Besluit in zaak 1182/2009/(BU)JF - Geschil over een in rekening gebrachte vergoeding

Besluiten
Zaak 1182/2009/(BU)JF - **Geopend op** 16/06/2009 - **Besluit over** 18/11/2010

Klager, een klein onderhoudsbedrijf voor lichte vliegtuigen, beklaagde zich bij de Ombudsman over de vergoeding die EASA in rekening had gebracht voor op zijn verzoek uitgevoerde werkzaamheden ten behoeve van een kleine veiligheidsaanpassing aan een vliegtuig.

Het onderzoek van de Ombudsman bracht aan het licht dat EASA op grond van de geldende wettelijke bepalingen ter zake en de informatie waarover klager beschikte, de vergoeding terecht in rekening had gebracht.

Tijdens het onderzoek bleek echter ook dat EASA bij het vorderen van voornoemde vergoeding van klager een formele waarschuwing had afgegeven die onder meer voorzag in de mogelijkheid tot intrekking van klagers bestaande certificaten.

De Ombudsman was van mening dat een dergelijke waarschuwing in dit geval disproportioneel, beledigend en mogelijk zelfs onwettig was. Hij stelde daarom een vriendschappelijke oplossing voor, die onder meer inhield dat EASA zich bij klager zou verontschuldigen voor de in de formele waarschuwing vervatte uitlatingen.

EASA bood klager zijn verontschuldigingen aan en herzag zijn formele waarschuwingen. Voorts liet het de Ombudsman weten van plan te zijn wijzigingen in de toepasselijke wetgeving voor te stellen.

De Ombudsman juichte de coöperatieve en constructieve houding van EASA toe en sloot de zaak.

The background to the complaint
1. On 1 June 2007, Commission Regulation (EC) No 593/2007 of 31 May 2007 on the fees and charges levied by EASA (the 'Fees and Charges Regulation') entered into force [1] .

2. The Fees and Charges Regulation applies to the fees and charges levied by EASA as compensation for the services it provides [2] . "Fee" means the amounts levied by EASA and payable by applicants, that is, any natural or legal person requesting to benefit from a service provided by EASA, including the issue, maintenance or amendment of a certificate [3] .

3. The above Regulation also contains an annex (the 'Annex to the Fees and Charges

Regulation') consisting of (i) Part I, which relates to tasks for which a flat fee is charged; (ii) Part II, which relates to tasks charged on an hourly basis; and (iii) Part III, which relates to fees for other certification related tasks. Part I of the Annex to the Fees and Charges Regulation contains ten tables pertaining to tasks charged with a flat fee. One of these tables concerns minor changes and repairs (Table 5).

4. Article 8(2) of the Fees and Charges Regulation states that the issue, maintenance or amendment of a certificate shall be subject to prior payment of the full amount of the fee due, unless agreed differently between EASA and the applicant. In the event of non-payment, EASA may revoke the relevant certificate after having given formal warning to the applicant.

5. Article 8(7) to the Fees and Charges Regulation provides that if a certification task has to be interrupted by EASA because, for instance, the applicant decides to abandon its application, the balance of any fees due, calculated on an hourly basis but not exceeding the applicable flat fee, shall be paid in full at the time EASA stops working.

6. On 12 July 2007, the complainant, a small light aircraft maintenance company based in the United Kingdom (UK), submitted an application to EASA for the approval of a minor safety modification to an aircraft (the 'Application'), by filling in the appropriate EASA application form (the 'Application Form').

7. Point 2 of the Application Form, entitled " *Classification, product identification and fees information* ", states the following:

" *Applicants for Minor Changes and Minor Repairs will be charged in accordance with the* [Fees and Charges Regulation.]

In case of withdrawal of the application, or other cases of interruption that qualify under Article 8(7) of [the Fees and Charges Regulation], EASA will recover any fees due, calculated on an hourly basis but not exceeding the applicable flat fee. In case the certification task is charged on an hourly rate, the working hours already spent will be fully recovered. EASA will also recover travel costs outside the territories of the EU Member States ".

8. At Point " *6. Applicant's declaration* ", the complainant

" *... confirm* [ed] *that ...* [it] *agree* [d] *to pay the fees levied by EASA in respect of the issuance of an Approval of a change to a Type Certificate.* "

9. On 18 July 2007, EASA entrusted the UK Civil Aviation Authority (the 'UK CAA') with the technical investigation relating to the complainant's Application.

10. On 10 August 2007, EASA informed the complainant, by letter, that the certification task gave rise to payment of a flat fee of EUR 250, established in accordance with " *Part I, table 5* " of the Annex to the Fees and Charges Regulation [4] . EASA enclosed an invoice for the above amount, to be paid by 9 September 2007 (the 'first invoice'), and referred to the Annex to the Fees and Charges Regulation.

