the European Commission regarding an update of these rules.
- 2.** For the task of suggesting changes to the flight time limitation rules, EASA established a



rulemaking group on the basis of its Rulemaking Procedure [2] and Terms of Reference [3]. The Pilots' Association raised concerns with EASA that the rulemaking group did not possess relevant medical and scientific knowledge. The Pilots' Association therefore asked EASA for details of the qualifications and declared interests of the rulemaking group. Not being satisfied with EASA's handling of the concern and request, the Pilot's Association complained to the Ombudsman. [4]

**3.** The Ombudsman opened an inquiry into the **allegation** that EASA's rulemaking process to update flight and duty time limitations and rest requirements for commercial air transport was flawed, for the following reasons:

(i) Given the terms of reference for the work involved, scientific advice should have had a more prominent role in the rulemaking process.

(ii) EASA failed to provide evidence of the qualifications of the rulemaking group.

(iii) EASA took no steps to record, or to manage possible conflicts of interest in the rulemaking group.

The Ombudsman identified the corresponding **claim** that the EASA should:

(i) Recommence the rulemaking process in question with the proper scientific and medical expertise in place. In support of this claim, the complainant argued that at least half of the members of the future rulemaking group should be scientists and medical specialists.

(ii) Disclose all relevant information, documentation and records relating to (a) the qualifications of the members of the rulemaking group; (b) any conflicts of interest concerning members of the rulemaking group.

Allegation of flawed rulemaking procedure

## The Ombudsman's recommendation

**4.** Having analysed the arguments put forward by the parties, the Ombudsman reached the following conclusions.

**5.** As regards **allegation (i)**, that scientific advice should have had a more prominent role in the rulemaking process, the Ombudsman noted that the EASA rules governing the rulemaking procedure state that the composition of rulemaking groups "*shall draw upon technical expertise available among national authorities and, where necessary, interested parties, as well as within the Agency itself*" [5]. The members of the rulemaking group for the flight time limitations rules did indeed come from national authorities, interested parties and EASA. The Ombudsman further noted that nothing in the relevant Terms of Reference suggested that the rulemaking group had to have *members* with relevant scientific or medical knowledge, but instead, that scientific or medical experts should be consulted if the rulemaking group deemed such consultation necessary. The Ombudsman did not find any evidence to suggest a manifest error in the selection of the members of the rulemaking



group in question. The Ombudsman therefore found **no maladministration** by EASA on this aspect of the complaint and there were thus no grounds for her to pursue the complainant's related claim.

**6.** As regards **allegation (iii)** , that EASA had taken no steps to record, or to manage, possible conflicts of interest in the rulemaking group, the Ombudsman was not convinced by EASA's arguments about the way in which possible conflicts of interest in the rulemaking group had been managed. The Ombudsman noted, however, that EASA had meanwhile revised its rules so that the Code of Conduct for the Staff of EASA, including its policy on impartiality and independence and the prevention and mitigation of conflict of interest, had come to apply also to experts in rulemaking groups. [6] Taking into consideration that the complainant had not put forward any argument suggesting a concrete conflict of interest situation within the rulemaking group in question, the Ombudsman considered that **no further inquiries were justified** in respect of this aspect of the complaint and the related claim.

**7.** However, as regards **allegation (ii)** , the Ombudsman was not convinced by the way in which EASA had dealt with the complainant's request to be provided with evidence of the qualifications of the rulemaking group.

**8.** The Ombudsman took the view that EASA should be able to provide anonymised information about the expertise declared by the members of the rulemaking group in such a way that the members would not be identifiable. Such anonymised data would thus not constitute *personal* data [7] and Regulation 45/2001 on the protection of personal data, and its requirement to demonstrate the necessity of having the data transferred [8] , would not apply. Reiterating the importance of transparency of the rulemaking process, the Ombudsman considered that EASA should have provided the complainant with the requested information in anonymised form.

