

DECISION OF THE EASA BOARD OF APPEAL OF 19 APRIL 2018¹

In Appeal Case AP/10/2017 lodged by:

Reiner Stemme Utility Air-Systems GmbH

Schmiedestraße 2A

15745 Wildau

Germany

("the Appellant"), represented initially by Michael Fischer, Rechtsanwalt, subsequently by Oliver Alexander, Rechtsanwalt,

against

The European Aviation Safety Agency

Konrad Adenauer Ufer 3

50668 Köln

Germany

("the Agency" or "EASA")

Appeal contesting Agency invoices No 90064499 of 13 April 2015, No 90081506 of 22 June 2016 and No 90091554 of 28 April 2017 ("the contested invoices"),

THE EASA BOARD OF APPEAL

Composed of:

Dr. Michael Sánchez Rydelski (Chairman and Rapporteur),

Dr. Helmut Stärker (Member)

and Humberto Vieira Rijo (Member),

Registrar: initially José Luis Penedo del Rio, subsequently replaced by Marcella Miano,

gives, on 19 April 2018, the following decision:

The Appeal is dismissed in so far as it is brought against Agency invoices No 90064499 of 13 April 2015 and No 90081506 of 22 June 2016 as inadmissible and in so far as it is brought against invoice No 90091554 of 28 April 2017 as unfounded.

¹ Language of the proceedings: English

I. BACKGROUND

1. On 12 September 2014, the Appellant lodged an application with the Agency for a Type Certificate Approval for the fixed wing aircraft type "REINER STEMME UA-SYSTEMS GMBH Q01", model: "Q01-100", with a weight of 2,750 kg ("the Q01-100 project"). The classification "Q01" refers to low-speed non-pressurized two-seater aircraft.
2. On 28 November 2014, the Appellant withdrew the application for the Q01-100 project and the fees levied by the Agency for this project were credited in December 2014.
3. On 19 March 2015, the Appellant submitted a new application for the Q01-100 project. In that application the Appellant provided, *inter alia*, information concerning the product identification in section 4.1 of the application form, entitled "Fees & Charges Information", and stated that the weight of the aircraft was over 2,000 kg (up to 5,700 kg) and that the aircraft was not a High Performance Aircraft. By signing the application form, the Appellant declared in section 8 of the application form: "*I have understood that I am submitting an application for which fees or charges will be levied by EASA in accordance with Commission Regulation (EC) on fees and charges levied by the European Aviation Safety Agency, as last amended and available from <http://easa.europa.eu/>>Legislation >Fees&Charges.*"
4. The first invoice No 90064499, amounting to EUR 265,646.60, was issued on 13 April 2015 and covered the billing period from 19 March 2015 to 18 March 2016. On 27 April 2015, the Appellant paid the full amount of invoice No 90064499.
5. The second invoice No 90081506, amounting to EUR 265,646.60, was issued on 22 June 2016 and covered the billing period from 19 March 2016 to 18 March 2017. The Appellant paid part of the invoice amount in October 2016 and the outstanding amount on 4 November 2016.
6. The third invoice No 90091554, amounting to EUR 265,913.04, for the billing period from 19 March 2017 to 18 March 2018, was issued on 28 April 2017. The Appellant has not paid the third invoice.
7. Each contested invoice contained an appeal clause specifying a two-month time limit for lodging an appeal against the invoices from the date of notification of the invoices.

II. PROCEDURE

8. On 26 June 2017, the Appellant lodged an appeal against the contested invoices, together with the statement of grounds ("**the Appeal**"). Upon request of the Registrar of the Board of Appeal, the Appellant submitted on 29 August 2017 additional documents, including a duly completed appeal form and a turnover certificate. The Appellant paid the appeal charges.
9. On 29 August 2017, the Registrar of the Board of Appeal formally notified the Executive Director of the Agency of the Appeal and requested an interlocutory revision in accordance with Article 47 of Regulation (EC) No 216/2008.
10. On 28 September 2017, the Agency handed down its interlocutory revision and remitted the Appeal to the Board of Appeal ("**the Board**"). Concerning invoices No 90064499 of 13 April 2015 and No 90081506 of 22 June 2016, the Agency concluded that the Appeal was inadmissible. With regard to invoice No 90091554 of 28 April 2017, the Agency concluded that the Appeal was admissible, but unfounded. Consequently, the Agency upheld invoice No 90091554 of 28 April 2017, but suspended the application of the invoice until the Board had taken its decision on the Appeal.
11. On 12 October 2017, the Board informed the Appellant of the outcome of the interlocutory revision. On the same day, the Board provided the Agency with a deadline of 28 October 2017 to submit its Defence and requested copies of the contested invoices, information about the dates when the contested invoices were paid, as well as a brief explanation of the aircraft type at hand.
12. On 26 October 2017, the Agency informed the Board that it considered the arguments presented by its Executive Director in the interlocutory revision, submitted on 28 September 2017, as its Defence in the present case. The Agency submitted no additional arguments. As requested, the Agency submitted copies of the contested invoices, specified the dates when the invoices were paid and provided a brief description of the aircraft type.
13. By letter dated 10 November 2017, the Board invited the Appellant to submit a written Reply to the Agency's Defence, i.e. the Agency's arguments presented in the interlocutory revision. The deadline for submitting the Reply was set for 11 December 2017. On 20 December 2017, the Appellant requested an extension of the deadline to submit its Reply until 31 January 2018. By email dated 20 December 2017, the Board informed the Appellant that the deadline was extended until 12 January 2018.
14. On 12 January 2018, the Board received the Appellant's Reply and forwarded it to the Agency. The Agency was given until 6 February 2018 to submit its Rejoinder. On 25 January 2018, the Agency requested an extension of the deadline to submit its Rejoinder until 23 February 2018. By email dated 26 January 2018, the Board informed the Agency that the deadline was extended until 23 February 2018. On 23 February 2018, the Agency submitted its Rejoinder, which the Board forwarded to the Appellant.