11. On 30 August 2007 and 26 September 2007, UK CAA worked on the Application for a total of two hours.

12. On 29 October 2007, the complainant contacted EASA, by e-mail, and apologised for not responding to the first invoice. It stated that it thought that the issue was being dealt with by UK CAA. It further stated that, when it made the Application, it had understood that the minor modification would be free of charge. It stated that it had not been notified that payment was due and it claimed that there had been no reference to the fee in the Application Form. The complainant stated that when it received the first invoice, it had contacted the UK CAA which had also been surprised to learn that EASA was charging fees and of their amount. The complainant stated that it would have chosen a different course of action if it had been made aware of the cost. It was, therefore, not prepared to pay the first invoice. It requested that EASA cancel it and send no further communication on the matter. In any event, the complainant had decided to abandon the Application because it had been unable to cope with the " *bureaucratic red tape* ".

13. On 28 March 2008, EASA replied, by letter, confirming receipt of the complainant's request for cancellation. It requested the complainant to disregard its letter of 10 August 2007, and the first invoice. Attached to its letter was a credit note which had been issued " *due to cancellation of project* ". EASA explained that the credit note overruled the first invoice. It stated, by way of explanation, that, according to " *Commission Regulation n° 488/2005 of 21 March 2005 on the fees and charges levied by* [EASA [5]] *, in case of withdrawal of an application,* [EASA] *will invoice the whole fixed fee up to an amount of 375€, plus any specific costs and/or additional transport costs outside the territories of the EU Member States. In case the certification task gives rise to the payment of a variable part, the working hours already spent will be invoiced in addition.* " EASA, therefore, enclosed a new invoice for the amount of EUR 250, corresponding to " *the above-mentioned withdrawal fee* ", payable by 27 April 2008 (the 'second invoice'). It again referred to the Annex to the Fees and Charges Regulation.

14. On 14 May 2008, not having received any payment, EASA sent a reminder to the complainant (the 'first reminder').

15. On 19 May 2008, the complainant replied to the first reminder, stating that it had not received EASA's letter dated 28 March 2008, and that it was shocked to be invoiced for EUR 250 to cancel an invoice which should have never been sent in the first place. It confirmed that it would not pay the invoice and requested EASA to cancel it immediately.

16. On 20 May 2008, EASA replied, providing the complainant with the following summary of events: (i) on 1 June 2007, the Fees and Charges Regulation entered into force; (ii) on 12 July 2007, the complainant made the Application; (iii) on 11 August 2007, the complainant received the first invoice; (iv) on 29 October 2007, the complainant cancelled the Application; and (v) on 14 December 2007, the complainant confirmed that it had cancelled the Application. Since the complainant did not pay the cancellation fee, EASA had to send it the first reminder. EASA then went on to quote Article 8(7) of the Fees and Charges Regulation [6] . In this respect, it explained that, " *Part II, §2* " of the Annex to the Fees and Charges

Regulation provided for an hourly fee of EUR 225 [7] . EASA explained that UK CAA had spent two working hours on the Application and, therefore, the complainant would normally have to pay EUR 450. However, given that the fee calculated on an hourly basis could not exceed the applicable flat fee, the complainant had been sent a second invoice for an amount equivalent to the first invoice, that is, EUR 250. In light of the Fees and Charges Regulation, and the principle of equal treatment of applicants, EASA considered that it could not, unfortunately, cancel the above payment, nor make any exceptions for the complainant.

17. On 21 May 2008, the complainant replied to EASA's above communication. It stated that it was the first correspondence it had received from EASA regarding the charge and that it had yet to receive an original of an invoice or any correspondence. It also stated that it had no record of having cancelled the application again in December 2007. The complainant stated that it had made the Application on the understanding that the minor modifications were free of charge. The complainant argued that EASA had started charging for these modifications without notifying the industry or making the UK CAA aware of this policy. It went on to stress that British law requires that EASA should inform interested parties that it charges for its services and that a posting on the internet did not fulfil this obligation. The Application Form made no mention or reference to the charge relating to minor modifications. Had it made such a reference, or had the complainant been made aware of the charges in any other way, it would have taken an entirely different course of action. Furthermore, the complainant stated that it had not been informed by the UK CAA, nor by EASA or the contents of its Application Form, that a further charge would be made if it abandoned the Application. EASA should have made all these things clear, since, the complainant claimed, it could not base its decisions on incomplete or obscure information. The complainant felt that it had been unfairly charged and that there was no justification for the second invoice. It again requested EASA to cancel the second invoice or to forward details of how it could file a grievance against EASA. It informed EASA that, in the meanwhile, it intended to contact its Member of the European Parliament ('MEP').