**9.** The Ombudsman therefore considered that EASA's failure to provide the information in anonymised form constituted an instance of maladministration and made a corresponding **recommendation** to EASA:

*"EASA should provide the complainant with information about the qualifications and expertise of the members of the rulemaking group in anonymised form."*

The Ombudsman also made a further remark to EASA:

*"EASA should consider adopting a decision to publish information about the qualifications and expertise of the members of its rulemaking groups having informed, in advance, the persons nominated as members of its intention to do so."*

**10.** EASA did not agree with the Ombudsman's recommendation. EASA stated that the expertise of the rulemaking group members is stated in a contact detail form [9] which is sent to EASA. The contact detail form contains a free text space to be filled in on " *Expertise in the field* ", in which the nominated candidates should " *indicate in a few lines, [the] previous*



experience and number of years on this technical area ". The members very often state their experience with some clearly identifiable indications, such as the relevant Ministry, organisation, nationality or professional experience. A combined reading of the contents of the contact detail form and of the published group composition, listing the names and the authority or organisation that the individual group members represent, would make the individuals fully identifiable. EASA thus still considered the requested information to constitute personal data and it noted that the members had not been informed in advance that personal data contained in the contact detail form would be made public.

**11.** EASA also stated that its role in determining the composition of the rulemaking groups is limited to the selection of an adequate number of members from among the nominated candidates, ensuring a balanced representation of interests within the group. EASA referred to the Ombudsman's statement, in her recommendation, that by publishing details on the expertise of the group members, the public would be assured that the rulemaking process involved " *input from experts with the qualifications, knowledge and experience to carry out the tasks set out in the Terms of Reference* ". In this regard, EASA stated that the decision as to which experts would be best qualified to contribute to the work of EASA is done by the Member States and the interested stakeholders that are nominating such experts. The experts are nominated because of their specific technical knowledge and expertise in the field. In addition, the outcome of the work of the rulemaking group is a draft technical proposal submitted to the Commission as an opinion. This opinion then goes through the comitology process and is almost systematically modified by the States represented in the EASA Committee before the adoption of the final legislative text. The text also goes through European Parliament scrutiny. EASA therefore considered that publishing the terms of reference and the group composition is an assurance to the public that the relevant expertise is ensured. In addition, the final decision on the text to be adopted lies with a higher political level.

**12.** In response to the Ombudsman's further remark, EASA reiterated its commitment to transparency, concurring that a sufficient degree of transparency is crucial to ensure public trust in its work. EASA constantly strives to take measures to improve transparency in decision-making and rulemaking activities. EASA nevertheless stated that the aim of ensuring transparency needs to be balanced with a number of other factors, in particular with the need to ensure proportionality in the administrative procedures and also with the need to ensure the protection of personal rights of the external experts involved in EASA's work.

**13.** EASA argued that additional transparency should not become an additional administrative burden without proper justification. EASA reiterated its position that the rulemaking group's contribution is not only advisory, but that it is also part of a rulemaking process that is scrutinised at various additional levels by technical and political experts. In EASA's view, the development of a policy for the publication of personal data of rulemaking group members - which would need to ensure that members are informed, would have to deal with members' refusal to have their data published and other necessary points - could be seen as disproportionate in light of the fact that the members provide expertise on an advisory basis without having any decision-making powers. EASA also emphasised the importance of protecting the personal data of experts who devote their time and share their



experience in order to assist EASA to produce the best possible proposals for rules on aviation safety. According to EASA, a request to publish personal data of rulemaking group members could be perceived negatively as a wish to evaluate and judge the much needed expertise that the rulemaking group members provide. This would be counterproductive to the work of EASA. Nevertheless, EASA stated that it is willing to analyse the issue further and to discuss it with the stakeholders concerned.

