European Aviation Safety Agency

DECISION
OF THE EASA BOARD OF APPEAL
OF
17 JANUARY 2014[1]

In appeal case AP/04/2013/ ROBINSON HELICOPTER COMPANY lodged by

Robinson Helicopter Company
2901 Airport Drive
Torrance, CA, 09505
USA
(hereinafter: 'the Appellant')

represented by Thomas Kittner and Dr Mirko Vianello, Danckelmann und Kerst Rechtsanwälte

against

The European Aviation Safety Agency
(hereinafter: 'EASA' or 'the Agency')

THE EASA BOARD OF APPEAL

composed of

Peter Dyrberg (Chairman and Rapporteur),
Arne Axelsson (Member),
Klaus Koplin (Member),

Registrar: José Luis Penedo del Rio

gives, on 17 January 2014, the following decision:

The appeal against Invoice No. 90037084 issued by the European Aviation Safety Agency on 27 November 2012 is dismissed.

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[1] Language of the proceedings: English

BACKGROUND

1 On 12 May 2010 the Appellant lodged an application with the Agency for type approval of the Robinson R66 helicopter, to be based on a Type Design Approval by the US Federal Aviation Administration (FAA). The Appellant is the producer of Robinson 66 helicopters.

2 A fee of € 281,400.85 was paid by the Appellant at the time of the application as per invoice No. 90009422 of 26 May 2010, covering the period from 14 May 2010 to 13 May 2011. A subsequent fee of € 180,651.82 as per invoice No. 90026809 of 7 December 2011, covering the billing period from 14 May 2011 through 31 December 2011, has also been paid.

3 Neither of the above invoices is subject of this appeal.

4 On 25 October 2010, the FAA issued a type certificate for the R66 helicopter which included an exemption from the requirements of Title 14 of the US Code of Federal Regulations § 27.695 relating to the powered flight control system.

5 A type approval familiarisation meeting between the Appellant and the Agency concerning the Appellant's application was held in Cologne on 1-2 December 2010. At that time the Appellant was informed that the European Union legal order does not provide for the possibility of an exemption such as the one granted by the FAA.

6 Since then, the Agency and the Appellant have attempted to reach an agreement in accordance with EASA safety specifications.

7 On 27 November 2012, the Appellant received invoice No. 90037084 totalling €290,182.95, which covered the billing period from 1 January to 31 December 2012. It is this invoice which is contested by the present appeal.

PROCEDURE

8 By letter of 25 January 2013, the Appellant appealed against Invoice No. 90037084 (hereinafter: 'the contested invoice') in its entirety. The Appellant requests the contested invoice to be rescinded. Moreover, the Appellant requests that 'an appropriate and fair flat type acceptance fee should be determined. This fee should not exceed the sum of the two [previous] invoices...already paid by the Appellant. A possible overpayment should be refunded to the Appellant.'

9 On 25 January 2013 the Appellant paid the appeal fee.

10 On 22 February 2013, the Agency handed down its interlocutory revision. The interlocutory revision held the appeal to be unfounded. The Agency upheld the contested invoice. However, the Agency suspended the payment of the contested invoice until the Board of Appeal had taken its decision in the appeal.

11 On 22 March 2013 the Board of Appeal (hereinafter: the Board) requested the Agency to submit its file on Robinson's request for type approval, to which the contested invoice related.

12 On 27 March 2013 the Appellant lodged its comments on the interlocutory revision of 22 February 2013.

13 On 25 April 2013 the Agency submitted its file on Robinson's request for type approval. The Agency stated that the file was confidential and could not be disclosed to third parties without the Agency's prior permission.

14 On 30 April 2013 the Agency lodged observations on the Appellant's comments maintaining its view that the contested invoice was duly issued.

15 On 22 May 2013 the Appellant lodged further comments on the observations of the Agency of 30 April 2013.

16 On 1 July 2013 the Agency lodged further observations.

17 On 9 July the Board asked the Appellant whether it intended to make use of its right to have an oral hearing. The Appellant did not reply to that query. The Board has not found an oral hearing necessary.

18 On 26 July 2013 the Appellant lodged further comments.

19 On 11 November 2013 the Board of Appeal informed the Agency that it considered that the file, on Robinson's request for type approval, submitted by the Agency should be communicated to the Appellant.

20 On 27 November 2013 the Agency replied to the Board of Appeal that it strongly opposed communication of the file to the Appellant.

21 On 2 December 2013 the Board asked the Appellant for its observations on the issue of communication of the file before 11 December 2013. The Board stated that given the position of the Agency, it would be inclined not to admit the Agency's file to the case file of the Board.

22 On 16 December 2013 the Appellant replied to the Board's letter of 2 December 2013. On the same date the Board communicated to the Appellant that being outside the time limit, its reply would not be admitted to the file.

THE MAIN PROVISIONS AT ISSUE

23 Pursuant to Article 64(4)(a) of Regulation No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (hereinafter: 'the Basic Regulation'), the Agency shall levy fees for the issuing of certificates. The matters for which fees are due, the fee amount and the way in which these are paid are set out in Commission Regulation No. 593/2007, as modified by Commission Regulation No. 1356/2008 of 23 December

2008 and by Commission Regulation No. 494/2012 of 11 June 2012 (hereinafter: 'the Fees Regulation').