18. On 5 June 2008, EASA replied. It repeated, in summary, some of the arguments put forward in its previous correspondence dated 20 May 2008 and added the following points: (i) On 28 March 2008, it sent the complainant a letter with a credit note and the second invoice. EASA stated that it could provide the complainant with copies of these documents if it so wished; (ii) it confirmed that the complainant had, in fact, cancelled its Application only once, in October 2007; (iii) it was not correct to state that the Application Form made no reference to charges, notably in the case of a cancellation; (iv) UK CAA was not responsible for EASA fees; (v) it could not cancel the invoice; and (vi) the complainant could find all the necessary information concerning appeals on EASA's website, for which it provided the relevant link.

19. On 16 June 2008, EASA issued a second reminder for payment of the second invoice, plus interest of EUR 2.57 for late payment, for an overall amount of EUR 252.57 (the 'second reminder'). In light of the fact that EASA was " *not aware of disputes or discussions that could have arisen* ", it requested the complainant to " *ensure the swift settlement of the due balance* ".

20. On 19 June 2008, the complainant confirmed that it had received the second reminder,

but emphasised that it had still not received the original correspondence regarding the matter. The complainant also requested copies of EASA's covering letters, the credit note, the first and second invoices, and its own cancellation request of October 2007. It expressed the view that the reference to the Fees and Charges Regulation in the Application Form was meaningless unless it made applicants aware that charges would be levied. In this respect, the complainant again emphasised that it had been unaware of any such charges, but that it had been aware that UK CAA was not responsible for EASA's fees. In this respect, the complainant pointed out that, if UK CAA was unaware of the charges, it could not have been expected to be aware of any such charges either. This showed that EASA had failed in its responsibility and ability to provide information. The complainant stated that EASA's website was not user friendly and that it was very difficult to obtain any such information. The complainant further requested EASA to issue a credit note to resolve the issue. It also observed that, since the appeals procedure appeared to be limited to two months, and it had, notably, taken EASA seven months to bring the matter to its attention, the complainant asked whether the procedure was still valid or whether another one would be required. Finally, it questioned why EASA could not cancel the second invoice in light of the fact that it had been able to cancel the first one.

21. On 15 January 2009, EASA replied, apologising for the delay. Its reply contained the following: (i) Copies of EASA's letters; the credit note; the first and second invoices, and the complainant's cancellation e-mail of 29 October 2007 [8] ; (ii) a further reference to the Fees and Charges Regulation; (iii) a reference to Points 2 and 6 of the Application Form; and (iv) a repetition of the fact that the UK CAA had spent two hours on the Application prior to the cancellation request, and that this was why the complainant had been invoiced for a withdrawal fee of EUR 250, which represented a sum not exceeding the applicable flat fee of the same amount. It stated that the second invoice, therefore, remained valid and the reminders were justified.

22. On 22 January 2009, the complainant replied stating that it had taken 17 months to obtain an invoice from EASA and again reiterated the arguments it had submitted previously in relation to the fee. It further added that no one it had since spoken to in the industry knew about the charges and all were shocked at their amount. It also noted that the Fees and Charges Regulation had entered into force just six weeks before it made the Application. In this respect, it questioned why more had not been done to draw attention to the introduction of the fee, notably by informing interested parties by e-mail or by publishing details on EASA's homepage [9] .

23. On 27 March 2009, EASA replied that the Fees and Charges Regulation was already in force when the Application was made and that this fact had been published on EASA's website. By signing the Application Form, the complainant agreed to pay the Approval for Minor Change fee, or, in the case of a withdrawal, a fee to be calculated on an hourly basis, but which would not exceed the applicable flat fee. The notifications for payment had been sent to the address provided by the complainant. In addition, the Fees and Charges Regulation did not introduce the cancellation charges. These had already existed in the previous Commission Regulation (EC) No 488/2005 of 21 March 2005 on the fees and charges levied by EASA. EASA therefore considered that the reminders remained valid.