**14.** In its observations on EASA's response to the Ombudsman's recommendation, the complainant emphasised that its complaint is about the qualifications of the rulemaking group to undertake the scientific and medical elements of its work. The complainant pointed out that it did not need to know that any particular member worked at a particular institution, but it would like to know how many members held relevant science and medical degrees. Information about the number of members of the rulemaking group holding degrees in psychology, natural sciences, medicine and so on, would not constitute persona data.

**15.** The complainant noted that the Ombudsman, on the question of whether scientific advice should have had a more prominent role in the rulemaking group, referred to the Terms of Reference for the rulemaking group concerned, which set out that the group should "*take account of all relevant recent and publicly available scientific and/or medical studies/evaluations*" and that "[s]cientific or medical experts [were to be] associated to this rulemaking activity when deemed necessary". The complainant does not agree with the Ombudsman's view that this formulation does not mean that the rulemaking group had to have *members* with direct relevant scientific or medical knowledge. In the complainant's view, when a group with a medical task has no medical specialists, it does not know enough to determine whether there is a need to consult such specialists. In addition, none of the experts consulted at the comment review stage were medical specialists. According to the complainant, a proper assessment of medical evidence requires that either the rulemaking group holds medical expertise, or that they refer to someone who does. This did not happen in the present case, which constitutes an instance of maladministration. As a consequence, the rulemaking group failed to assess the proposal's health impacts on pilots.

**16.** As regards the conflict of interest issue, the complainant argued that it is for the Ombudsman to investigate credible citations of potential conflicts of interest, given that the Ombudsman has powers of investigation that ordinary citizens do not have and that these powers are independent and discreet. The complainant referred to the rulemaking group member from the UK Civil Aviation Authority as a concrete example of a conflict of interest situation. In the complainant's view, this member should have declared that the SAFE program, which was used for the EASA Regulatory Impact Assessment, was to be (and ultimately became) commercially exploited by the UK Civil Aviation Authority through a wholly owned subsidiary. In summary, the principal customers for the SAFE program are the airlines. The use of SAFE in the EASA Regulatory Impact Assessment widely promoted SAFE. The complainant was not allowed to obtain access to SAFE during the consultation period for the relevant rulemaking procedure, which would have allowed it to demonstrate deficiencies in the EASA proposals. According to the complainant, it was not in the commercial interests of the UK Civil Aviation Authority to allow the complainant to demonstrate lack of safety of



the EASA proposals using the SAFE program.

## Further developments after the recommendation

**17.** On the basis of the complainant's clarifications as to the format of the information that it wished to obtain regarding the qualifications of the members of the rulemaking group (see paragraph 14 above), the Ombudsman's inquiry team contacted EASA and invited it to reconsider its response to the Ombudsman's recommendation. In response, EASA provided the following information, which was forwarded to the complainant:

*" Based on the information contained in the contact detail form that each expert has provided it can be established that*

- 15 experts can be considered as aviation professionals:*
- 5 are working for a regulator from one of the EU member states*
- 9 are working for stakeholders representing industry, interest groups*
- 1 has not given any specific information;*
- W.r.t. to the years of experience:*
- 10 of them have professional experience between 10-30 years*
- 3 of them have professional experience between 30-40 years*
- 2 have professional experience of more than 40 years*
- 1 have not given specific information "*

**18.** In response, the complainant stated that the information provided by EASA did not detail any scientific or medical qualifications. The complainant thus concluded that EASA either refuses to reveal the details of the scientific and medical qualifications of the group members, or that it has not been able to ascertain whether the group members held scientific or medical qualifications. In the complainant's view, the present case illustrates how data protection laws are inappropriately used to hide maladministration.

