



European Aviation Safety Agency

The Board of Appeal of the European Aviation Safety Agency (EASA)

**DECISION
OF
THE EASA BOARD OF APPEAL
OF
17 DECEMBER 2012¹**

In appeal case AP/01/2012 lodged by

Heli-Flight GmbH & Co. KG
Flugplatz
61203 Reichelsheim, Germany
(hereinafter: the Appellant)

represented by Thomas Kittner, Rechtsanwalt

against

The European Aviation Safety Agency
(hereinafter: the Agency)

represented by its agents Frank Manuhutu, Chief Legal Advisor, Fredrik Kämpfe, Deputy Chief Legal Advisor, and by Frederic Copigneaux, Deputy Certification Director

THE EASA BOARD OF APPEAL

composed of

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

Registrar: José Luis Penedo del Río

gives, on 17 December 2012, the following decision:

The appeal against the decision of the European Aviation Safety Agency of 13 January 2012 rejecting an application for approval of flight conditions for a Robinson R66 helicopter (serial number 0034) is dismissed.

¹ Language of the proceedings: German

BACKGROUND

- 1 In July 2011 the Appellant lodged an application with the Agency for approval of flight conditions with a view to applying for a permit to fly from national authorities. The application concerned one Robinson R66 helicopter. The Appellant is the exclusive distributor for Germany for the producer, Robinson Helicopter Company. The application concerned the period until end of 2011. The application was not granted.
- 2 On 10 January 2012 the Appellant made a new application, also concerning the Robinson R66 helicopter, for approval of flight conditions with a view to applying for a permit to fly from national authorities, this time for the period 15 January 2012 to 15 January 2013.
- 3 The application was made on the Agency's form E 37. In the appropriate boxes on that form the Appellant indicated that the application was made for flights with the following purposes: flying the aircraft for customer acceptance; market survey, including customer's crew training; exhibition and airshow; and flying the aircraft to a location where maintenance or airworthiness review are to be performed, or to a place of storage.
- 4 In support of its application, the Appellant referred to the fact that the Robinson R66 is a helicopter for which the Federal Aviation Administration of the United States of America (hereinafter the "FAA") has issued a type certificate (hereinafter a "TC").
- 5 The producer of the helicopter, Robinson Helicopter Company, has applied to the Agency for an EU TC. In the on-going procedure evaluating that application, the Agency has voiced safety concerns, namely as concerns the hydraulic system of the flight control system, under the standard known as CS-27.
- 6 By decision of 13 January 2012 the Agency rejected the application of the Appellant (hereinafter the "contested decision" or the "decision"). In the view of the Agency, the concerns it had concerning the R66 helicopter as a type were of such a nature that it could not grant even a limited approval of flight conditions for an individual specimen of the R66.

PROCEDURE

- 7 By letter of 17 January 2012, received at the Board's registry on 18 January 2012, the Appellant appealed against that decision.
- 8 The Appellant also requested the contested decision to be suspended.
- 9 The appeal was submitted to the Executive Director of the Agency for interlocutory revision in accordance with Article 47(1) of Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, published in OJ L79, 19.3.2008, as later amended (hereinafter the "Basic Regulation").
- 10 On 21 February 2012 the Executive Director issued his decision in interlocutory revision. The Executive Director held the appeal to be admissible, but unfounded. He also held that there were no circumstances such as to grant the request for suspension of the contested decision.

- 11 On 22 May 2012 the Appellant submitted its writ detailing the grounds of appeal.
- 12 On 7 September 2012 the Agency submitted its writ in reply.
- 13 On 31 October 2012 the Appellant submitted its rejoinder.
- 14 On 13 November 2012 the oral hearing was held.

THE MAIN PROVISIONS AT ISSUE

- 15 The dispute relates to an approval of flight conditions with a view to applying for a permit to fly.
- 16 Article 20(1) letter k) of the Basic Regulation provides:

1. With regard to the products, parts and appliances referred to in Article 4(1)(a) and (b), the Agency shall, where applicable and as specified in the Chicago Convention or its Annexes, carry out on behalf of Member States the functions and tasks of the state of design, manufacture or registry when related to design approval. To that end, it shall in particular:

.....