24. On 2 April 2009, EASA issued a formal warning to the complainant for payment of the outstanding fees, plus interest, in the total amount of EUR 252.57 (the 'Formal Warning'). It warned that failure to make payment in full within 30 days could lead EASA to (i) put on hold all activities related to the Application until the complainant's account was cleared; (ii) block the complainant's account and not treat any further new applications; (iii) enforce recovery through legal action in the national or Community courts; or (iv) make use of any other remedies available, including the revocation of existing certificates. EASA stated further that " *in case of cancellation under article 8(7) of* [the Fees and Charges Regulation, the complainant should] *inform the Agency thereof immediately in writing.* "

25. On 6 April 2009, the complainant replied and repeated its arguments. It questioned why, considering that it had received several e-mails a day from EASA, none of them had mentioned the fundamental change in EASA's business practices. It also asked again why EASA could not cancel the second invoice when it had been able to cancel the first one. It further took the view that there was no justification for the costs charged in EASA's invoice. It therefore requested EASA to provide a detailed account of how it arrived at the total amount charged, including a copy of the timesheet recording the time spent on the Application. Finally, it informed EASA that it was about to contact its MEP.

26. On 28 April 2009, the complainant informed EASA that it had submitted the matter to its MEP and the European Ombudsman [10] . It again reiterated its previous arguments and requested EASA to retract the Formal Warning until such time as both its MEP and the Ombudsman had considered the matter. It added that it had not been notified of the withdrawal fee until 28 March 2008, and that, since correspondence with EASA had been painfully slow, it had missed the two-month deadline for making an appeal. Moreover, it stated that it had not received any of the documents it requested on 6 April 2009. The complainant further added that the dispute was of a commercial nature and did not relate to poor engineering practices. The complainant considered that the statements made in the Formal Warning, notably those pertaining to the removal of certificates, endangered the livelihoods of the complainant's employees, and ought to be considered as infringing Human Rights legislation. The complainant considered that the action threatened by EASA would be outside its legal powers, since enforcement could only be carried out within the national system, that is, by the UK CAA, under the supervision of the national courts. In addition, the complainant requested explanations regarding the " *cancellation* " part of the Formal Notice, which it found odd. It also drew particular attention to the second reminder, where EASA stated that it was unaware of any disputes or discussions regarding the second invoice. In this respect, the complainant emphasised that it had expressly contested the invoice on numerous occasions and that it was still waiting for information. In light of the above, the complainant took the view that EASA had failed to adhere to the principles of openness, transparency and accountability, and to supply the documentation requested. It considered that EASA was also breaching the " *Unfair Terms in Consumer Contracts Regulations 1999* ", since all transactions had taken place within the UK, with the UK CAA, and were, therefore, subject to UK law.

The subject matter of the inquiry

27. The complainant alleged that EASA's withdrawal fee of EUR 252.57 was unfair.

28. The complainant also alleged that EASA failed to answer its letter of 28 April 2009.

29. It claimed that EASA should cancel its claim for payment of EUR 252.57.
The inquiry
30. On 16 June 2009, the Ombudsman forwarded the complaint to the Executive Director of EASA for an opinion.

31. On 1 October 2009, the Ombudsman received EASA's opinion, which he forwarded to the complainant with an invitation to make observations. The Ombudsman received the complainant's observations on 29 October 2009.

32. After careful consideration of the opinion and the observations, the Ombudsman was not satisfied that the Commission had responded adequately to the complaint. He therefore made a provisional finding of maladministration and, in accordance with Article 3(5) of his Statute, proposed a friendly solution to the Commission.

33. On 29 June 2010, the Ombudsman received the Commission's reply, which he forwarded to the complainant with an invitation to make observations. No observations were received from the complainant.
The Ombudsman's analysis and conclusions

A. Allegation of unfairness and the cancellation claim

Arguments presented to the Ombudsman

34. The complainant alleged that EASA's withdrawal fee of EUR 252.57 was unfair.

35. In support of this allegation, the complainant argued that

(a) EASA failed to explain the basis on which it claimed the payment of the above amount, namely, to provide details of the work carried out;

(b) in contrast to what is stated in EASA's second reminder of 16 June 2008, the complainant disputed the amount in question on numerous occasions and was, at the time of its complaint to the Ombudsman, still waiting for information from EASA; and

(c) the sanction, mentioned in the Formal Warning of 2 April 2009, which consisted of a possible revocation of existing certificates, was disproportionate because it could put the complainant out of business and because the complainant's dispute with EASA was of a commercial nature and not related to poor engineering practices on its part.