24 Recital 3 in the preamble to the Fees Regulation states:

> *The Agency's revenue and expenditure should be in balance.*

25 Recital 4 in the preamble to the Fees Regulation states:

> *Fees and charges referred to in this Regulation should be demanded and levied by the Agency only and in euro. They should be set in a transparent, fair and uniform manner.*

26 Recital 5 in the preamble to the Fees Regulation states:

> *The fees levied by the Agency should not jeopardize the competitiveness of the European industries concerned. Furthermore, they should be established on a basis which takes due account of the ability of small undertakings to pay.*

27 Recital 6 in the preamble to the Fees Regulation states:

> *While civil aviation safety should be the prime concern, the Agency should nevertheless take full account of cost efficiency when conducting the tasks incumbent on it.*

28 Recital 8 in the preamble to the Fees Regulation states:

> *The applicant should be informed, as far as possible, of the foreseeable amount to be paid for the service which will be provided and the way in which payment must be made before provision of the service starts. The criteria for determining the amount to be paid should be clear, uniform and public. Where it is impossible to determine this amount in advance, the applicant should be informed accordingly before provision of the service starts. In such a case, clear rules for assessing the amount to be paid during the provision of the service should be agreed before it is provided.*

29 Recital 11 in the preamble to the Fees Regulation states:

> *The tariffs set out in this Regulation should be based on Agency's forecasts as regards its workload and related costs.*

30 Article 1 of the Fees Regulation provides:

> *This Regulation shall apply to the fees and charges levied by the European Aviation Safety Agency, hereinafter the 'Agency', as compensation for the services it provides, including the supply of goods.*

31 Article 4 of the Fees Regulation provides:

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

(a) a flat amount which shall vary according to the task concerned in order to reflect the cost incurred by the Agency in carrying out this task. The different amounts of the flat fee are set out in Parts I and III of the Annex; or

(b) a variable amount proportional to the workload involved, expressed as a number of hours multiplied by the hourly fee. The hourly fee shall reflect all costs arising from certification tasks. The certification tasks which are charged on an hourly basis as well as the applicable hourly fee are specified in Part II of the Annex.

Upon application of future Regulations, the Agency may levy fees according to Part II of the Annex for certification tasks other than those referred to in Part I of the Annex.

Any changes to the organisation that are reported to the Agency and affect its approval may have the effect of a recalculation of the surveillance fee due, which will be applicable as of the next fee cycle.

32 The certification at issue in this case attracted a fee under Article 4, letter (a).

33 The Explanatory Note to the Annex of the Fees Regulation sets out in note No. 2:

Products related fees referred to in Tables 1 to 4 of Part I are levied per operation and per period of 12 months. After the first period of 12 months, if relevant, these fees are determined pro rata temporis (1/365th of the relevant annual fee per day beyond the first 12 months period). The fees referred to in Table 5 are levied per operation. The fees referred to in Table 6 are levied per period of 12 months.

34 In the present case the applicable fee is set out in Table 1 of Part 1 of the Annex to the Fees Regulation.

35 Article 5(1) and (2) of the Fees Regulation provides:

(1) The amounts set out in the Annex shall be published in the Agency's official publication.

(2) These amounts shall be annually indexed to the inflation rate set out in Part V of the Annex.

36 Article 11(1) of the Fees Regulation provides:

The amount of the charges levied by the Agency shall be equal to the real cost of the service provided, including the cost of making it available to the applicant. To that end, the time spent by the Agency to provide the service shall be invoiced at the hourly fee referred to in Part II of the Annex.

SUBMISSIONS OF THE PARTIES

The Appellant

37 The Appellant submits:

38 The contested invoice does not conform to the principles on which fees are based.

39 Under Article 4 of the Fees Regulation there are exclusively two types of admissible fees, i.e. a 'flat amount which shall vary to the task concerned in order to reflect the cost incurred by the Agency in carrying out this task' and a 'variable amount proportional to the workload involved'. Respectively Part I of the Annex to the Fees Regulation regulates the 'tasks charged at flat fee' and Part II the 'tasks on an hourly basis' The contested invoice refers explicitly to "Table 1 of Part I of the Annex to Fees Regulation'. According to this table a flat fee has been fixed for type certificates and restricted type certificates of medium rotorcrafts (other CS-27). Therefore the contested invoice does not conform to the principles of the Regulation on which it is based. The invoice refers to a flat fee while EASA charges the appellant an annual amount (e.g. invoices of May 14, 2010, December 07, 2011 and November 27, 2012).

40 In addition, the contested invoice does not conform to recital 4 of the Fees Regulation. It is neither transparent, because it does not disclose the amount of hours involved by EASA, nor uniform, because the amount varies from year to year (i.e. invoices 2010 - 2012) without any explanation, nor is it fair, because it was not foreseeable by the Appellant.

41 The recitals of the Fees Regulation do not only set out concise reasons for the provisions of the Regulation, but they especially constitute rules for the interpretation of those provisions.