15. On 27 February 2018, the Board informed the parties that the written part of the procedure was closed, and asked the parties whether they would request an oral hearing. The Board also requested from the Agency a copy of the Appellant's application form dated 19 March 2015 and copies of its email correspondence with the Appellant after the Appellant's submission of the application form (the Agency referred to the application form in paragraph 21 of its Rejoinder² and to the email correspondence in paragraphs 5 and 21 of the Rejoinder).
16. By email dated 2 March 2018, the Agency submitted the requested information and informed the Board that it waived its right to an oral hearing.
17. By email of 7 March 2018, the Appellant informed the Board that it did not wish an oral hearing.

III. MAIN PROVISIONS AT ISSUE

18. According to Article 44(1) of Regulation (EC) No 216/2008 of the European Parliament and 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 L 79, 19.03.2008, page 1) ("the Basic Regulation"), an appeal may be brought against decisions of the Agency taken pursuant to, *inter alia*, Article 64 of the Basic Regulation.
19. Article 46 of the Basic Regulation reads:

"The appeal, together with the statement of grounds thereof, shall be filed in writing at the Agency within two months of the notification of the measure to the person concerned, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be".
20. Article 64(4)(a) of the Basic Regulation provides:

"Fees and charges shall be levied for:

(a) the issuing and renewal of certificates, as well as the related continuing oversight functions; ... "
21. Article 64(5), first sentence, of the Basic Regulation states:

"The amount of the fees and charges shall be fixed at such a level as to ensure that the revenue in respect thereof is in principle sufficient to cover the full cost of the services delivered."

² Paragraph 21 of the Rejoinder contained a typographical error: the Agency referred erroneously to 19 March 2017 as the date of the application form. The correct date is 19 March 2015.

22. The matters for which fees are due, the fee amount and the way in which these are paid are set out in Commission Regulation (EU) No 319/2014 of 24 March 2014 on the fees and charges levied by the European Aviation Safety Agency, and repealing Regulation (EC) No 593/2007 (OJ L 93, 28.03.2014, page 58)(“**the Fees Regulation**”).
23. Recital 3 of the preamble of the Fees Regulation states:
- “Fees and charges provided for in this Regulation should be set in a transparent, fair and uniform manner.”*
24. Recital 11 of the preamble of the Fees Regulation provides:
- “The industry should enjoy good financial visibility and be able to anticipate the cost of the fees and charges it will be required to pay. At the same time, it is necessary to ensure a balance between overall expenditure incurred by the Agency in carrying out certification tasks and services provided, and overall income from the fees and charges it levies.”*
25. Recital 13 of the preamble of the Fees Regulation states:
- “The tariffs set out in this Regulation should be based on the Agency’s forecast as regards its workload and related costs.”*
26. Article 1 of the Fees Regulation provides:
- “This Regulation determines the matters for which fees and charges are due, establishes the amount of the fees and charges and the way in which they are to be paid.”*
27. Article 2(a) of the Fees Regulation states:
- “‘fees’ means the amounts levied by the Agency and payable by applicants for certification tasks; ... ”*
28. Article 2(c) of the Fees Regulation provides:
- “‘certification task’ means all activities carried out by the Agency directly or indirectly for the purposes of issuing, maintaining or amending certificates pursuant to Regulation (EC) No 216/2008 and its implementing rules; ...”*
29. Article 3(4) of the Fees Regulation reads:
- “The amounts referred to in Parts I and II of the Annex shall be annually indexed to the inflation rate in accordance with the method set out in Part IV of the Annex.”*
30. Article 7(1), first sentence, of the Fees Regulation states:
- “The certification task is subject to prior payment of the full amount of the fee due, unless the Agency decides otherwise after due consideration of the financial risks.”*

31. Article 7(2) of the Fees Regulation reads:

“The fee to be paid by the applicant for a given certification task shall consist of:

(a) a flat fee set out in Part I of the Annex; or

(b) a variable fee.”

32. Article 8(1) of the Fees Regulation provides:

“Fees referred to in tables 1 to 4 of Part I of the Annex shall be levied per application and per period of 12 months. For the period after the first 12 months, the fees shall be 1/365th of the relevant annual fee per day.”

33. Article 13(1) of the Fees Regulation reads:

“The amount of the charges levied by the Agency for services listed in Part II, point 1 of the Annex shall be equal to the real costs of the service provided. To that end the time spent by the Agency shall be invoiced at the hourly rate mentioned in that list.”

34. Part I of the Annex to the Fees Regulation specifies the tasks for which a flat rate fee is charged. Table 1 of Part I of the Annex to the Fees Regulation lays down flat fees for “*type certificates and restricted type certificates*”. Table 1 of Part I of the Annex to the Fees Regulation specifies a flat fee of EUR 263,800.00 for fixed wing aircraft over 2,000 kg up to 5,700 kg (except for High Performance Aircraft).

35. Part II of the Annex to the Fees Regulation specifies the certification tasks or services that are charged on an hourly basis.

