

**DECISION
OF THE EASA BOARD OF APPEAL
OF
21 November 2014**

In Appeal Case AP/06/2013 lodged by

Issoire Aviation
Z.A. La Bechade
Aerodrome Issoire Le Broc, BP 1
63500 Issoire
FRANCE
(hereinafter: 'the Appellant')

against

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

THE EASA BOARD OF APPEAL

composed of

Peter DYRBERG (Chairman),
Klaus KOPLIN (Member and Rapporteur),
Arne AXELSSON (Member),

Registrar: José Luis PENEDO DEL RIO

gives, on 21 November 2014, the following decision:

The appeal against the Major Change Approval No. 10045951 issued by the European Aviation Safety Agency on 31 July 2013 is dismissed.

BACKGROUND

- 1 The Appellant is an aircraft manufacturer that produces the single engine aircraft APM40 and is holder of the related EASA Type Certificate No EASA.567.
- 2 On 6 February 2013 the Appellant lodged an application with the Agency for approval of a major change to this Type Certificate, to install a propeller with a reduced diameter to improve aircraft performance, and to introduce structural modifications to the propeller to enhance its vibration characteristics.
- 3 On behalf of EASA, the French Civil Aviation Authority, DGAC (Direction Generale Aviation Civile), assessed the compliance of the major change with the applicable certification specifications and environmental protection requirements.
- 4 On 31 July 2013, the Agency issued the Major Change Approval – approval No. 10045951 - on the basis of the assessment made by the DGAC.
- 5 The approval accepted the technical modifications to the propeller but kept the original noise emission values of the unmodified aircraft.
- 6 In the opinion of the Appellant, the noise emission values should be set at a lower level. The Appellant refers to the values that result from a test conducted by MT Propeller Entwicklung GmbH (hereinafter: 'MT Propeller') at MT Propeller's test facilities and documented in a test report E-2318-1 of 18 March 2013.
- 7 In EASA's opinion, the values resulting from that test cannot be taken into account as the procedural rules governing the test were not followed.
- 8 The subject matter of the appeal is thus whether EASA was right in disregarding the values resulting from the MT Propeller test.

PROCEDURE

- 9 By letter of 23 September 2013, the Appellant submitted the appeal against the Major Change Approval ('the contested decision'). The Appellant requests the current noise level in the contested decision to be changed to those resulting from the MT Propeller test. The Appeal was received by the EASA on 24 September 2013.
- 10 On 20 of November 2013 the Appellant paid the appeal fee.
- 11 On 21 October 2013, the Agency handed down its interlocutory revision. The interlocutory revision held the appeal to be unfounded. The Agency therefore upheld the contested decision. The Agency did not find any reason to suspend the application of the contested decision.

- 12 On 2 December 2013 the Appellant submitted its comments in the form of a slide show to the interlocutory revision.
- 13 On 20 December 2013, the Agency lodged observations on the Appellant's comments maintaining its view that the contested decision was correct.
- 14 On 1 February 2014 the Agency asked the Appellant whether it wanted to make use of its right to an oral hearing. On 13 February 2014 the Appellant replied in the affirmative.
- 15 On 30 April 2014 the Board suggested the date of 26 May 2014 to the Appellant as the date for the hearing. On 12 May 2014 Appellant asked for another date.
- 16 On 20 May 2014 the Board suggested to the Appellant 27 June 2014 as the date for the hearing. On 24 May 2014 the Appellant asked for a postponement of the hearing to the month of September 2013.
- 17 On 3 June 2014 the Board suggested to the Appellant 23 September 2014 as the date for the oral hearing. Given the absence of reply to that suggestion, the Board, on 2 July 2014, asked the Appellant to reply before 16 July 2014; in the contrary, the Board would assume that the Appellant waived its right to an oral hearing. Given the absence to reply to that communication, the Board, on 1 August 2014, informed the Appellant that it considered that Appellant had waived its right to an oral hearing and that the Board would decide on the appeal on the basis of the written documents.

THE MAIN PROVISIONS AT ISSUE

- 18 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 organisations (hereinafter 'Regulation 748/2012') provides in its Annex I, point 21.A.97, entitled 'Major Changes', as far as material:

An applicant for approval of a major change shall: ...

5. comply with point 21.A.33 ...