42 Recital 3 in the preamble to the Fees Regulation states that the Agency's revenue and expenditure should be in balance. Recital 6 to the preamble states that the Agency has to take full account of cost efficiency when conducting the tasks incumbent on it. Recital 11 in the preamble states that the tariffs in the Fees Regulation should be based on the Agency's forecast regarding its workload and related costs. Article 11 of the Fees Regulation states that the amount of charges levied by the Agency shall be equal to the real cost of the service provided.

43 The Agency does not give an explanation how the fees levied correspond to the workload and reflect the cost incurred by the Agency during the examination of the type design approval. It does not appear that the charges levied by the Agency in this case are equal to the real cost of the service provided.

44 Recital 9 in the preamble to the Fees Regulation states that the Agency has to consider that "the industry should enjoy good financial visibility and be able to anticipate the cost of the fees it will be required to pay".

45 Recital 8 in the preamble to the Fees Regulation states that the applicant should be informed of the foreseeable amount to be paid for the service which will be provided and the way in which payment must be made before provision of the service starts. The criteria for determining the amount to be paid should be clear, uniform and public. Where it is impossible to determine this amount in advance, the applicant should be informed accordingly before provision of the service starts. In such case, clear rules for assessing the amount to be paid during the provision of the service should be agreed before it is provided. In addition, Article 8(4) states that the scale of fees applied by the Agency and the terms of payment shall be communicated to applicants when they submit their applications.

46 Contrary to these regulations the Agency has never given any information to the Appellant about the foreseeable total amount of the fees for the examination of its application for the European type certificate (TC) for the R66 helicopter.

47 EASA charged the Appellant with invoice No. 90009422 of May 14, 2010. The fee of € 281,400.85 was paid in due time.

48 This corresponds to the regular period of time for the flat fee mentioned in Part I Table 1 and the explanatory note 2 of the Annex to the Fees Regulation. Only in particular cases (''if relevant'') additional fees will be levied (pro rata temporis) after this first period. The Agency did at no time inform the Appellant about the expected time to complete the certification.

49 EASA did not communicate to the Appellant that it had to pay annual amounts until the type design has been approved and the type certificate issued and that this can last various years. Therefore the Appellant had rightly had the understanding at the time that the timing of the application was not important. The fees invoiced on November 27, 2012 were not foreseeable in advance or before the service was provided.

50 Recital 5 in the preamble to the Fees Regulation states that the fees should be established on a basis which takes into account the ability of small undertakings to pay. However the fees do not take into account the ability to pay.

51 The financial turnover of the Appellant falls within the range between € 50,000,001 and € 500,000,000. The result of the Agency's invoicing is never ending fees. Apparently the Agency just needs to not make a decision on the application of the Appellant regarding the type design approval of the Robinson R66 helicopter to issue invoices every year - ad infinitum. It is contradictory to fair fees and charges if EASA is completely free to charge the Appellant as long as it likes (i.e. ad libitum). This is completely unfair and also contrary to sound economic principles.

52 Recital 4 in the preamble to the Fees Regulation states in part that the fees must be set in a fair and uniform manner; however the fees are not fair or uniform. The arguments for the appeal are based on a comparison of EASA validation fees associated with two other model helicopters, the Robinson R44 II and the Bell 429, a comparison of fees for the validation of the R66 in a number of countries, the disconnect between the fee and the work completed, and the conflict of interest between regulation and revenue generation.

53 It is reasonable to expect that the certification fee may be related to design complexity since the amount of work required to become familiar with a product and the issues involved may be related to its complexity. The price of a helicopter is considered the best measure for this parameter. The ratios of certification fee to unit price for these helicopters, normalized by the ratio for the R44 II are:

Robinson R44 II:	1.00
Robinson R66:	6.63
Bell 429:	1.06

54 By this measure, therefore, the certification fees for the R66 are more than six time those for the R44 II and Bell 429. By any measure the R66 has more in common with the R44 II than the Bell 429, and yet the flat fees for the R66 and Bell 429 helicopters are identical, and larger than the R44 II by an order of magnitude. By creating such coarse divisions between certification categories based on the number of seats, the fees cannot be uniform or fair and do not take into account the ability to pay.

55 The R66 has received type design approval, or is in the process of receiving type design approval from a number of countries around the world. The following table summarizes the fees (converted to US dollars using the exchange rate at the time of payment):

Country	Fee
Argentina	US$ 2,709.40
Brazil	US$ 18,759.89
Canada	CAD$ 90,000.00
Chile	US$ 7,253.90
European Union	US$ 345,222.00
Japan	US$ 6,048.00
Malaysia	US$ 5,875.50
Mexico	US$ 6,837.00
Commonwealth of Independent States	US$ 178,000.00
South Africa	US$ 170.38

The table indicates that the minimum fee charged by the European Union (that for a validation completed within one year) is almost double the next most expensive, and over two thousand times more expensive than the least expensive country that charges a fee. There is no fee charged by the FAA in the United States.

56 Further, the Appellant argues that, there is a disconnect between fees and work completed. In terms of validation team size and depth of review of the FAA certification, the validations undertaken by Transport Canada and EASA are very similar. The Transport Canada validation is also cost recoverable except that an upper limit is placed on the fees that are charged. To date (invoice dated August 22, 2012) the total amount billed by Transport Canada for the R66 validation is CAD 67,191.60. By comparison, the European Union places a lower limit on the validation fee and as of December 31, 2012 has billed approximately US$ 930,646. The billed amount is therefore estimated to be well over ten times what would be necessary to recover costs.