(k) for aircraft for which a permit to fly is to be issued, establish airworthiness standards and procedures to comply with Article 5(4)(a);

- 17 Article 5(4) letter a) of the Basic Regulation provides:

4. By way of derogation from paragraphs 1 and 2:

a permit to fly may be issued when it is shown that the aircraft is capable of performing safely a basic flight. It shall be issued with appropriate limitations, in particular to protect third parties' safety;

- 18 Implementing provisions to the Basic Regulation are laid down by Commission Regulation (EC) No 1702/2003 of 24 September 2003 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, published in OJ L243, 27.9.2003, now repealed through 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 the certification of design and production organizations, published in OJ L224, 21.8.2012.
- 19 Commission Regulation (EC) No 1702/2003 has been amended several times. The version that is applicable in the present case is the version that results from Commission Regulation (EC)

No 1194/2009 of 30 November 2009 amending Regulation (EC) No 1702/2003 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 organizations, published in OJ L321, 8.12.2009. This version is hereinafter referred to as the "Implementing Regulation".

20 The Annex (Part 21) to the Implementing Regulation contains in Subpart P detailed provisions concerning the procedure at issue (hereinafter the "Annex").

21 21A.701 in the Annex, entitled 'Scope', provides:

Permits to fly shall be issued in accordance with this Subpart to aircraft that do not meet, or have not been shown to meet, applicable airworthiness requirements but are capable of safe flight under defined conditions and for the following purposes:

- 1.development;*
- 2.showing compliance with regulations or certification specifications;*
- 3.design organizations or production organizations crew training;*
- 4.production flight testing of new production aircraft;*
- 5.flying aircraft under production between production facilities;*
- 6.flying the aircraft for customer acceptance;*
- 7.delivering or exporting the aircraft;*
- 8.flying the aircraft for Authority acceptance;*
- 9.market survey, including customer's crew training;*
- 10.exhibition and air show;*
- 11.flying the aircraft to a location where maintenance or airworthiness review are to be performed, or to a place of storage;*
- 12.flying an aircraft at a weight in excess of its maximum certificated takeoff weight for flight beyond the normal range over water, or overland areas where adequate landing facilities or appropriate fuel is not available;*
- 13.record breaking, air racing or similar competition;*
- 14.flying aircraft meeting the applicable airworthiness requirements before conformity to the environmental requirements has been found;*
- 15.for non-commercial flying activity on individual non-complex aircraft or types for which a certificate of airworthiness or restricted certificate of airworthiness is not appropriate.*

22 21A.707 in the Annex is entitled "Application for permit to fly". Letter c) of that provision establishes:

c) Where the flight conditions are not approved at the time of application for a permit to fly, an application for approval of the flight conditions shall be made in accordance with 21A.709.

23 21A.709 in the Annex is entitled "Application for approval of flight conditions". The provision establishes in so far as material:

(a) Pursuant to 21A.707(c) and when the applicant has not been granted the privilege to approve the flight conditions, an application for approval of the flight conditions shall be made:

- 1. when approval of the flight conditions is related to the safety of the design, to the Agency in a form and manner established by the Agency; or*
- 2. when approval of the flight conditions is not related to the safety of the design, to the Competent Authority in a form and manner established by that authority.*

24 21A.710 is entitled "Approval of flight conditions". It establishes in correspondence with 21A.709:

(a) When approval of the flight conditions is related to the safety of the design, the flight conditions shall be approved by:

- 1. the Agency; or*
- 2. an appropriately approved design organisation, under the privilege of 21A.263(c)(6).*

(b) When approval of the flight conditions is not related to the safety of the design, the flight conditions shall be approved by the Competent Authority, or the appropriately approved organisation that will also issue the permit to fly.

(c) Before approving the flight conditions, the Agency, the Competent Authority or the approved organisation must be satisfied that the aircraft is capable of safe flight under the specified conditions and restrictions. The Agency or the Competent Authority may make or require the applicant to make any necessary inspections or tests for that purpose.

SUBMISSIONS OF THE PARTIES

25 The Appellant submits:

26 The Robinson R66 helicopter has been type certified by the FAA and all conditions for the issuance of a TC by the Agency are fulfilled.

27 The helicopter has been in use internationally since 2010 without any safety problems. Next, R66 helicopters have been flying over 100 000 flying hours, without safety problems. Moreover, the hydraulic system in the R66 is the same as the one in a R44 helicopter. Thus, there are more than 5000 R44 helicopters that use the same hydraulic system, and there has been no technical incident reported that casts doubts about the reliability of the hydraulic system. There are more than 26 million flying hours without reported safety issues.

28 The Appellant would be able to obtain a November certificate (also referred to as an N-registration). An N-registration would allow the Appellant to fly the helicopter. Moreover, a servant of the Agency has suggested to the Appellant to consider the option of an N-registration. The R66 has not been black-listed under the Safety Assessment of Foreign Aircraft (SAFA) Programme.