IV. SUBMISSIONS OF THE PARTIES

The Appellant

36. In essence, the Appellant contests the application of a “flat fee” in Table 1 of Part I of the Annex to the Fees Regulation to the certification for the Q01-100 project and alleges that the flat fee is “grossly out of proportion” to the Agency’s workload in relation to the Appellant’s certification application.

37. The Appellant is of the view that only upon disclosure of the actual hours and costs the Agency actually spent on the certification for the Q01-100 project would the Appellant be put in a position to appeal the contested invoices. The Appellant therefore alleges that the conditions for the Appeal can only apply upon receipt of this information by the Appellant.

38. The Appellant submits that the Agency should have used its discretion and charged on an hourly basis, according to Article 7(2)(b) of the Fees Regulation. The Appellant estimates that charging on an hourly basis would have resulted in a fraction of the flat fee charged and that the Agency is required to keep track of hours due, in accordance with Article 9(2) of the Fees Regulation.
39. The Applicant observes that a flat fee is only applicable to regular aircraft, while High Performing Aircraft must be levied on the basis of an hourly rate. According to the Appellant, this leads to a situation where a more complex aircraft is charged less than a simple aircraft.
40. The Appellant is of the opinion that the flat fee for the certification of aircraft over 2,000 kg is inadequate, because by adding 1 g of mass to 2,000 kg the fee increases by EUR 249,860.00 to EUR 263,800.00, which constitutes an increase of 1,792% (an increase by a factor of 19). The Appellant sees no justification for such an increase. The Appellant alleges that a 2,750 kg aircraft is not 19 times more complex and does not require additional work by the Agency of this magnitude.
41. The Appellant further alleges that the simple weight of an aircraft cannot serve as a proper method for determining a flat fee and that this is reflected in the proposed reorganisation of Part 23 and CS-23 by the Agency. The Advance Notice of the proposed amendment 2015-06 (RMT.0498-27.03.2015) contains a classification of certification levels in Appendix A CS 23.5 (d) and (e). Under this classification the Q01 will be regarded as a low-speed non-pressurized two-seater: CS 35.5 (d)(1) and (e)(1). According to the Appellant, this is the lowest complexity of the whole regulation, yet the current flat fee determination in Table 1 does not reflect that and results in an arbitrary fee.
42. The Appellant considers that the flat fee actually constitutes an annual fee, which burdens any aircraft certification above 2,000 kg and punishes manufacturers of these aircraft disproportionately, as they face longer developing and certification periods. In the Appellant's view, the fee structure breaches the principle of market equality, because manufacturers of aircraft under 2,000 kg enjoy a discount of roughly a million EUR compared to a design above this weight. According to the Appellant, EUR 55,760.00 versus EUR 1,055,200.00 on a four-year developing and certification project makes a real difference in the overall development costs of an aircraft and that aircraft developers are likely to choose their designs by the Agency's fee structure.
43. The Appellant argues that the flat fee is also unjustified because the longer the Agency takes to process the certification application, the higher its claim, which thus rewards a slower processing of the applications.
44. The Appellant submits that the Agency has not provided an explanation how the fees levied reflect the workload and costs incurred by the Agency during the examination of the certification application. In this context, the Appellant refers to Article 13 of the Fees Regulation, which provides that the amount of charges levied by the Agency shall be equal to the real cost of the service provided. According to the Appellant, the Agency never provided any information about the foreseeable total amount of the fees for the examination of the Appellant's application, although according to Article 6(1) of the Fees Regulation, an applicant may request a financial estimate for amounts to be paid.

45. In the Appellant's opinion, the flat fee amounts to a tax or punitive fee. According to the Appellant, the Agency is not empowered to levy any taxes or punitive fees. Further, at no time did the Agency inform the Appellant about the expected time to complete the certification, meaning that the Agency's invoicing practice results in "never ending fees".
46. The Appellant questions the legality of the Fees Regulation. In the Appellant's view, the Fees Regulation breaches provisions of the Treaties of the European Union and fundamental principles of the European legal system. In this context, the Appellant submits that the scale of fees and charges is disproportionate and therefore in breach of the principle of proportionality, according to Article 5(4) of the Treaty on European Union.
47. Finally, the Appellant submits that, since the contested invoices did not provide sufficient information to enable the Appellant to foresee the overall application costs, the Agency breached Article 41(2)(c) of the Charter of Fundamental Rights of the European Union, which imposes an obligation on the administration to provide reasons for its decisions.
48. In light of these submissions, the Appellant requests that: (1) the contested invoices be rescinded; (2) the certification fee be determined on a fair and appropriate basis; and (3) any overpayment be refunded to the Appellant.

The Agency

49. The Agency submits that the Appeal concerning invoices No 90064499 and No 90081506 is inadmissible, as it was filed outside the two-month time limit laid down in Article 46 of the Basic Regulation. In relation to invoices No 90064499 and No 90081506, the Agency also explained that it never received any requests from the Appellant asking for the detailed hours spent in the context of these invoices.
50. With regard to invoice No 90091554, the Agency contends that the Appeal is admissible, but unfounded. The Agency is of the opinion that it must apply a flat fee as provided for in Article 7(2)(a) of the Fees Regulation, in conjunction with Part I of the Annex to the Fees Regulation, and enjoys no discretion to apply an hourly fee concerning the certification of fixed wing aircraft.
51. The Agency is of the opinion that only in cases of the termination or revocation of an application and the surrender or transfer of a certificate does the Fees Regulation allow the Agency to levy an hourly fee, provided that it does not exceed the amount of the applicable flat fee (Articles 9(2), 10(3) and 11 of the Fees Regulation). *A contrario*, the Fees Regulation does not establish a general discretion to apply either a flat fee or a fee calculated on an hourly basis.
52. The Agency submits that complex aircraft are exempted from the general fee determination process, as they fall in a special category of fees for complex aircraft. These fees are higher than the ones for regular aircraft.