36. The complainant claimed that EASA should cancel its claim for payment of EUR 252.57.

37. In its opinion, EASA quoted the Fees and Charges Regulation and denied that it had not

duly informed the complainant about the fee. It referred to the Application Form, which contained all the relevant information, and to its exchange of correspondence with the complainant. It also regretted wrongly relying on Commission Regulation No 488/2005 as the legal basis for the withdrawal fee, as expressed in its letter dated 28 March 2008. In this respect, it clarified that the Fees and Charges Regulation was already in force at the relevant time and emphasised that the second invoice, enclosed with the said letter, then made a correct reference to the latter Regulation. It further emphasised that it had duly explained to the complainant how much time the UK CAA had spent on the Application and added that, along with its opinion to the Ombudsman, it enclosed copies of the relevant documents issued by that authority. Finally, it took the view that the late payment interest was due for reasons of sound financial management and equal treatment of applicants, including other non-paying applicants who would also have to pay late payment interest. In light of the above, EASA considered that the complainant's payment was due.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

38. As regards point (a) of the complainant's argument in support of his allegation of unfairness, the Ombudsman noted that:

(i) in the Application Form, EASA informed the complainant that

"[a] *pplicants for Minor Changes and Minor Repairs will be charged in accordance with the* [Fees and Charges Regulation.] *In case of withdrawal of the application, or other cases of interruption that qualify under Article 8(7) of* [the Fees and Charges Regulation] *, EASA will recover any fees due, calculated on an hourly basis but not exceeding the applicable flat fee. In case the certification task is charged on an hourly rate, the working hours already spent will be fully recovered. EASA will also recover travel costs outside the territories of the EU Member States* ".

The complainant signed the Application and thus " *confirmed that …* [it] *agree* [d] *to pay the fees levied by EASA in respect of the issuance of an Approval of a change to a Type Certificate* ";

(ii) on 10 August 2007, EASA explained to the complainant, by letter, that

"[the Fees and Charges Regulation] *requires* [EASA] *to levy fees for the issue of approvals and certificates (see attachment for terms of payment). Based on information we received, the certification task gives rise to the payment of a flat fee of* 250.00 € *(Annex, Part I, table 5 of the* [Fees and Charges] *Regulation)* ";

(iii) in its e-mail of 29 October 2007 to EASA, the complainant " *apologise* [d] *for the lack of response regarding* [the first] *invoice …* " The complainant also clearly stated that it " *received this invoice* " and confirmed that " *the modification application ha* [d] *been dropped by* [it] *…* "

(iv) on 28 March 2008, EASA sent the complainant, by letter, the second " *invoice for the amount of 250 € corresponding to the … withdrawal fee* ". This second invoice made clear

reference to " *Annex, Part I, table 5 of the* [Fees and Charges Regulation]";

(v) on 20 May 2008, EASA explained to the complainant, by e-mail, that

"[i] *n Article 8, § 7 of the Fees and Charges Regulation …* [it could] *find the following regarding the cancellation of a project (see also attachment):* **If a certification task has to be interrupted by the agency, because the applicant … abandons its application, the balance of any fee due, calculated on an hourly basis but not exceeding the applicable flat fee, shall be payable in full at the time the agency stops working.** *Regarding Part II, § 2 of the Fees & Charges Regulation the applicable hourly fee is 225 €. Because the CAA UK has spent 2 working hours* [the complainant has] *normally to pay 450 €. Because the fee calculated on an hourly basis should not exceed the applicable flat fee* [the complainant] *only received an invoice for working hours with the same amount as the first invoice (250 €)* ".

On 15 January 2009, EASA again re-emphasised to the complainant that

"[a] *ccording to the Fees and Charges Regulation … EASA is obliged to invoice any working hours spent on a project that has been withdrawn, however, not exceeding the applicable flat fee … In* [the complainant's] *case, the UK CAA, to whom the task was allocated, had spent 2 working hours on the project … prior to* [its] *cancellation request. Therefore* [the complainant] *ha* [d] *been invoiced with a withdrawal fee of 250€, which represents a sum not exceeding the applicable flat fee of 250 €* "; and

(vi) according to the complainant's letter to its MEP of 28 April 2009

"[o] *n 28/03/2009 a letter was received from EASA asking for the original invoice to be disregarded and a new invoice was enclosed for 250 € as a fee for the withdrawal of the modification application. The justification for this charge was made by quoting Commission regulations on levies by EASA but amended by further Commission regulations … The withdrawal charge was based on a total of 2 hours work …* "

Relatedly, in its letter to EASA of the same date, the complainant stated that it " *was not notified of a withdrawal fee until 28/03/08 …* "

39. It appeared from the above evidence that the complainant should already have known from the Application Form that there was a fee for work done on the Application and that, even if it withdrew the Application, it would be required to cover all costs relating to any such work.

40. Similarly, the complainant appeared to have received sufficient information in the correspondence that followed the Application concerning the fees and charges applicable both to the Application and to its possible withdrawal.