- 29 A failure of the hydraulic system of the helicopter will not entail that the helicopter is not airworthy anymore. On the contrary, even in case of complete failure of the hydraulic system, the R66 is capable to perform an absolutely safe flight when controlled by a pilot with the necessary training and experience. The steering of the helicopter may be more cumbersome but still manageable without any bigger effort. In case of a hydraulic failure, no R66 would have to perform an emergency landing. In fact, the flight could be continued to the destination without any risks.
- 30 The Agency is wrong in considering that only qualified test pilots with an in-depth understanding of the helicopter should be allowed to fly it. The Appellant guarantees that persons outside the Appellant such as customers who fly in the helicopter will never fly by themselves and that there is always an experienced pilot present who either flies the helicopter himself or can take over the control immediately.
- 31 The Agency has mistakenly considered that it has a margin of discretion. Contrary to the view of the Agency there is no margin of discretion; an approval of flight conditions with a view to a permit to fly must be granted if the Agency is convinced that the aircraft can fly safely under the conditions applied for.
- 32 The Agency mistakenly confuses the procedures for approval of flight conditions with a view to a permit to fly with the procedure for type certification. The very essence of the procedure for approval of flight conditions with a view to a permit to fly is to dispense the aircraft concerned from complying with all the airworthiness standards that the type certification procedure covers.
- 33 The Agency has not been sufficiently specific about the faults that it finds with the helicopter and it has not given the Appellant an opportunity to respond to the Agency's concerns. The Agency should, for reasons of transparency, have disclosed to the Appellant in full the technical reservations it has in the on-going TC procedure.
- 34 In violation of 21A.710 of the Annex, the Agency has not carried out inspections or asked the Appellant to carry out inspections.
- 35 The contested decision is at variance with recitals 3 and 11 of Commission Regulation (EC) No 375/2007 of 30 March 2007 amending the Implementing Regulation, published in OJ L94, 4.4.2007. The recitals provide:

(3) While airworthiness certificates should only be issued when the Agency has been able, following a technical evaluation of the product, to approve their design restricted certificates of airworthiness can be issued for a limited period of time to allow the continued operation of these aircrafts and to enable the Agency to review their design.

(11) By derogation from the rules for issuance of certificates of airworthiness, Article 5 (3)(a) of Regulation (EC) No 1592/2002 provides for the issuance of a permit to fly. Such a permit is generally issued when a certificate of airworthiness is temporarily invalid, for example as the result of a damage, or when a certificate of airworthiness cannot be issued for instance when the aircrafts does not comply with the essential requirements for airworthiness or when compliance with those requirements has not yet been shown, but the aircrafts is nevertheless capable of performing a safe flight.

- 36 The recitals show that a permit to fly can only be denied exceptionally and that a restricted certificate of airworthiness can be issued without a technical evaluation of the construction.
- 37 The Agency submits:
- 38 The FAA type certification does not entail per automatism that the Agency must reach the same conclusions as the FAA. The Agency must satisfy itself that the aircraft is in compliance with the applicable norms of the European Union. The Agency's concerns about the helicopter are related to the airworthiness standard CS-27, namely CS-27.695 letter c) which provides that the failure of mechanical parts (such as piston rods and links) must be considered unless they are extremely improbable.
- 39 The FAA had similar concerns when approving of the helicopter in the United States of America; however the FAA eventually approved of the helicopter through an exemption to the parallel FAA standard, FAR 27.
- 40 Such an exemption is not appropriate. As long as there is no compliance with CS-27.695 letter c) the Agency's concerns remain.
- 41 The fact that the hydraulic system in the R66 is also used in the R44 is known to the Agency and is particularly taken into consideration in the on-going TC procedure.
- 42 The R66 is a new aircraft type whereas the R44 was certified in the early nineties. The R66 type certification basis is different to the R44 type certification basis. The TC for the R44 was grandfathered into the European system by an act of law in accordance with Article 2a of the Implementing Regulation with no obligation or right for the Agency to re-assess it. While no occurrences have been reported hitherto as regards the hydraulic system in the R44, the system is not compliant with EU airworthiness requirements and has been exempted from compliance demonstration.
- 43 November certificates (also referred to as N-registrations) are not issued by the Agency. N-registration concerns the operation of foreign aircraft, type certified by and registered with a foreign administration under whose authority the aircraft remains; The operation of N-registered aircraft in Europe is subject to national legislation only while the Agency must take its decision based on the applicable EU law. As concerns the SAFA Programme, the fact that a foreign aircraft has not been black-listed does not mean that the Agency would approve of the aircraft if an application were made to the Agency.
- 44 A possible failure of the hydraulic system is a major concern. The specific failure modes of the hydraulic system are part of the technical assessment and discussions in the on-going TC procedure. The Agency does not have concerns regarding a complete loss of hydraulic power but there are other specific failure modes currently under investigation. A specific failure mode of the existing design of the helicopter has the potential to jam the controls and to render the aircraft uncontrollable. Therefore the Agency cannot be satisfied that the helicopter is capable of safe flight under the conditions and restrictions applied for.
- 45 It is questionable that flights with non-company persons, i.e. the public/potential customers, and pilots other than qualified test pilots with in-depth understanding of the helicopter should be allowed when a failure of the hydraulic system can lead to the non-controllability of the helicopter.