53. The Agency further submits that the Appellant should have a full understanding of the Agency's fee system and the fee levels applied for type certification of the Q01-100 aircraft. The Agency explains that from the first application, the Appellant has been in close contact with the Agency and that the amount of the fee levied, as well as the rules for calculating the fees were discussed with the Appellant on several occasions. According to the Agency, the Appellant was advised several times of the possible options for reducing the costs for the certification of the Q01-100 aircraft, notably by reducing the maximum certified take off weight or suspending the certification project for a certain period of time. While the certification project is on hold, the Appellant would not have been required to pay any fees. According to the Agency, apparently these options were not further considered by the Appellant, on the contrary, the flat fees invoiced by the Agency in 2015 and 2016 were paid without question.
54. The Agency also underlines that comprehensive information on the Agency's fees and charges scheme, including application of flat fees, terms of payment, annual indexation of fees, etc. is available on the Agency's website.
55. The Agency also submits that before an application is formally submitted, the Agency offers potential applicants the possibility of holding pre-application meetings, in which the application procedure, including the applicable fees and charges, is discussed. These pre-application meetings are free of charge for the applicants. The Agency states that the Appellant made use of this possibility and was advised during the pre-application meeting and via email on several aspects of its application. Specifically, the Agency also provided advice on how the costs could be lowered for the Appellant.
56. The Agency submits that, as the annual flat fees in Table 1 of Part I to the Annex of the Fees Regulation have been set by the EU legislator, it is bound by the Fees Regulation and that it cannot deviate from the principles established in the Fees Regulation for the calculation of fees in favour of a particular applicant for a certification task. The Fees Regulation is a generally applicable regulatory act adopted by the European Commission and any review of the inherent fairness of the flat fees thus falls outside the scope of review of the Agency.
57. The Agency stresses that before the current fee structure was adopted by the European Commission, a dedicated working group was created in 2008 following a request from industry to review the previous Regulation (EC) No 593/2007, with the aim of providing a more transparent and cost-reflective fee charging scheme as stipulated in Article 64(5) of the Basic Regulation. As part of this process, the industry was consulted on numerous occasions on the charging principles and the mechanism of the fee determination. At that point, questions relating to proportionality and market impact of the new fee structure were discussed and the input from the industry was duly taken into account. Further, an external consultant advised on the calculation methods and the determination of new tariffs, including a verification of the plausibility and correctness of the underlying calculation methods. In addition, the tariffs were developed, taking into consideration data from three years of the Agency's certification activities. In this respect, for the determination of the new tariffs, the Agency identified yearly activity volumes (e.g. number of initial certification tasks, number of continued airworthiness/oversight tasks) and analysed the work volumes per type of certification task in order to determine the average work volume and annual costs. The flat fees laid down in the Fees Regulation

therefore reflect the typical costs/average number of hours that the Agency will incur in a certification project for a certain type of aircraft, based on the data collected by the Agency in the past. According to the Agency, when setting the tariffs, one objective was to retain the existing fees for small products/organisations, e.g. for the category of “fixed wing aircraft over 2,000 kg up to 5,700 kg”, which implied “cross subsidies” within the same category of certification tasks, with contributions proportionate to work volumes. In addition, when determining the scale of flat fees the principles of efficiency, transparency and predictability of costs, for both the applicant and the Agency, were duly taken into account.

58. Finally, the Agency explains that in each application form, there is a reference to the applicant’s declaration and acceptance of the general conditions and terms of payment. In particular, by submitting an application, the applicant declares to be aware that fees or charges must be paid whether or not the application is successful. Such a declaration was also made by the Appellant when signing the application form on 19 March 2015. By emails dated 7 and 28 April 2015, the Agency informed the Appellant, *inter alia*, about the amount of the flat fee to be invoiced and that an additional fee would be levied on a *pro rata* basis if the project lasted more than twelve months.
59. The Agency requests that the Appeal concerning invoices No 90064499 of 13 April 2015 and No 90081506 of 22 June 2016 be declared inadmissible and that the Appeal concerning invoice No 90091554 of 28 April 2017 be dismissed as unfounded.

V. FINDINGS OF THE BOARD OF APPEAL

Admissibility

60. According to Article 44(1) of the Basic Regulation, an appeal may be brought against decisions the Agency has adopted pursuant to, *inter alia*, Article 64 of the same Regulation.
61. The contested invoices are Agency decisions taken pursuant to Article 64(4)(a) of the Basic Regulation and are therefore subject to appeal as set forth in Article 44(1) of the same Regulation.
62. Under Article 45 of the Basic Regulation the Appellant, as the addressee of the contested invoices, is entitled to appeal the contested invoices.
63. The Appellant paid the appeal charges in accordance with Article 15(3) of the Fees Regulation.
64. Article 46 of the Basic Regulation, entitled “Time limit and form”, provides that the appeal, together with the statement of grounds thereof, shall be filed within two months of the notification of the measure to the person concerned, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.
65. All contested invoices contained an appeal clause specifying that an appeal shall be filed in writing at the Agency within two months of the date of notification of the contested invoices.