57 The six months dedicated to the R66 by the EASA project manager between the application for EASA Type Approval (May 18, 2010) and the familiarization meeting (December l, 2010) involved assembling the validation team. In this period no significant type acceptance work was performed. As EASA is structured, there is no accountability for time spent by any team member performing their review, and no allowance is made for delays that may be caused by the lack of availability of any validation team member. It is therefore possible that a type acceptance, which is considerably less time consuming than an initial certification, could take longer than one year based entirely on the lack of work performed by EASA. The Appellant contends that over twelve months of the time since the type acceptance commenced has been without activity on the part of EASA.

58 A significant proportion of the R66 validation effort can be attributed to the inability of EASA to accept the exemption granted by the FAA. There is no EASA guidance to indicate that FAA exemptions are not acceptable, and in fact the FAA-EASA Technical Implementation Procedures for Airworthiness and Environmental Certification, dated October 19, 2011, includes a number of references to exemptions in the discussions of certification bases.

59 In order to find an alternate means by which the design could be accepted, there has been considerable involvement on the part of the FAA. The discussions and negotiations, although necessary for R66 type acceptance, were often not necessarily specific to the R66 and the Appellant was not always involved at this level. The time taken to resolve issues is often, therefore, heavily dependent on the availability and unrelated workload of both FAA and EASA personnel and beyond the control of the Appellant, and therefore fundamentally unfair.

60 There is a conflict of interest between regulation and revenue generation. According to the invoices of May 14, 2010 (No. 90009422), December 7, 2011 (No. 90026809), and November 27, 2012 (No. 90037084) EASA fees for the type acceptance of an aircraft are based on the calendar time taken to complete the acceptance, with a minimum charge equal to one year of type acceptance activity, although they are described as a 'flat fee' in the Fees Regulation. It is therefore to the financial benefit of EASA to minimize resources applied to a type acceptance program and to maximize the depth of review and generation of certification review items. In all other countries where aircraft certification cost recovery is implemented there is a recognition of this conflict and in the interest of fairness a limit is set on the amount recoverable or the fee is independent of the time taken to complete the acceptance. The concept of paying more to receive less is the opposite of normal economic principles. This makes the fee structure fundamentally unfair.

61 In accordance with Article 41(1) of the Charter of Fundamental Rights agencies of the Union are required to handle the affairs of every person '*impartially, fairly and within a reasonable time*'.

62 The Appellant submits that the Agency has acted unfairly and thus contrary to Article 41(1) of the Charter.

63 Article 41(2)(c) of the Charter obliges the Union administration to give reasons for its decisions. The justification should enable the affected to preserve his rights against the decision and ensure legal control of the decision, cf. Case 233/94 *Germany v European*

Parliament and Council [1997] ECR I-2405, paragraph 25. The reasons should be part of the decision, cf. Case 240/82 *Stichting sigarettenindustrie v Commission* [1985] ECR 3831, paragraph 8.

64 According to the Appellant, the term *decision* must be interpreted broadly. As a result, every invoice of the Agency is such a *decision.*

65 The invoices have not contained sufficient reasoning to enable the Appellant to foresee the outstanding application costs.

66 The Appellant has still not been informed of the approximate outstanding total costs for handling its request for a type certificate.

67 The contested invoice should therefore be rescinded and replaced by an appropriate and fair fee not exceeding the sum of the two invoices already paid.

The Agency

68 The Agency submits:

69 As regards the arguments brought forward by the Appellant related to the establishment of the contested invoice, the Agency takes the following position:

70 The Appellant is justifying its arguments by referring to recitals of the Fees Regulation. It should be noted that the purpose of these recitals is to set out concise reasons for the provisions of the Regulation. Thus, the recitals do not contain normative provisions and therefore cannot be referred to as legal basis for claims.

71 Pursuant to Article 64(4)(a) of the Basic Regulation the Agency shall 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 stipulated in the Fees Regulation.

72 The Fees Regulation distinguishes between *fees for certification tasks* and *charges for services.* This is of particular relevance as regards the applicable invoicing schemes, which are completely different for certification tasks as compared with services. Certification tasks attract either a 'flat amount' *or* a 'variable amount' of fees; cf. Article 4 of the Fees Regulation. Certification can never attract both the flat amount and the variable amount for one and the same task simultaneously.

73 According to Article 4(a) of the Fees Regulation, applications for type certificates attract only flat fees as set out in Parts I and III of the Annex to the Fees Regulation, depending on category and weight of aircraft. The actual workload performed by the Agency does not affect the amounts of flat fees. In other words, contrary to what the Appellant indicates, a combination of a flat amount and a variable amount cannot occur.

74 In view of this, the type certification of the R66 helicopter, which the Appellant has applied for, attracts a flat fee for 'medium rotorcraft' as stipulated in Table 1of the Annex to Fees Regulation. This flat fee is levied in accordance with the principles set forth in point 2 of the Explanatory Note in the Annex to Fees Regulation (e.g. per operation/application and per period of 12 months), in this case for the period of 01

January 2012 until 31 December 2012. Moreover, the flat fee is indexed according to the inflation rate in accordance with Article 5(2) and Part V of the Annex to Fees Regulation.