- 19 Point 21.A.33, entitled 'Inspection and Tests', provides (emphasis added):

(a) The applicant shall perform all inspections and tests necessary to demonstrate compliance with the applicable type-certification basis and environmental protection requirements.

(b) Before each test required by point (a) is undertaken, the applicant shall have determined:

1. for the test specimen:

- (i) that materials and processes adequately conform to the specifications for the proposed type design;*
 - (ii) that parts of the products adequately conform to the drawings in the proposed type design;*
 - (iii) that the manufacturing processes, construction and assembly adequately conform to those specified in the proposed type design; and*
- 2. that the test equipment and all measuring equipment used for tests are adequate for the test and are appropriately calibrated.*
- (c) The applicant shall allow the Agency to make any inspection necessary to check compliance with point (b).*
- (d) The applicant shall allow the Agency to review any report and make any inspection and to perform or witness any flight and ground test necessary to check the validity of the declaration of compliance submitted by the applicant under point 21.A.20(d) and to determine that no feature or characteristic makes the product unsafe for the uses for which certification is requested.*
- (e) For tests performed or witnessed by the Agency under point (d):*
- 1. the applicant shall submit to the Agency a statement of compliance with point (b); and*
 - 2. no change relating to the test that would affect the statement of compliance may be made to a product, part or appliance between the time compliance with point (b) is shown and the time it is presented to the Agency for test.*

SUBMISSIONS OF THE PARTIES

The Appellant

- 20 The Appellant submits:
- 21 The contested decision states that *'the associated certified noise ... levels of the original product are unchanged and remain applicable to this approval'*. These noise levels are not correct.
- 22 The wrongly determined noise levels of the changed aircraft type are: a) 78.5 dB(A) with a maximum take-off weight of 985 kg (normal category) and b) 75.6 dB(A) with a maximum take-off weight of 816 kg (utility category).
- 23 The correct noise levels should be: a) 77.0 dB(A) in the normal category and b) 74.9 dB(A) in the utility category. These are the noise levels derived from the tests conducted by MT Propeller on behalf of the Appellant.

- 24 It is right that the originally scheduled tests foreseen for 12 and 13 March 2013 and communicated to the DGAC were cancelled by the Applicant on 7 March 2013. That was done because the MT Propeller tests were conducted on 6 March 2013. For a number of reasons, related to business and organisation, it was convenient for the Appellant to have the tests done at that date.
- 25 MT Propeller is an approved design organisation. It is well established to carry out noise tests and has long experience in performing such tests. It has followed all necessary test requirements and it is a certified noise level measurement station.
- 26 The procedural requirements laid down are too burdensome and expensive for light aircraft to follow. It was therefore an appropriate business decision to perform the tests with MT Propeller on short notice.

The Agency

- 27 The Agency submits:
- 28 Securing compliance with the environmental protection requirements is a legal element of the type certification process, as follows from the Article 2(2)(a) 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 (hereinafter 'the Basic Regulation'). When applying for a type certificate or a change approval, the applicant must demonstrate that the product meets both applicable certification specifications and environmental protection requirements.
- 29 The Appellant failed to comply with its legal obligations under point 21.A.33 of Annex I of Regulation No 748/2012. The Appellant did not establish and provide the required information, e.g. a noise test plan. Without such a plan the Agency is unable to determine whether the specimen, the test equipment, all measuring equipment and the proposed flight conditions are adequate. The absence of such a plan made it impossible to approve it and to determine the level of involvement of the Agency in the compliance finding prior to the performance of the tests.
- 30 The Appellant did not inform the Agency in advance of the tests that it conducted, and therefore made it impossible to witness those tests. The Agency did not have knowledge of those tests until the day after they were conducted, when the Appellant informed DGAC by e-mail.
- 31 The non-compliance by the Appellant with the procedural requirements bars the Agency from basing itself on the MT Propeller tests.
- 32 The fact that the noise tests were performed by an organization that holds a design organization approval, namely MT Propeller, does not remedy the non-compliance with point 21.A.33. The design organization approval includes the possibility to show compliance with the applicable certification specifications and environmental protection

requirements, however only after submission of the test plan and a formal determination of the Agency's level of involvement in the tests.