- 46 The Agency does not confuse the procedures for type certification and the procedures for approval of flight conditions. The non-compliance of the helicopter with the applicable standard in the TC procedure is a major concern also in the procedure for approval of flight conditions.
- 47 The Agency has sufficiently substantiated its concerns to the Appellant, taking into consideration the on-going TC procedure to which the Appellant is not a party. Moreover, the flight purposes requested in the Appellant's application are mainly commercial, thus involving non-company persons and only normally trained pilots were envisaged for the operation, rather than qualified test pilots. An inspection of the helicopter was not needed.
- 48 The provisions concerning issuance of restricted certificates for airworthiness has no bearing on the matter at issue.

FINDINGS OF THE BOARD OF APPEAL

Admissibility of the appeal

- 49 The contested decision has been taken pursuant to Article 20(1) letter k) of the Basic Regulation and is therefore subject to appeal as set forth in Article 44(1) of the same Regulation.
- 50 Under Article 45 of the Basic Regulation the Appellant, as an addressee of the contested decision, is entitled to appeal against it.
- 51 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.
- 52 The time limit has been complied with.
- 53 The statement of reasons accompanying the appeal is rudimentary. However, that has not prevented the Agency and, ultimately, the Board from seizing the matter that is in dispute.
- 54 Against that background, the Board holds that Article 46 of the Basic Regulation is complied with.
- 55 The appeal is thus admissible.

Substance

- 56 The Board shall remark that a number of the Appellant's submissions have not been made until at a very late stage of the appeal procedure. However, the Agency has not taken issue with that, and the Board finds no reasons to take issue with it, either.
- 57 The Board will first deal with the submissions of the Appellant to the effect that the contested decision is materially wrong in law and fact. The Board will then deal with the submissions

concerning procedural errors and thereafter with the allegations concerning restricted certificates of airworthiness.

First remarks in relation to Appellant's submissions that the contested decision is wrong in law and fact

- 58 Approval of flight conditions has to occur only if the Agency is satisfied that the aircraft is capable of safe flight under the specified conditions and restrictions cf. 21A.710 of the Annex, quoted above.
- 59 In the present case the Agency is not satisfied. It holds in essence that the hydraulic system of the aircraft gives rise to concerns.
- 60 The Appellant contests the rightness of the assessment of the Agency.
- 61 The Board shall remark that it must be for the Appellant to carry the burden of proof for the contentions it makes, see to that effect judgment of 17 June 2010 in Case C-413/08 *Lafarge v European Commission* [2010] ECR I-5361, paragraph 29.
- 62 Next, the Board must recall that aviation safety is intimately linked to the protection of the life of humans. The protection of the life of humans ranks foremost among the assets or interest protected by the European Union legal order. That follows from settled case law, see amongst other judgment of the Court of Justice of 2 December 2010 in Case C-108/09 *Ker-Optika bt v ÁNTSZ Dél-dunántúli Regionális Intézete* [2010] ECR I-12213, paragraph 58; it is also reflected in Article 35 of the Charter of Fundamental Rights. Moreover, it follows from the first recital to the Basic Regulation that it aims at establishing a *high* level of aviation safety, see also judgment of the Court of Justice of 8 November 2012 in Case C-271/11 *Techniko Epimelitirio Elladas (TEE) and Others v Ypourgos Esoterikon, Dimosias Dioikisis kai Apokentrosis and Others*, not yet reported, paragraph 72.
- 63 Moreover, the Board must recall that when the issue in dispute concerns a complex technical assessment, the Agency enjoys a margin of appreciation, see to that effect judgment of the Court of Justice of 18 July 2007 in Case C-326/05 P *Industrias Químicas del Vallés SA v European Commission* [2007] ECR I-6557, paragraph 75. That the Agency has a margin of appreciation appears also confirmed by the wording of 21A.710 letter c) of the Annex. The provision submits the issuance of an approval of flight conditions to only one condition, without any further qualifications. That condition is broadly drafted and it is that the Agency must be satisfied that the aircraft is capable of safe flight.