41. Finally, although EASA did not directly provide the complainant with copies of the UK CAA's documents pertaining to the hours spent on the Application, the Ombudsman considered that EASA provided the complainant with satisfactory replies to its queries

regarding the amount of both the modification and the withdrawal fee. In this respect, the Ombudsman further noted that, in the course of the inquiry, EASA enclosed the documents in question with its opinion. These were forwarded to the complainant for its observations.

42. In light of the above, the Ombudsman took the view that no maladministration could be found as regards the complainant's argument raised in point (a) of its allegation of unfairness.

43. As regards the complainant's argument in point (b), EASA's statement in the second reminder that it was " *not aware of disputes or discussions that could have arisen* ", indeed, appeared to be rather unexpected in light of the events which led up to the complaint. Similarly, its statement in the Formal Warning that "[i] *n the case of cancellation under article 8 (7) of* [the Fees and Charges Regulation, the complainant should] *inform the Agency thereof immediately in writing* ", appeared to be, at that stage, at the very least overtaken by events, if not completely without purpose.

44. The Ombudsman noted that EASA did not offer any explanation in respect of the complainant's arguments raised in (b) when it submitted its opinion to him. The Ombudsman did not, however, consider that the fact that it omitted to do so meant that the complainant was not duly informed of the reasons why a fee was due.

45. The Ombudsman was, however, deeply concerned about the wording of the Formal Warning, to which the complainant referred above in its argument at point (c). In that Formal Warning, EASA informed the complainant that failure to make payment in full of the " *outstanding invoice(s) related to certification tasks/services provided by the Agency* " within thirty days, could lead it to:

" *1.* [P] *ut on hold all activities related to* [the complainant's] *application until* [its] *account is cleared.*

2. [The complainant's] *account will be blocked and no further new applications will be treated.*

3. Enforce recovery of the outstanding amount including late interest through legal action in the national or Community courts.

4. Any other remedies as may be available to [EASA] , including revocation of existing certificates " (emphasis added).

46. The Ombudsman noted the wording of Article 8(2) of the Fees and Charges Regulation, which provided that

"[t] *he issue, maintenance or amendment of* **a certificate** *shall be subject to a prior payment of the full amount of the fee due, unless agreed differently between* [EASA] *and the applicant.* [EASA] *may invoice the fee in one instalment after having received the application or at the start of the annual surveillance period.* In the event of non-payment " [11] *(emphasis added).* [EASA] *may refuse to issue or make revoke* **the relevant certificate** *after having given formal warning to the*

applicant

47. The Ombudsman's understanding of the above provision was that, if an applicant failed to pay the fee for **a given certificate** , EASA could revoke **that very certificate** . [12] Applied to the case at hand, that provision meant that EASA could (i) refuse to issue **the certificate in question** until the complainant paid the corresponding flat fee; and (ii) if the certificate in question had been issued, but the fee remained unpaid, EASA could revoke **that certificate** , after addressing the Formal Warning to the complainant.

48. In the present case, however, the complainant abandoned the Application. In light of the work already carried out on it by the UK CAA, EASA subsequently demanded a withdrawal/cancellation fee from the complainant in place of the certification fee, in accordance with Article 8(7) of the Fees and Charges Regulation. This article provided that

"[i] *f a certification task has to be interrupted by* [EASA] *because the applicant has insufficient resources or fails to comply with the applicable requirements, or because* **the applicant decides to abandon its application** *or to postpone its project,* **the balance of any fees due** *, calculated on an hourly basis for the ongoing period of twelve months but not exceeding the applicable flat fee,* **shall be payable in full** *at the time* [EASA] *stops working, together with any other amounts due at that time. The relevant number of hours shall be invoiced at the hourly fee set out in Part II of the Annex. When, on demand of the applicant,* [EASA] *starts again a certification task previously interrupted, this task shall be charged as a new project* " [13] (emphasis added).

49. The Ombudsman noted that the only obligation which resulted under the above provision was that of payment of any fees that could be due if an applicant decided to abandon its application. The provision did not, and, above all, logically speaking, could not be invoked to justify any other possibility, such as the one provided for in Article 8(2) of the Fees and Charges Regulation, whereby EASA could " *revok* [e] *the relevant certificates* ". This was because, if an applicant did in fact abandon its application, the " *certification tasks* " would not have been completed and/or " *the relevant certificate* " would not have been issued. In addition, there was no mention in Article 8(7) of the Fees and Charges Regulation of a Formal Warning if an applicant failed to pay the withdrawal/cancellation fee.