75 Regarding the duration of the charging period, the invoicing cycle under Fees Regulation commences as of the date of the receipt of the application by the Agency and will last until the validity of the application, issuance of a certificate or until the application is abandoned or postponed by an applicant or interrupted by the Agency in accordance with Article 8(5) of the Fees Regulation.

76 Finally, as regards the lack of uniformity of the invoiced amounts, the invoices for 2010, 2011 and 2012 differ due to the indexation rates. Additionally, the invoice for year 2011 was calculated on pro rata temporis basis (see point 2 of the Explanatory note in the Annex to Fees Regulation), given that initially the project should have been finalised earlier.

77 With regard to the argument that 'the applicant should be informed of the foreseeable amount to be paid', the Agency points out that the Fees Regulation as amended in 2012 does not require 'to communicate the scale of the fees' to the applicant. The fees are stipulated in the Annex to the Fees Regulation and the terms of payment are available on the Agency's website in accordance with Article 8(1) of the Fees Regulation. Additionally, the Agency underlines that comprehensive information regarding the EASA fees and charges scheme, including application of flat fees, terms of payment, annual indexation of fees, etc. is available on the Agency's website. In addition to this, the Agency strives to ensure that all applicants are adequately informed about the conditions related to their applications. Each application form contains a specific paragraph which requires each applicant to declare that they have accessed, read and agreed to be bound by the Agency's Terms of Payment (point 5 in the application for type certificate by the Appellant). The Agency is also open at any time to answer additional questions that applicants may have.

78 The Fees Regulation states that an applicant may request an estimate only for a certification task which will give rise to the payment of fees calculated on an hourly basis (see Article 8(3) thereof). It is not the case regarding Robinson R66 project.

79 In light of the above, the Agency takes the view that the contested invoice has been correctly established in accordance with Article 4(a), 5(2), Part I, Table 1 and the explanatory Note 2 of the Annex to Fees Regulation and that there are no grounds for rescinding the decision.

80 With respect to the general concerns regarding the principles underlying the Fees Regulation, the Agency acknowledges the concerns raised by the Appellant with regard to the underlying principles of the Fees Regulation. However, it is not for the Agency to contest the principles established by the European legislator. The Agency - as an EU body - is strictly bound to follow European law and has not discretion to deviate from the established principles therein (here: the EASA fees and charges scheme) for a discontent applicant.

81 Finally, from the general concerns raised by the Appellant, the Agency cannot see any substantial arguments that would demonstrate that it has not applied correctly the

principles set forth in the Fees Regulation when establishing the contested invoice and thus would affect the validity of the invoice.

82 With regard to the Appellant's reference to the Charter of Fundamental Rights and in particular to the right of good administration as set out in its Article 41(1), the Agency takes the view that it has handled the Robinson R66 project with due care and fully in accordance with the applicable rules of the European Union.

83 The Appellant does not provide any reasons in what respect the Agency has not observed the referred rules.

84 As a general rule, the duration of the product certification of medium rotorcraft (e.g. R66) is determined by point 21.A.17(b) of Annex I to Commission Regulation 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 the certification of design and production organisations (hereinafter: 'the Rules Regulation'), whereby '(...) *an application for any other type-certificate shall be effective for three years.*' In certain cases the application can be also extended or the applicant can file a new application (see 21.A.17(c) of the Rules Regulation).

85 That provision determines the validity of the application for a type certificate and not the duration of a type certification project. The invoicing cycle under the Fees Regulation is related to the validity of the application e.g. it commences as of the date of the receipt of the application by the Agency and will last until the validity of the application expires, is abandoned or postponed by the applicant or interrupted by the Agency, respectively until a certificate has been issued.

86 The forecasting of the duration of any particular project by the Agency is not possible. Certification tasks are influenced by a number of factors that cannot be foreseen, such as completeness of the application, cooperativeness on the applicant's side or the need to involve third parties. The Appellant's project did not advance due to the extensive discussions to establish the requested substantiation in the certification process. Additionally, the delay was caused by crucial differences in compliance determination between the State of Design (the U.S.) system and the European Union system.

87 The Appellant argues, that the Agency has not given (sufficiently) reasons for its decisions (invoices). The Agency can confirm that the contested invoice contained a proper reference to reasons for issuance (on the first page of the invoice, in the last two rows/boxes).

88 Finally, the appeal concerns only the contested invoice. Insofar the Appellant refers to other or previous invoices; the Agency has understood that it is not the intention of the Appellant to appeal against these previous invoices as a deadline for submitting an appeal has elapsed.

FINDINGS OF THE BOARD OF APPEAL

Admissibility of the appeal

89 An appeal may be brought against decisions of the Agency set out in Article 44(1) of the Basic Regulation which mentions decisions taken pursuant to Article 64 of the same Regulation.

90 The contested invoice has been issued pursuant to Article 64(4) letter a) of the Basic Regulation and is therefore subject to appeal as set forth in Article 44(1) of the same Regulation.

91 Under Article 45 of the Basic Regulation the Appellant, as an addressee of the contested invoice, is entitled to appeal against it.