66. Invoice No 90064499, issued on 13 April 2015, was paid by the Appellant on 17 April 2015. Invoice No 90064499 was notified to the Appellant and it is apparent that the Appellant had knowledge of invoice No 90064499 on 17 April 2015, when the Appellant paid the full amount of that invoice. Consequently, the two-month period for bringing an appeal against invoice No 90064499 elapsed in June 2015. However, the Appeal contesting invoice No 90064499 was only submitted on 26 June 2017. The Appeal against this invoice was therefore submitted outside the time limit provided for in Article 46 of the Basic Regulation.
67. Invoice No 90081506, issued on 22 June 2016, was partly paid by the Appellant in October 2016. Invoice No 90081506 was notified to the Appellant and it is apparent that the Appellant had knowledge of invoice No 90081506 in October 2016, when the Appellant partly paid the amount of this invoice. The two-month period for bringing an appeal against invoice No 90081506 therefore elapsed, at the latest, in December 2016. Again however, the Appeal concerning invoice No 90081506 was only submitted on 26 June 2017, which was therefore outside the time limit provided for in Article 46 of the Basic Regulation.
68. The fact that the Appellant was not in possession of the details of the working hours spent by the Agency does not suspend the two-month time limit under Article 46 of the Basic Regulation: First, the Agency submitted that it never received any request from the Appellant asking for the detailed hours spent in the context of invoices No 90064499 and No 90081506, which the Appellant is not contesting. Second, the Appellant paid both invoices without questioning them. Third, the Agency has no obligation under the Fees Regulation to disclose the amount of hours spent on a certification project, when a flat fee is applicable. Finally, Article 46 of the Basic Regulation refers to an appeal against a “measure”, but does not require the disclosure of the details on which the measure is based. The contested invoices were unequivocal, final and binding measures within the meaning of Article 46 of the Basic Regulation, which imposed payment obligations upon the Appellant.
69. Consequently, the Appeal must be dismissed as inadmissible insofar as it concerns invoices No 90064499 of 13 April 2015 and No 90081506 of 22 June 2016.
70. The Appeal, together with the statement of grounds, concerning invoice No 90091554, issued on 28 April 2017, was filed at the Agency on 26 June 2017 and was therefore within the two-month time limit laid down in Article 46 of the Basic Regulation. The fact that a complete appeal form and the turnover certificate were submitted only on 29 August 2017 has no effect on the aforementioned time limit. The Appeal concerning invoice No 90091554 is therefore admissible.

Substance

71. The Appellant's submissions fall essentially into three categories: The first category concerns the legality of the Fees Regulation. In that respect, the Appellant argues that: (1) the flat fee for certification of an aircraft over 2,000 kg up to 5,700 kg is inadequate and disproportionate compared to a 2,000 kg aircraft; (2) the flat fee burdens the Appellant with substantive additional costs, which are far detached from the actual costs of the Agency; (3) basing the flat fee on the weight of the aircraft is not a proper and factually mandated method of fee determination; and (4) the flat fee violates market equality. The second category concerns the alleged misapplication by the Agency of the Fees Regulation, in particular that the Agency should have applied an hourly fee instead of a flat fee for the certification Q01-100 project. The third category relates to alleged breaches of general principles of the Charter of Fundamental Rights of the European Union. The Board will address the Appellant's submissions in that order.

The Fees Regulation

72. The Appellant questions the legality of the Fees Regulation, for instance when the Appellant alleges that the fee structure is inadequate, that the flat fee burdens the Appellant with substantive additional costs, which are not in relation to the actual costs of the Agency, that basing the flat fees on the weight of an aircraft is not a proper method for the fee determination and that the flat fee violates market equality.
73. At the outset, the Board remarks that it is not empowered to question the legality of provisions of an act such as the Fees Regulation (Appeal Case AP/04/2013 *Robinson Helicopter Company*, paragraphs 105 *et seq.*). The Board must, as the Agency, apply validly adopted regulations until they are abrogated or the Union Judicature establishes their invalidity or inapplicability, as the case may be (Judgment of 5 October 2004, *Commission v Greece*, C-475/01, EU:C:2004:585, paragraph 18; Judgment of 12 February 2008, *CELF and Ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 60; Judgment of 9 September 2011, *dm-drogerie markt v OHIM*, T-36/09, EU:T:2011:449, paragraph 83; Judgment of 6 October 2015, *Maximilian Schrems v Data Protection Commissioner*, C-362/14, EU:C:2015:650, paragraph 52).
74. The Board cannot question the fee structure and the flat fees set by the Union legislator for the respective certification tasks of the Agency. Only Agency decisions adopted pursuant to Article 44(1) of the Basic Regulation can be subject to review by the Board. If the Appellant wishes to question the provisions of the Fees Regulation, the Board considers that the Appellant may wish to take the matter further to the Union Judicature, i.e. the Union's Courts in Luxembourg and invoke the inapplicability of the Fees Regulation, cf. Article 277 of the Treaty on the Functioning of the European Union. Consequently, the Board cannot but apply the Fees Regulation (Appeal Case AP/04/2013 *Robinson Helicopter Company*, paragraphs 105 to 107).