50. In its opinion, EASA stated that it sent the Formal Warning " *threatening* **" (emphasis added). In EASA's view, "** *as a matter of principle* **[it]** *had no choice in this case but to insist on payment by* **[the complainant]** *of the fee owed ... and* **pursue such payment through the means made available to it by law " (emphasis added). ,** to take **enforcement measures available to it, as the Agency would deem appropriate**

51. The Ombudsman was deeply concerned by EASA's statements. In his view, a warning should do no more than warn. It should not intimidate or, as EASA put it, threaten. The complainant was a small aircraft maintenance company and, therefore, **threatening** to revoke its " *existing certificates* " (emphasis added), which were absolutely fundamental for its very survival as a company, made the complainant fear for its business and the welfare of its staff.

52. In addition, the Ombudsman did not see how EASA could possibly consider it **appropriate** to "[p] *ut on hold all* **activities related to** *" (emphasis added), when, at the relevant time, the Application had already been cancelled. Similarly, neither Article 8(2) nor Article 8(7) of the Fees and Charges Regulation provided for the possibility of blocking a non-paying applicant's account and/or refusing to treat any of its further applications. Finally, as analysed in paragraphs 46 to 49 above, nothing whatsoever in the Fees and Charges Regulation appeared to support the option of " revo* **[king]** *existing certificates " (emphasis added).* [the complainant's] *application*

53. On the basis of the evidence available to him, the Ombudsman considered that the only acceptable way for EASA to seek redress was through taking legal action in a court of national or European Union jurisdiction, as the case may be. All the other possibilities advanced in the Formal Warning appeared, at the very least, to be unreasonable and disproportionate, if not abusive or even illegal. [14]

54. In light of the circumstances in the present case, the Formal Warning issued by EASA provided for enforcement measures which could have been perceived as unreasonable, disproportionate, abusive, and even illegal. By issuing such a warning, EASA committed an instance of maladministration.

55. The Ombudsman noted that the complainant considered that EASA should cancel its claim for payment of EUR 252.57. According to EASA's opinion, on 9 July 2009, that is, after complaining to the Ombudsman, the complainant proceeded to pay the EUR 250 withdrawal fee. In its observations, the complainant confirmed that, although it had paid the outstanding invoice, it continued to contest its legitimacy, and that it would leave it to the Ombudsman to decide if the payment should stand.

56. In light of the evidence gathered during the present inquiry and, in particular, of the provisions of the Fees and Charges Regulation, the Ombudsman concluded that EASA was legally entitled to the payment of EUR 250. Moreover, there appeared to be no causal link between the instance of maladministration identified above and the complainant's legal obligation to pay the amount in question, since, as outlined in paragraphs 38 to 42, it was properly informed, that such a payment was indeed due.

57. However, the Ombudsman also noted that, in addition to the EUR 250 already paid by the complainant, EASA was claiming a further EUR 2.57 in interest for late payment. The Ombudsman took the view that investing further time and/or resources to recover EUR 2.57 would be unreasonable.

B. Allegation of failure to reply

Arguments presented to the Ombudsman

58. The complainant alleged that EASA failed to answer to its letter of 28 April 2009.

59. In its opinion, EASA acknowledged that it did not reply to the complainant. Its reason for not doing so was that the complainant had not put forward any new arguments and that the letter confirmed EASA's impression that there was no room for further discussion. EASA, nevertheless, noted that, in that letter, the complainant contradicted itself by again stating that it never received the second invoice, but, at the same time, it mentioned that it had been notified of the withdrawal fee on 28 March 2008. Finally, it argued that, in that letter, the complainant indicated clearly that it had submitted a complaint to the European Ombudsman.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

60. The Ombudsman has repeatedly taken the view that principles of good administration require European Union institutions, bodies, offices and agencies to reply to letters they receive. [15] Even if, in accordance with the European Code of Good Administrative Behaviour, a letter can be qualified as repetitive and/or abusive, the Ombudsman considers that the institution should still inform citizens that, unless they submit new elements, no reply will be sent to them. Moreover, the above entities should not automatically classify the correspondence as repetitive before looking into its content to determine whether it contains any new elements.

61. In the present case, although EASA must have obviously noted the inconsistencies in the complainant's letter dated 28 April 2009, it decided not to reply to it. The fact that the complainant informed EASA that it had submitted a complaint to the Ombudsman did not, in any way, prevent EASA from replying to the complainant directly. It followed that EASA committed another instance of maladministration.

62. In light of his conclusions in paragraphs 54, 57, and 61 above, the Ombudsman made a proposal for a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman, that

"... EASA could apologise to the complainant for the statements made in its Formal Warning and for failing to reply to the complainant's letter dated 28 April 2009.

It could further consider that investing additional time and/or resources to recover EUR 2.57 in interest for late payment is unreasonable and should, therefore, cancel such recovery."