92 Article 46 of the Basic Regulation is entitled "Time limit and form". It 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.

93 The time limit has been complied with.

94 Against that background, the appeal is admissible.

Communication of the file to the Appellant

95 The Board must decide whether the administrative file of the Agency, to which the Agency denies the Appellant access, can be part of the case file of the Board.

96 The Agency has stated that it strongly opposes that the file be communicated to the Appellant. The Agency has regrettably not specified the reasons for which it holds that opinion. It is not clear whether the Agency's concerns as to confidentiality apply to the whole file or just to part of it. It is the understanding of the Agency that the Board cannot communicate to an Appellant documentation that the Agency considers to be confidential.

97 In the Board's view, there are two issues to decide.

98 In the first place, the question must be addressed as to which instance should take the decision as to whether the administrative file should be communicated to an Appellant. If the decision is to be taken by the Agency, the question must be addressed as to what should be the consequence for the Board's review.

99 As concerns the first issue, the Board holds that it cannot communicate to an Appellant documents that the Agency considers being confidential. The Board has no powers to oblige the Agency to share documentation with an Appellant that the Agency considers that it cannot share with the Appellant.

100 The Board shall remark in that respect that Article 49 of the Basic Regulation does not alter that view of the Board. Article 49 provides that the Board may exercise 'any power which lies within the competence of the Agency or remit the case to the competent body

of the Agency'. In the Board's view that provision must be interpreted as envisaging decisions on substance, in particular that the Board – when annulling a decision of the Agency – may rule on the matter in stead of referring it back to the instance that took the decision annulled. Article 49 thus presupposing a decision on the substance of the appeal, it cannot validly apply to procedural issues that arise during the appeal procedure. The fact that the Board under Article 42 of the Basic Regulation is independent and in making its decisions shall not be bound by any instructions, cannot either alter the finding of the Board; it must be for the Agency to take the decision as to what it wants to disclose, under the control of the Union Judicature and/or the European Ombudsman.

101 That being said, the Board must still take a decision on the second issue, stated above, namely as to whether the information claimed to be confidential can be part of the Board's case file.

102 In the Board's view that question calls for an unequivocal answer. The Board cannot base its decisions on material to which the Appellant has had no access and on which it has had no possibility to comment. Basing the Board's decision on material not disclosed to the Appellant would be contrary to the principle of fair process, included the respect of the rights of defence.

103 Thus, given that principle and the Agency's refusal to grant the Appellant access to the administrative file, the Board must decide that the administrative file cannot be admitted to the case file of the Board. The administrative file is returned to the Agency and the Board cannot in any respect take into account information in that file.

Substance

104 The submissions of the Appellant fall in three categories. The first one concerns the Fees Regulation as such. The Appellant argues that the Fees Regulation is not transparent, not uniform and generally unfair. The second one concerns the alleged misapplication by the Agency of the Fees Regulation, in particular contrary to the recitals in the preamble of the Fees Regulation. The third one concerns the alleged lack of respect for principles of good administration as stated in Article 41 of the Charter of Fundamental Rights. The Board will deal with the Appellant's arguments in that order.

The Fees Regulation

105 To the Board it appears that by some submissions, the Appellant questions the legality of the Fees Regulation, for instance when it is alleged that the fee structure is fundamentally unfair; that the fees set for the certification of medium-seized helicopter are not rightly set; and that in general, the fees set out by the Fees Regulation are too high in comparison with the fees that a similar certification task would attract in other jurisdictions.

106 The Board shall therefore first remark that it is not empowered to question the legality of provisions of an act such as the Fees Regulation. 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 (see Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 10; Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-02555, paragraph 48; Case C-245/92 P

Chemie Linz v *Commission* [1999] ECR I-4643, paragraph 93; Case C-475/01 *Commission* v *Greece* [2004] ECR I-8923, paragraph 18, and Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 60; Case T-36/09 *dm-drogerie markt v OHIM* [2011] ECR II-06079, paragraph 83). The Board cannot question the 'prices' set by the Union legislator even if it were to be established that they amount to abuse of the monopolistic position that the Agency holds in providing the certification tasks that the Basic Regulation confers upon it. If the Appellant wants to question the provisions of the Fees Regulation, it appears to the Board that the Appellant must take the present matter further to the Union Judicature, i.e. the Union's Courts in Luxembourg, and invoke the inapplicability of the Regulation, cf. Article 277 TFEU.

107 The Agency has conceded that it acknowledges the concerns of the Appellant concerning the Fees Regulation's articulation of the principles underlying the Regulation. The Board understands fully the parties' concerns in that respect. However, as stated, the Board cannot but apply the Regulation.

Interpretation and Application of the Fees Regulation

108 As concerns the principles guiding the interpretation and application of the Fees Regulation the Board shall first remark 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, cf. Case 70/83 *Kloppenburg* [1984] ECR 1075, paragraph 11., Case 325/85 *Ireland v Commission* [1987] ECR 5041, paragraph 18; Case 326/85 *Netherlands v Commission* [1987] ECR 5091, paragraph 24; Case 332/85 *Germany v Commission* [1987] ECR 5143, paragraph 23; Case 336/85 *France v Commission* [1987] ECR 5173, paragraph 17; Case 348/85 *Denmark v Commission* [1987] ECR 5225, paragraph 19; and Case C-325/91 *France v Commission* [1993] ECR I-3283, paragraph 26.