The relevance of the TC issued by the FAA

- 64 The Board can understand that it can appear awkward to the Appellant that one and same helicopter can be approved by the FAA and not by the Agency.
- 65 However, the Board has no knowledge that a TC of the FAA is subject to unconditional mutual recognition on behalf of the Agency. The matter is governed by a bilateral Agreement between the United States of America and the European Community on cooperation in the regulation of civil aviation safety. The Agreement allows for differences in e.g. certification standards.

- 66 The Board has neither any knowledge that such a TC should on its own lead to an approval of flight conditions.
- 67 Therefore, the Board disagrees with the Appellant when it claims that as a matter of law, the TC issued by the FAA must necessarily lead to the approval of flight conditions and to holding that all conditions in the on-going validation process with the Agency have been complied with.
- 68 Moreover, the Board remarks that the FAA issued the TC for the R 66 helicopter although it was aware of a non-compliance as regards the hydraulic system of the helicopter; the FAA did so through an exemption from the applicable standards, namely through FAA exemption No 9589, of January 28 2008 regarding 27.695 jamming of control valve as a possible single failure. Thus, it appears as a matter of fact that there is non-compliance of the helicopter and thus safety concerns. The fact that the FAA has considered that those concerns can be accommodated through an exemption cannot bind the Agency to reach the same result.
- 69 Therefore, the Board holds that the TC issued by the FAA does not determine the issue of the present dispute.

The relevance of the fact that helicopters R66 and R44 are actually flying

- 70 The Board can understand that it may appear strange that R66 helicopters are in use while the Agency is not approving of the helicopter.
- 71 However the Board observes that the fact that those helicopters are flying is conditioned by the fact that some authorities have approved of it.
- 72 Thus, the question remains, as above, whether the Agency should in this matter be bound the assessment made by those authorities.
- 73 The Board is not aware of any legal norm imposing that. The Appellant has not referred to any legal norm from which another conclusion can be derived.
- 74 As concerns the submissions concerning the R44 helicopter, the Board cannot see that they help the Appellant. That there are R44 flying under different normative regimes is in itself no evidence that the Authority should have no concerns in regard of the R66 helicopter. Moreover, as the Agency has stated, it has not approved of the R44 which was grandfathered into the European system. If the Agency seeks to ensure a higher safety standard than the one applicable elsewhere or hitherto, the Appellant has not referred to a norm that impedes the Agency from doing so. And the Board has no knowledge of such a norm.

The relevance of N-registrations and SAFA

- 75 An N-certificate would entail that a helicopter, registered in the United States of America and coming within the jurisdiction of the United States of America, can operate outside the United States of America under the international provisions of the ICAO; the supervision would be ensured through the FAA that has staff and inspectors in Europe.

- 76 For the Board it suffices to recall that N-registrations fall under a distinct regulatory regime and that the registrations are not issued by the Agency. The possibility of an N-registration does not appear materially relevant. That a servant of the Agency, probably in an attempt to assist the Appellant, has brought the possibility of such a registration to the attention of the Appellant does not alter the fact that the issue of N-registration is materially irrelevant.
- 77 Regarding the SAFA Programme it should be noted that it is a so-called ramp inspection normally carried out during a short time while an aircraft is at an airport gate or on the ramp. It is intended to detect obvious problems with aircraft and crew documentation and aircraft general appearance. A SAFA inspection is not intended to identify whether an aircraft meets all applicable certification requirements. Type certification is an elaborate and complex process including analysis of a large amount of detailed design and test documentation. A SAFA inspection provides no understanding of the internal functioning of complex systems.

Reasons for safety concerns and qualified test pilots

- 78 There is a non-compliance issue. The Agency has explained why it considers the non-compliance issue also to be relevant for the approval of flight conditions; why it has safety concerns; and why qualified test pilots would be needed. The Appellant is of a different opinion.
- 79 Thus, in essence the Appellant calls upon the Board to decide which opinion is the better. The Board cannot see that the elements presented give it a basis for finding that the Agency is wrong. The view of the Agency is not invalidated because for instance the FAA would have taken a different view, or because some other instance considers a certain number of flying hours sufficient to overcome the concerns that it may have.