The arguments presented to the Ombudsman after his friendly solution proposal

63. In its reply to the Ombudsman, EASA apologised to the complainant for any failure or

omission on its part. It emphasised that it had not been its intention to offend or threaten the complainant with disproportionate measures, or to cause it to fear for its or its employees' livelihoods. It stated that it was unfortunate that the complainant had interpreted EASA's response in such a way.

64. EASA further informed the Ombudsman that it has reviewed and amended the template of its Formal Warning, making it more precise as to the measures available to it in cases of non-payment. Likewise, the forthcoming revision of the Fees and Charges Regulation includes clearer provisions on non-payment situations. Relatedly, EASA has amended its internal procedures and now treats each and every incoming letter on its merits. It acknowledges all correspondence and provides reasons if no reply can be given.

65. Finally, EASA agreed to cancel the recovery of EUR 2.57 of interest for late payment.

66. EASA's response was forwarded to the complainant for its observations. No observations were received from the complainant.

The Ombudsman's assessment after his friendly solution proposal

67. EASA replied in a fully satisfactory manner to the Ombudsman's proposal for a friendly solution. It has further adopted actions which appear to be appropriate to prevent similar maladministration from taking place in the future. The Ombudsman welcomes EASA's collaborative and constructive approach to his proposal and closes the case.

C. Conclusion

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

The Ombudsman welcomes EASA's collaborative and constructive approach to his proposal and closes the case.

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

P. Nikiforos Diamandouros

Done in Strasbourg on 18 November 2010

[1] Article 14 of the Fees and Charges Regulation. OJ 2007 L 140, p. 3.

[2] Article 1 of the Fees and Charges Regulation.

[3] Article 2 (a) and (d) of the Fees and Charges Regulation.

[4] Table 5 of Part I " *Tasks charged a flat fee* " of the Annex to the Fees and Charges Regulation relates to "[m] *inor changes and minor repairs ...* "

[5] OJ 2005 L 81, p.7.

[6] " *If a certification task has to be interrupted by* [EASA] *because the applicant ... decides to abandon its application ... the balance of any fees due, calculated on an hourly basis but not exceeding the applicable flat fee, shall be payable in full at the time* [EASA] *stops working.* "

[7] Paragraph 2 of Part II of the Annex to the Fees and Charges Regulation, entitled " *Tasks charged on an hourly basis* " provides for "[h] *ourly basis according to the tasks concerned* ".

[8] The copy of the EASA's e-mail of 15 January 2009, enclosed by EASA with its opinion and forwarded to the complainant for its observations, provides that the complainant could " *find* [its e-mail of 29 October 2007] *at the bottom of this email chain* ". That copy of EASA's e-mail of 15 January 2009, received by the Ombudsman, did not include the complainant's e-mail of 29 October 2007.

[9] The copy of the complainant's e-mail of 22 January 2009, as provided to the Ombudsman by EASA along with its opinion and forwarded to the complainant for its observations, appears to be incomplete.

[10] By letter and a duly completed complaint form, of the same date.

[11] In accordance with the new wording of Article 8(2) of the Fees and Charges Regulation resulting from Commission Regulation (EC) No 1356/2008 of 23 December 2008, amending the Fees and Charges Regulation which was in force at the time of EASA's Formal Warning, OJ 2008 L 350, p. 46.

[12] The Ombudsman emphasises that the Court of Justice of the European Union is the highest authority for interpreting European Law.

[13] In accordance with the new wording of Article 8(7) of the Fees and Charges Regulation resulting from Commission Regulation (EC) No 1356/2008 of 23 December 2008, amending the Fees and Charges Regulation which was in force at the time of EASA's Formal Warning.

[14] Article 4, entitled 'Lawfulness', of the European Code of Good Administrative Behaviour (the 'Code') provides that "[t] *he official shall act according to law and apply the rules and procedures laid down in Community legislation. The official shall in particular take care that decisions which affect the rights or interests of individuals have a basis in law and that their content complies with the law.* "

Article 6(1), entitled 'Proportionality', of the Code provides that "[w] *hen taking decisions, the*

official shall ensure that the measures taken are proportional to the aim pursued. The official shall in particular avoid restricting the rights of the citizens or imposing charges on them, when those restrictions or charges are not in a reasonable relation with the purpose of the action pursued. "

Article 7, entitled 'Absence of abuse of power', of the Code provides that "[p] *owers shall be exercised solely for the purposes for which they have been conferred by the relevant provisions. The official shall in particular avoid using those powers for purposes which have no basis in the law or which are not motivated by any public interest.* "

[15] Article 14 of the Code.