## The Ombudsman's assessment after the recommendation and further developments

### On the information about the qualifications and expertise of the members of the rulemaking group

**19.** The Ombudsman notes that the contact details form to be filled in by the rulemaking group members contains a box requesting the following information "*Expertise in the field (Indicate in a few lines your previous experience and the relevant number of years on this technical area. Additionally, express in terms of a list of groups, your previous participation in rulemaking groups)*". There is thus no requirement for the rulemaking group members to provide information about their *qualifications* in terms of university degrees or similar. In



fact, given the way in which the contact details form is formulated, it is entirely logical for the rulemaking group members only to provide information about their relevant *experience*, which would normally be understood as referring to professional experience.

**20.** On the basis of the above, the Ombudsman finds no reason to believe that EASA withheld any information on the rulemaking group members' qualifications, but that it ultimately provided a synthesised and anonymised compilation of the information available to it. The Ombudsman considers that EASA has thereby accepted her recommendation in this regard.

**21.** As regards the Ombudsman's further remark encouraging EASA to adopt a more proactive approach to disclosing information about the qualifications and expertise of the rulemaking group members, the Ombudsman maintains the view that making public such information about the members will ensure greater trust in the outcome of the rulemaking process. The Ombudsman welcomes EASA's willingness to analyse the issue further and she is convinced that a solution can be found that will not entail a disproportionate administrative burden or be perceived negatively by the rulemaking group members. The Ombudsman encourages EASA to analyse the issue in light of recent case law on access to personal data, particularly as regards experts, which is consistently moving towards greater transparency when balancing the interests at stake when persons act in their public capacity [10]. The Ombudsman will therefore reiterate her further remark in the decision closing her inquiry into the present case, with the corresponding request that EASA inform her of its conclusions after having analysed the issue further.

## On the role of scientific advice

**22.** Needless to say, the proactive approach to disclosing information, encouraged through the Ombudsman's further remark, can only relate to information that is actually available to EASA. In this regard, the Ombudsman takes due note of the complainant's concern about the rulemaking group's expertise based on the members' education - information that EASA does not seem to have.

**23.** As set out in her recommendation, the role of the Ombudsman in cases such as the present is to check that *correct and transparent procedures* were followed and that there was no *manifest error* of appraisal. The EU institution, office, body or agency concerned - in this case EASA - should be able to provide a complete and easily understood account of the steps undertaken and the entities involved in the rulemaking procedure. [11] In this regard the Ombudsman maintains her finding of no maladministration on the part of EASA. This finding is based on the conclusion that the relevant rules had been followed for the composition of the rulemaking group in question and that, on the basis of the formulation of the relevant Terms of Reference, the rulemaking group did not have to have *members* with direct relevant scientific or medical knowledge, but such knowledge should be fed into the work of the rulemaking group through other channels, where necessary.

**24.** Nevertheless, despite the fact that proper procedures were followed in the present case



and that no manifest error of appraisal can be found, the Ombudsman is not fully convinced by EASA's argument that its role in determining the composition of rulemaking groups is limited to selecting an adequate number of members from among the nominated candidates, ensuring a balanced representation of *interests*. According to EASA, the decision as to which experts would be best qualified to contribute to the work of EASA is done by the Member States and interested stakeholders. First, the Ombudsman is not convinced by EASA's argument that it is up to the Member States and interested stakeholders to guarantee the expertise of EASA rulemaking groups. Second, it is the Ombudsman's general position that the composition of a group of experts called upon to provide expertise should not only be balanced in terms of *interests*, but should also take into account the expertise required. Therefore, pending developments in the ongoing own-initiative inquiry into the composition of Commission expert groups [12], the Ombudsman is considering looking into issues related to the work done by external experts for certain EU agencies.

## On the management of possible conflicts of interest

**25.** The Ombudsman acknowledges that it is vital to building citizens' trust in the work of EASA that its rulemaking group members are, and are also *seen* to be, independent of any third party influence that might unduly affect their input into the rulemaking procedure. The rulemaking group members should be free to provide their input without influence from, in particular, commercial interests. In this regard, it is important also that any appearance of a lack of independence is avoided, in order to ensure that EASA retains its legitimacy in the eyes of citizens.