109 Moreover, it 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, included the general principles of Union law, cf. Joined Cases C-402/97 and C-432/07 *Sturgeon* [2009] ECR I-10923, paragraphs 47 and 48.

110 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. This principle does not hinder that there is a discretion on behalf of the Union in establishing and applying fee provisions; for instance, for operational and efficiency reasons, amongst others, 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.

111 It is against that background that the Board shall examine the Fees Regulation.

112 The Board shall first note that under Article 1 of the Fees Regulation, 'fees and charges' are levied by the Agency 'as compensation for the services it provides'.

113 Thus, both fees and charges are governed by the common principle that they should be 'compensation for the services it provides'. As concerns fees, it would appear that the Union legislator has sought to respect that principle on a macro-level by establishing in Article 3 of the Fees Regulation that the overall revenue shall match the costs entailed by certification tasks.

114 Article 4(1) of the Fees Regulation provides that as concerns the certification tasks falling within that paragraph, the fees are either flat amounts that 'vary according to the task concerned in order to reflect the cost incurred by the Agency' in carrying out its task, **or** 'variable amounts proportional to the workload involved, expressed as a number of hours multiplied by the hourly fee.' Article 4 establishes thus two forms of fees; a standardized flat fee and an individualized variable fee. It is plain that a standardized flat fee has a looser relation to the work actually performed than the individualized variable fee. Thus, as a matter of principle, standardized flats fee are set as to reflect the typical costs that the Agency may incur in a certification task and apply no matter the amount of work actually performed by the Agency in delivering its service in an individual instance, i.e. the certification; there are limited exceptions to that principle, for instance under Article 8(4) which concerns non-acceptance of an application, and Article 8(5) which concerns interruption of the examination of or the withdrawal of an application: In those instances the Agency must charge the applicant according to the work actually performed, the flat fee operating under Article 8(5) as an upper bar to the chargeable sum.

115 The Explanatory Note to the Annex of the Fees Regulation provides that in some instances, the flat fee foreseen by Article 4 is not a once-for-all flat fee but rather a revolving flat fee. Point 2, first sentence of the Note provides:

> *Products related fees referred to in Tables 1 to 4 of Part I are levied per operation and per period of 12 months.*

116 To the Board the quoted passage makes clear that a flat fee set out in one of those Tables mentioned may be levied more than once. If the fee could only be levied once, then there would be no need to provide that the fee is also levied 'per period of 12 months'. It would be sufficient to provide that the fee is levied 'by operation'.

117 Paragraph 2, second sentence which relates to the same fees as the first sentence, provides:

> *After the first period of 12 months, if relevant, these fees are determined pro rata temporis (1/365th of the relevant annual fee per day beyond the first 12 months period).*

118 In the Board's view the sentence confirms that there can be more than one 12 months period in dealing with a certification task. The pro rata temporis rule raises a number of questions such as for instance as to what is meant by 'if relevant' and why the rule should only apply after the 'first' period of 12 months, and not after for instance a second period of 12 months. As concerns the terms 'if relevant' the Board agrees with the Agency that they must be taken to mean that the pro rata temporis rule applies if the certification is terminated before the expiry of the billing period paid for.

119 In conclusion, it appears to the Board that the above provisions must interpreted as implying that the Agency levies the product related fees in Tables 1 to 4 of Part I of the Annex as long as the certification process is on-going and until the certification is delivered.

120 Against this background the Board shall now turn to the contested invoice. It is not contested that the invoice had to be established as a flat fee, under Article 4 of the Fees Regulation and in accordance with Table 1 of Part I of the Annex to the Fees Regulation. It is also plain that in 2012 – the period to which the invoice relates – the certification process was still on-going.

121 Thus, the contested invoice was rightly issued by the Agency.

122 The submissions of the Appellant cannot alter that finding.

123 The Appellant alleges that for a large part of the time that the certification process has lasted the Agency appears to have been idle. The Board shall in that regard first remark that the contested invoice refers to the year 2012. In any case, the Agency cannot be blamed for the fact that the Appellant lodged its application prematurely; the application was lodged in May 2010 but the FAA approval on which the application depended was not delivered to the Appellant until October 2010. Next, the Board observes that when enacting the flat fee regime, the Union legislator has based himself 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 - see Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86; Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 34; Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision and Others* v *Commission* [1996] ECR II-649, paragraph 93; and Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 99). To the extent that the Appellant alleges that the Agency has not acted in accordance with principles of good administration by letting the certification process linger on unduly, the loss arising at the hands of the Appellant out of such a breach of the obligations incumbent on the Agency must, in the Board's view, be channelled into another remedial course of action, namely an action for damages. The Board is not empowered to deal with such actions which under Article 50(1) of the Basic Regulation must be lodged directly before the Union Judicature.

124 The Appellant alleges that contrary to recital 8 of the preamble to the Fees Regulation it has not been informed in advance about the foreseeable amount to be paid. The Board does not find it necessary to decide whether the information provided was appropriate, as in any case, a possible lack of information cannot alter that the contested invoice was correctly established and issued.