Interpretation and Application of the Fees Regulation

75. Concerning the principles guiding the interpretation and application of the Fees Regulation, the Board considers that it follows from settled case-law that the Union legislation must be unequivocal and its application must be predictable for those who are subject to it (Judgment of 16 June 1993, *France v Commission*, C-325/91, EU:C:1993:245, paragraph 26; Judgment of 5 March 2015, *Europäisch-Iranische Handelsbank AG v Council of the European Union*, C-585/13 P, EU:C:2015:145, paragraph 93).
76. It also follows from settled case-law that any act of secondary law must be interpreted so as to ensure its effectiveness and its consistency with primary law, including the general principles of Union law (Judgment of 19 November 2009, *Sturgeon*, C-402/97 and C-432/07, EU:C:2009:716, paragraphs 47 and 48; Judgment of 16 April 2015, *European Parliament v Council of the European Union*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 48).
77. Next, the interpretation of the Fees Regulation must take into account that fees are levied as compensation for services provided. As a matter of principle, levying a fee without there being any service provided, amounts to a tax; and neither the Fees Regulation nor, to the Board's knowledge, any other provisions of Union law relevant to this case provide the legal basis for levying a tax. The fees charged must thus be related to services provided by the Agency (Appeal Case AP/04/2013 *Robinson Helicopter Company*, paragraph 110).
78. The principle that fees charged must relate to services provided by the Agency does not prevent the existence of a discretion on behalf of the Union in establishing and applying fee provisions. For instance, for operational and efficiency reasons, fees may be established at flat rates so as to reflect in general the costs associated with providing a service, without it being necessary to establish in each individual case what the costs of providing the service amounts to (Appeal Case AP/04/2013 *Robinson Helicopter Company*, paragraph 110).
79. It is against this background that the Board applies the Fees Regulation.
80. Pursuant to Article 64(4)(a) of the Basic Regulation, the Agency shall, *inter alia*, levy fees for "the issuing ... of certificates ...". The matters for which fees are due, the amount of the fees and the way in which they are paid are provided for in the Fees Regulation.
81. The Board notes that Article 7(2) of the Fees Regulation provides that a fee to be paid by an applicant for a given certification task consists of: (a) a flat fee set out in Part I of the Annex to the Fees Regulation; or (b) a variable fee. For a given certification task, Article 7(2) of the Fees Regulation establishes thus two forms of fees, a standardized flat fee and an individual variable fee.
82. Part I of the Annex to the Fees Regulation lists the tasks for which the Agency charges a flat fee. Part II of the Annex to the Fees Regulation lists the certification tasks or services for which the Agency charges on an hourly basis, i.e. where the Agency applies an individual variable fee.

83. The tasks in Part I of the Annex to the Fees Regulation are further sub-divided into different tables specifying the respective tasks the Agency performs. Each of the tasks mentioned in these tables corresponds to a specific flat fee, which is also mentioned in the tables.
84. Amongst other things, Table 1 of Part I of the Annex to the Fees Regulation, entitled "Type Certificates and Restricted Type Certificate", provides, in its first category, fixed wing aircraft and divides these aircraft by weight. According to the weight of an aircraft a different flat fee applies. The actual flat fee charged therefore depends on the category of aircraft and weight of the aircraft.
85. In light of these general remarks, the Board finds that the Fees Regulation provides an unequivocal, transparent and predictable fee structure and overview of applicable fees, which correspond to the Agency's respective tasks and services.
86. The Agency levies fees, under the Basic Regulation and the Fees Regulation, to compensate for tasks and services provided by the Agency (Article 64(4)(a) of the Basic Regulation and Articles 2(a), 2(c) and 7 of the Fees Regulation). Flat fees relate to specific certification tasks of the Agency and cannot therefore be considered as a tax. In this context, the Appellant has not contested that the Agency actually performed certification tasks for the Q01-100 project.
87. Further, a standardized flat fee has a looser relation to the work actually performed by the Agency than an individualized variable fee (Appeal Case AP/04/2013 *Robinson Helicopter Company*, paragraph 114). Thus, as a matter of principle, flat fees are set to reflect the typical costs that the Agency may incur in a certification task and apply irrespective of the amount of work actually performed by the Agency (Appeal Case AP/04/2013 *Robinson Helicopter Company*, paragraph 114).
88. In this context, the Board accepts the Agency's submission that the flat fees laid down in the Fees Regulation reflect the typical costs/average number of hours that the Agency may incur in a certification project for a certain type of aircraft. The fees and charges were fixed at a level to ensure that the revenues were sufficient to cover the full costs of the services delivered ("principle of cost recovery"). The flat fees laid down in the Fees Regulation were the result of a dedicated working group, which was created in 2008, with the aim of providing a more transparent and cost-reflective fee-charging scheme. For this purpose, numerous workshops and meetings took place with participants from industry, the Agency and the European Commission, between 2008 and 2012. As part of this process, the industry was therefore consulted on numerous occasions on the charging principles and the mechanism of the fee determination. An external consultant advised on the calculation methods and the determination of new fees, including a verification of the plausibility and correctness of the underlying calculation methods. In addition, the fees were developed, taking into consideration data from three years of the Agency's certification activities. In this respect, for the determination of the fees, the Agency identified the yearly activity volumes (e.g. number of initial certification tasks, number of continued airworthiness/oversight tasks) and analysed the work volumes per type of certification task, in order to determine the average work volume and annual costs. When setting the fees, one objective was to retain the fees for small products/organisations as laid down in the previous Fees and Charges Regulation (Commission Regulation (EC) No 593/2007). Finally, the Agency submitted that when determining the scale of flat fees the principles

of efficiency, transparency and predictability of costs, for both the applicants and the Agency were duly taken into account.