**26.** Nevertheless, an alleged conflict of interest situation has to have a certain degree of concreteness in order for the Ombudsman to be able to pursue a useful inquiry into the matter. After careful analysis, the Ombudsman concluded that this was not the case in respect of the information related to possible conflicts of interest, provided in the complaint. The complainant has now brought to the Ombudsman's attention a concrete situation that it considers to be problematic from a conflict of interest point of view. However, before the Ombudsman could possibly look into the issue, the relevant concern has to be brought directly to EASA's attention [13]. The Ombudsman thus maintains her conclusion that on the basis of the information provided in the complaint, no further inquiries are justified in respect of this aspect of the complainant's allegation and the related claim. The complainant is free to raise its concern, about the rulemaking group member from the UK Civil Aviation Authority, directly with EASA; and in the event of it being unhappy with whatever response it receives, it would then have the option to make a separate complaint to the Ombudsman.

### Conclusion

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

**EASA has accepted the Ombudsman's recommendation to provide the complainant with information on the qualifications and expertise of the members of the rulemaking group.**



**There was no maladministration on the part of EASA as regards the role of scientific advice in the rulemaking process.**

**No further inquiries are justified as regards the management of possible conflicts of interest.**

The complainant and EASA will be informed of this decision.

Further remark

**EASA should consider adopting a decision to publish information available to it about the qualifications and expertise of the members of its rulemaking groups, after having informed, in advance, the persons nominated as members of its intention to do so.**

Emily O'Reilly

Strasbourg, 06/11/2015

[1] EASA Opinion 04/2012 of 28 September 2012, entitled "Implementing Rules on Flight and Duty Time Limitations and rest requirements (FTL) for commercial air transport (CAT) with aeroplanes", available at:

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

[2] The 'rulemaking procedure' is the structured process applied by EASA for issuing an Opinion. The 'rulemaking procedure' was defined by EASA Management Board decision MB/8/07 of 13/06/07. EASA's 'rulemaking procedure' was modified on 13 March 2012 by Management Board Decision 01-2012. See

[https://easa.europa.eu/management-board/docs/management-board-meetings/2012/01/EASA%20MB%](https://easa.europa.eu/management-board/docs/management-board-meetings/2012/01/EASA%20MB%2001-2012)

[3] EASA Terms of Reference, OPS.055 (a) & (b) of 20 November 2009, paragraph 1. 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)

[4] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's recommendation available at:

<http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/54686/html.bookmark>

[5] See Article 4(5) in the EASA Rulemaking Procedure adopted through EASA Management Board Decision 08-2007 (applicable at the time of the rulemaking process in question).

[6] Article 2 of the Code of Conduct for the staff of EASA, available at

[http://easa.europa.eu/system/files/dfu/docs-quality-PO.HR.00180\\_Code-of-Conduct-for-the-staff-of-EASA](http://easa.europa.eu/system/files/dfu/docs-quality-PO.HR.00180_Code-of-Conduct-for-the-staff-of-EASA)



[7] Article 2(a) of Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data,

defines personal data as any information relating to an identified or identifiable natural person hereinafter referred to as 'data subject'; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.

[8] Article 8(b) of Regulation 45/2001

[9]

<http://easa.europa.eu/system/files/dfu/rulemaking-docs-procedures-and-work-instructions-FO.RPRO.000>

[10] See, for instance, case C-615/13 P ClientEarth and PAN Europe v EFSA, judgment of 16 July 2015.

[11] See the Ombudsman's decision in case 875/2011/JF.

[12] OI/6/2014/NF,

[www.ombudsman.europa.eu/en/cases/caseopened.faces/en/54293/html.bookmark](http://www.ombudsman.europa.eu/en/cases/caseopened.faces/en/54293/html.bookmark)

[13] According to Article 2(4) of the Ombudsman's Statute, a complaint must be preceded by the appropriate administrative approaches to the institutions and bodies concerned.