The relation between the TC procedure and the procedure for approval of flight conditions

- 80 The Appellant claims that the Agency has confused the procedure for a TC and the procedure for approval of flight conditions. According to the Appellant the procedure for approval of flight conditions is independent of a procedure for TC approval. Therefore the findings of the latter procedure cannot be transferred to the former.
- 81 The Board agrees in principle with the Appellant. The procedure for TC approval is distinct from the procedure for approval of flight conditions. However, the Board cannot see how this finding is relevant for the present issue.
- 82 In the present case the Agency has not held that concerns in a procedure for TC automatically prevent the approval of flight conditions.
- 83 On the contrary, in the present case the Agency has held that the material concerns it has in relation to a TC approval are also relevant in the procedure for approval of flight conditions.
- 84 The Board cannot see that the Agency whose task is to ensure aviation safety is prevented from doing so.

Failures to substantiate the Agency's concerns and disclose its technical reservations, to hear the Applicant, and to inspect the helicopter

- 85 The Board shall first recall that it follows from settled case law that the guarantees afforded by the European Union legal order in administrative proceedings include the principle of sound administration, which encompasses, amongst other, the right to be heard, see to that effect judgment of the General Court of 27 September 2012 in Case T-387/09 *Applied Microengineering Ltd v European Commission*, not yet reported, paragraph 76, and Article 41 of the Charter of Fundamental Rights. The observance of that principle is of utmost importance.
- 86 Next, the Board fails to see how the submissions of the Appellant, made very late in the appeal proceedings, can prosper.
- 87 The Agency has identified the device with which it has concerns. It has also stated under which standard it has concerns. It has also stated the risk that the device in its opinion gives rise to. It is not clear to the Board which further substantiation and which further technical details it is that the Appellant requests. In any case, account must be taken of the fact that a third party's right to confidentiality, in this case the producer, may put limits on the Agency's possibilities for providing details.
- 88 Moreover, it is not clear to the Board how a possible missing substantiation or limited disclosure of technical reservations should have caused prejudice to the Appellant. As rightly stated by the Appellant in the oral hearing, the Appellant would not be entitled to modify the device at issue.
- 89 Next, the Board notes that the statement of grounds to the appeal refers to "continuously raised" safety concerns, namely in: "The safety [aspects] that are continuously raised in this context, are automatically put in perspective considering that the LBA [the German Aviation Authority] and EASA have recommended us to N-register the helicopter". Moreover, the Appellant has submitted, as attachment 2 to its rejoinder, an e-mail of a servant of the Agency. In the e-mail the servant mentions the possibility of an N-registration, namely in: "I therefore regret that I can see no other solution than an "N" registration number for your helicopter." That e-mail is dated 19 July 2011. Thus, it would appear that there has been continuous communication between the Appellant and the Agency.
- 90 The Board is aware that the Appellant disagrees with the Agency on the material assessment. However, that is another issue than a substantiation of the Agency's concerns and hearing the Appellant. And the Board has no basis for finding that the Agency failed to substantiate its concerns, disclose sufficiently its technical reservations and hear the Appellant.
- 91 As concerns the failure to inspect the helicopter, the Board shall recall that 21A.710 letter c) does not mandate an inspection. The provision allows the Agency to carry out an inspection or to request one to be carried out. It is a faculty for the Agency. The Board cannot see that the Agency could have made good use of that faculty in the present case. The issue with the helicopter is in the Agency's view a design flaw; an inspection cannot alter that.

Restricted airworthiness certificate

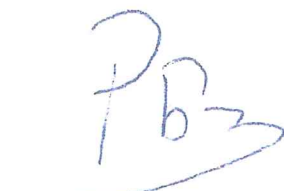
- 92 The procedure for a certificate of restricted airworthiness is a procedure that is governed by the provisions of 21A.171 et seq of the Annex.
- 93 Thus, the procedure is governed by provisions that are different to the provisions applicable in the present Case.
- 94 In the Board's view, the Appellant has failed to show how those provisions have any bearing on the issue of the present case.

CONCLUSION

- 95 The examination of the appeal has not disclosed any reason for allowing the appeal.
- 96 Thus, the appeal is dismissed.
- 97 The decision is unanimous.

JUDICIAL REVIEW

- 98 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.



P. Dyrberg

Signatures of the Board of Appeal




Arne Axelsson



Klaus Koplin

Registrar:



José Luis Penedo del Río