89. In light of this information, it appears to the Board that the fee structure and the actual flat fees were the result of a long process, taking various factors into consideration, in order to establish flat fees that reflect the typical costs/average number of hours that the Agency will incur in a certification project for a certain type of aircraft. Therefore, it is not at all apparent to the Board that the flat fees are disproportionate or in breach of “market equality”, as alleged by the Appellant.
90. As stated above, only decisions of the Agency taken pursuant to Article 44(1) of the Basic Regulation can be subject to review by the Board. Any review of the inherent fairness of the flat fees set out in Part I of the Annex to the Fees Regulation will thus fall outside the scope of review of the Board (Appeal Case AP/04/2013 *Robinson Helicopter Company*, paragraph 127).
91. The Board also notes that flat fees may be levied more than once and consequently the Agency may levy the flat fee as long as the certification process is on-going and until the certification is delivered (Appeal Case AP/04/2013 *Robinson Helicopter Company*, paragraphs 115 to 119). The Appellant is not however correct when it submits that the flat fee is an annual fee. According to Article 8(1) of the Fees Regulation, fees referred to in Tables 1 to 4 of Part I of the Annex to the Fees Regulation are levied per application and per period of twelve months and for the period after the first twelve months, the fees shall be 1/365th of the relevant annual fee per day. In other words, in the first twelve months the fee is fixed, but after this period, the fee is calculated *pro-rata temporis*.
92. Only in a limited number of cases, for example, concerning rejections, withdrawals, suspensions and revocations of applications or the surrender or transfer of a certificate (Article 9(2), Article 10(2) and (3) and Article 11 of the Fees Regulation), is the Agency allowed to charge the applicant according to the work actually performed, the flat fee serving as an upper bar to the chargeable sum.
93. The Appellant’s allegation that the Agency’s invoice practice results in “*never ending fees*” and that the Agency is free to charge the Appellant “*as long as it likes*” is not correct. First, the Agency levies the fees based on the validity of the application, as referred to in Section 21.A.17(b) of the Annex I to Commission Regulation (EU) No 748/2012 of 3 August 2012 “*laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for certification of design and production organisations*” (OJ L 224, 21.08.2012, page 1). According to this provision, an application for a type-certification other than large aeroplanes and large rotorcraft is in principle valid for a period of three years. In the case where a type-certificate has not been issued, or it is clear that a type-certificate will not be issued within this period, the applicant may file for an extension of the original application. On that basis, the Agency can only charge for a maximum of three years unless the applicant agrees to extend the validity of the application. Second, the timelines and pace of a given certification process are primarily determined by the applicant. The Agency is not responsible for delays caused by applicants and possible high fees resulting from this. Further, the applicant can always decide to suspend or stop the certification project. While the certification project is on hold, the applicant is not required to pay any fees.

94. Against this background, the Board shall now turn to the contested invoice No 90091554.

Invoice No 90091554

95. Article 7(2) of the Fees Regulation states that the fee to be paid by an applicant for a given certification task “shall” consist of: (a) a flat fee set out in Part I of the Annex; or (b) a variable fee.
96. Part I of the Annex to the Fees Regulation lists the tasks for which the Agency charges a flat fee. Part II of the Annex to the Fees Regulation lists the certification tasks or services for which the Agency charges a variable fee. In other words, if a certain certification task falls within Part I of the Annex, a flat fee is applicable, while if the task falls into Part II of the Annex, a variable fee is applicable.
97. The wording *shall* in Article 7(2) of the Fees Regulation means that the Agency cannot deviate from the fee structure provided. For example, if the task is listed in Part I of the Annex, the Agency must apply a flat fee.
98. Part II of the Annex to the Fees Regulation specifies the certification tasks or services which are charged on an hourly basis. Type certification of fixed wing aircraft over 2,000 kg up to 5,700 kg is not mentioned in Part II.
99. Table 1 of Part I of the Annex to the Fees Regulation lays down the flat fees for “*type certificates and restricted type certificates*”. Table 1 of Part I of the Annex to the Fees Regulation, in its first category entitled “*fixed wing aircraft*”, specifies a flat fee of EUR 263,800.00 for fixed wing aircraft over 2,000 kg up to 5,700 kg (except for High Performance Aircraft).
100. High Performance Aircraft are exempt from the general flat fee, as they fall in a special category of fees for complex aircraft. These fees are higher than those for regular aircraft. According to Explanatory Note (5) in Part V to the Annex of the Fees Regulation, “*High Performance Aircraft in the weight category up to 5 700 kg ... are those aeroplanes having a Mmo greater than 0,6 and/or a maximum operating altitude above 25 000 ft. They shall be charged as defined in the categories ‘over 5 700 kg ... up to 22 000 kg’*”.
101. The type certification of the Q01-100 project, as applied for by the Appellant, falls into the category of “*fixed wing aircraft over 2,000 kg up to 5,700 kg (except for High Performance Aircraft)*”, as stipulated in Table 1 of Part I of the Annex to Fees Regulation and is therefore subject to a flat fee. It is undisputed that the Q01-100 project has a weight of 2,750 kg and that it is not a High Performance Aircraft.
102. Article 7(2)(a) of the Fees Regulation, in conjunction with Table 1 in Part I of the Annex to the Fees Regulation, was applicable to the Q01-100 project and it attracted a flat fee of EUR 263,800.00. The Agency thus had no discretion to apply a variable fee to the Q01-100 project.