125 In this regard it should be noted that the rules concerning EASA fees stipulated in the Annex to Fees Regulation are available on the Agency's website. The information on the Agency's website includes information on application of flat fees, terms of payment, annual indexation of fees, etc. The Agency is also open at any time to answer any additional questions.

126 The Appellant submits that fees and charges should be set in a transparent, fair and uniform manner, as set out in recital 4 of the preamble to the Fees Regulation.

127 The Board must reiterate that the annual flat fees as set out in Part I to the Annex of the Regulation have been set by the Union legislator and as such are not decisions of the Agency. Only decisions of the Agency taken pursuant to Article 44(1) of the Basic Regulation can be subject to review by the Board of Appeal. Any review of the inherent fairness of the flat fees set out in Part I will thus fall outside the scope of review of the Board of Appeal.

128 As submitted by the Agency, Part I of the Annex to the Fees Regulation stipulates that type certification falls within the scope of tasks charged at a flat fee only. This appeal does not concern tasks where services are performed on the basis of an hourly fee. Details on establishing an invoiced amount are provided in Explanatory Note 2 of the Annex.

129 The Appellant's argument that the contested invoice is not transparent because it does not disclose the amount of hours involved or any other criteria for establishing the invoiced amount, must therefore fail.

130 The Appellant submits that the Agency should take full account of cost efficiency when conducting the tasks incumbent upon it (cf. recital 6 of the Preamble of the Fees Regulation).

131 It is, of course, expected that the Agency will work in a cost effective manner, but there are no legal requirements tying the flat fee to a certain minimum working commitment. The Appellant's argument that the Agency's work does not reflect the invoiced fees and that the latter are unfair on that basis must therefore fail.

132 The alleged lack of uniformity of the contested invoice is put forward by the Appellant as being due to the differing amounts for each periodic invoice, without the Agency having provided any explanation for this.

133 It is clear from Article 5(2) of the Fees Regulation and Part V of its Annex that any flat fee will be indexed to the inflation rate set out in that part.

134 It follows from the very nature of an annual inflation rate that it will vary from year to year.

135 The Appellant's arguments that the invoice is in breach of the principle of uniformity must therefore fail.

136 Furthermore, in accordance with recital 8 of the Fees Regulation's preamble, the applicant should be informed, as far as possible, of the foreseeable amount to be paid for the service which will be provided *before* provision of the service starts. If it is impossible to determine this amount in advance, the applicant should be informed accordingly, also *before* provision of the service starts.

137 The Appellant claims that it has not received any such information from the Agency.

138 The Board must point out that flat fees are levied regardless of how much time is spent by the Agency working on a given case. Lack of information, even if established, cannot alter that.

139 Next, as concerns point 21.A.17 of the Annex to Commission Regulation (EU) No. 748/2012, the provision determines the validity of an application for a type certificate, not the duration of a type certification project. The three years period foreseen by the provision refers only to the validity of the application and does not constitute any deadline for handling the application. It is clear from this provision that the duration of a type certification project may be longer than three years. In any case, the contested invoice was issued within the three years period foreseen.

140 The Appellant noted that, according to recital 5 of the Fees Regulation's preamble, the fees levied by the Agency should be established on a basis which takes due account of the ability of small undertakings to pay. The appellant submits that the fees do not take into account this ability.

141 The Board shall remark that, according to Article 2(2) of Annex 1 to Commission Regulation (EC) 800/2008 of August 2008, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million. The same definition can be found in the Article 2(2) 2 in the Annex of the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. That definition is relevant for the present purposes.

142 The financial turnover of the Appellant is equivalent to range between € 50,000,001 and € 500,000,000. Thus, the Appellant is not a small undertaking. Recital 5 of the Fees Regulation's preamble therefore does not apply to the Appellant.

143 The Appellant's arguments that the fees do not take into account the ability of small undertakings to pay must therefore fail.

Considerations regarding an alleged violation of the Charter of Fundamental Rights

144 The Board will now turn to the Appellant's final submissions relating to an alleged violation of Article 41 of the Charter of Fundamental Rights. In this regard, it should be stressed that the Agency is bound by the rules of law. The Agency cannot contest the law established by the Union legislator i. a. the Fees Regulation. As it was explained above, the contested invoice was issued in compliance with the Fees Regulation. The invoice contained all the sufficient information and references to the Fees Regulation, and there is therefore no basis to hold that the decision lacks reasoning, cf. settled case law to the effect that the reasoning requirement must be adapted to the nature of the act in question; it must be assessed with regard not only to the wording of the act but also to the context and all the legal rules governing the matter in question, see amongst other Case C-352/96 *Italy* v *Council* [1998] ECR I-6937, paragraph 40.

145 The Appellant's arguments that the contested invoice violates the Charter of Fundamental Rights must therefore fail.

CONCLUSION

146 The examination of the appeal has not disclosed any reason for allowing the appeal.

147 Thus, the appeal is dismissed.

148 The decision is unanimous.

JUDICIAL REVIEW

149 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. The appeal shall be made within two months of the notification of this decision to the Appellant.

Peter Dyrberg Arne Axelsson Klaus Koplin

Registrar:

José Luis Pérez del Rio