103. As explained above, in only a limited number of cases, for example, concerning rejections, withdrawals, suspensions and revocations of applications or the surrender or transfer of a certificate (Article 9(2), Article 10(2) and (3) and Article 11 of the Fees Regulation), is the Agency allowed to charge the applicant according to the work actually performed, the flat fee serving as an upper bar to the chargeable sum. However, none of these cases are applicable to the case at hand.
104. Since a flat fee was applicable to the Q01-100 project, the Appellant's argument that invoice No 90091554 was not transparent, because it did not disclose the amount of hours involved or any other criteria for establishing the invoiced amount, must therefore fail. The Agency is under no obligation to disclose the amount of hours spent when applying a flat fee.
105. The Appellant also argues that the fees levied by the Agency in the present case are not equal to the real costs of the service provided and makes reference to Article 13 of the Fees Regulation. However, Article 13 of the Fees Regulation only applies to charges which are levied for the specific certification tasks or services listed in Part II of the Annex to the Fees Regulation. Article 13 of the Fees Regulation is not therefore applicable to the case at hand.
106. The total amount levied by invoice No 90091554 was EUR 265,913.04, which is higher than the amount of EUR 263,800.00 mentioned in Table 1 of Part I of the Annex to the Fees Regulation. Article 3(4) of the Fees Regulation however provides that the amounts referred to in Parts I and II of the Annex are annually indexed to the inflation rate in accordance with the method set out in Part IV of the Annex. This explains the difference between the amounts. The Appellant did not question the correct indexation of the final amount.
107. Thus, invoice No 90091554 was correctly issued by the Agency.
108. The Board observes that when enacting the flat fee regime, the Union legislator has based itself on the premise that the Agency will deal with applications in accordance with the principle of sound administration, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Judgment of 20 March 2002, *ABB Asea Brown Boveri v Commission*, T-31/99, EU:T:2002:77, paragraph 99).
109. The Appellant alleges that the Agency has not acted in accordance with principles of good administration by letting the certification process linger on unduly and that it did not sufficiently inform the Appellant.
110. However, the Agency explained that from the first application, the Appellant has been in close contact with the Agency and that the amount of the fee levied, as well as the rules for calculating the fees were discussed with the Appellant on several occasions. According to the Agency, the Appellant was advised several times of the possible options for reducing the costs of the certification of the Q01-100 project, notably by reducing the weight of the aircraft or by suspending the certification project for a certain period of time. While the certification project was on hold, the Appellant would not have been required to pay any fees. According to the Agency, these options were not further considered by the Appellant;

on the contrary, the flat fees invoiced by the Agency in 2015 and 2016 were paid without questioning. The Appellant has not contested the Agency's submissions on these points.

111. The Agency's fees stipulated in the Annex to the Fees Regulation are available on the Agency's website. The information on the Agency's website includes information on the application of flat fees, terms of payments, annual indexation of fees, etc. The Agency is also open at any time to answer any additional questions.
112. In that respect, the Agency also submitted that before an application is formally submitted, the Agency offers potential applicants the possibility to hold pre-application meetings, in which the application procedure, including the applicable fees and charges, is discussed. These pre-application meetings are free of charge for the applicants. The Agency stated that the Appellant made use of this possibility and was advised during the pre-application meeting and via email on several aspects of its application. Specifically, the Agency also provided advice on how the costs could be lowered for the Appellant. The Board has no reasons to doubt the Agency's submissions.
113. By submitting the application on 19 March 2015, the Appellant declared itself to be aware that fees or charges must be paid in relation to the Q01-100 project and in accordance with the applicable Fees Regulation. Further, after submitting the application, the Appellant was made aware by the Agency, by emails dated 7 and 28 April 2015, of the amount of the flat fee to be invoiced and that an additional fee would be levied on a *pro rata* basis if the Q01-100 project lasted longer than twelve months.
114. The Appellant's argument that Agency has not acted in accordance with principles of good administration by letting the certification process linger on unduly and that it did not sufficiently inform the Appellant must therefore fail.

Alleged violation of the Charter of Fundamental Rights

115. The Board will now turn to the Appellant's final submissions, relating to an alleged breach of Article 41(2)(c) of the Charter of Fundamental Rights of the European Union, which imposes an obligation on the administration to provide reasons for its decisions.
116. In that respect, the statement of reasons required must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its jurisdiction to review the legality of that measure (for example, Judgment of 8 March 2017, *Viasat Broadcasting UK v Commission*, C-660/15 P, EU:C:2017:178, paragraph 43).
117. As explained above, invoice No 90091554 was issued in compliance with the Fees Regulation. The invoice contained all the necessary information and references to the Fees Regulation and there is therefore no basis to hold that the decision lacks reasoning
118. The Appellant's argument that the Agency provided insufficient reasoning in its decision to issue invoice No 90091554 must therefore fail.

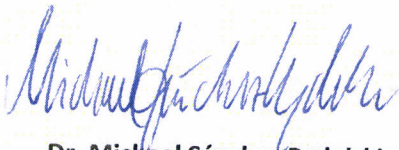
VI. CONCLUSION

119. The examination of the Appeal has not disclosed any reasons for allowing the Appeal.
120. Thus, the Appeal is dismissed.
121. The decision is unanimous.


VII. JUDICIAL REVIEW

122. This decision can be appealed to the General Court of the European Union, in accordance with Article 263 of the Treaty on the Functioning of the European Union in conjunction with Article 50 of the Basic Regulation. Any appeal must be made within two months of the notification of this decision to the Appellant.

Signatures of the Board of Appeal



Dr. Michael Sánchez Rydelski



Dr. Helmut Stärker



Humberto Vieira Rijo

Adopted on 19 April 2018

Registrar:



Marcella Miano