- 33 Faced with this situation, the Agency had two options: Either not approve the major change until the Appellant complied with the applicable provisions; or approve the major change without changing the certified noise limits of the original product until the Appellant complied with the applicable provisions. Given the information in the Agency's possession it found it justified to choose the option most favourable to the Appellant, i.e. the latter one.
- 34 Finally, the Agency has explained the reasons for which the applicable rules must be considered sound and proportionate, also for light aircraft.

FINDINGS OF THE BOARD OF APPEAL

Admissibility of the appeal

- 35 As set out in Article 44(1) of the Basic Regulation, an appeal may be brought against decisions of the Agency taken pursuant to Article 20 (of the same Regulation).
- 36 The contested decision has been taken pursuant to Article 20(1) letter f) of the Basic Regulation and is therefore subject to appeal as set forth in Article 44(1) of the same Regulation.
- 37 Under Article 45 of the Basic Regulation the Appellant, as an addressee of the contested decision, is entitled to appeal against it.
- 38 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.
- 39 The time limit has been complied with by the Appellant.
- 40 Against that background, the appeal is admissible.

Substance

- 41 After the Appellant's application for approval of major change in February 2013, the corresponding procedures were set in motion. The DGAC on behalf of the Agency assessed the compliance of the changed aircraft type with the applicable certification specifications and environmental requirements. The Agency approved the major change on 31 July 2013 on the basis of the assessment made by the DGAC.

- 42 The Appellant did not provide the Agency or the DGAC with the necessary documentation, e.g. a noise test plan which is necessary to determine the level of involvement of the two authorities in the compliance finding process.
- 43 The Appellant did not inform the Agency or the DGAC about the date and place for the planned noise tests. Therefore the authorities could not witness the tests, as provided for under point 21.A.33 of Annex I of Regulation 748/2012.
- 44 The non-compliance with the applicable requirements is not remedied through the fact that MT Propeller is an approved design organization. Such approval does not override the requirements of point 21.A.33 and the need for the authorities to determine the level of their own involvement on the basis of a test plan, hereunder witnessing the flight tests.
- 45 In that situation the Agency took, on the basis of the information in its possession, the decision less onerous to the Applicant.
- 46 Thus, it appears to the Board that not only has the Agency acted within the limits of the applicable provisions, but within those limits it has also sought to take full consideration of the interests of the Appellant and it has acted in accordance with the principle of proportionality.
- 47 The Appellant also questions the soundness and proportionality of the applicable provisions, i.e. the legality of the provisions. The Board has two remarks to make in that respect.
- 48 First, as the Board has previously stated in its decision of 14 January 2014 in Case AP/04/2013, available at the website of the Agency, the Board is not empowered to undo the legality of the provisions applicable in the case. The Board must, as the Agency, apply regulations, validly adopted by the Union legislator, until they are abrogated or the Union judicature establishes their invalidity or inapplicability, as the case may be. This is settled case law, see for instance judgment in Case 15/85 *Consorzio Cooperative d'Abruzzo v Commission* [1987] ECR 1005, paragraph 10, and judgment in Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, paragraph 48. Both judgments are available at the website of the Court of Justice of the European Union. If the Appellant wants to question the legality of the applicable provisions, it must take the present matter further to the Union judicature.
- 49 Next, although the Agency knows that the Board cannot rule on the legality of the applicable provisions, it has, in accordance with its user-friendly policy, explained why the rules are reasonable and proportionate. The Agency has done so in length and in detail; and in the Board's opinion, convincingly. The Board shall add that, to its knowledge, the Agency would not hesitate to voice its concerns in this regard, if it had any, see the above decision of the Board, at paragraph 107.

CONCLUSION

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

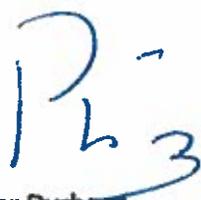
51 Thus, the appeal is dismissed.

52 The decision is unanimous.

JUDICIAL REVIEW

53 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.

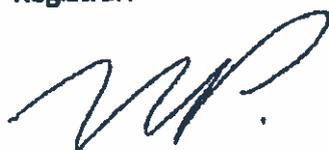
Signatures of the Board of Appeal


Peter Dyrberg


Arne Axelsson


Klaus Koplin

Registrar:


José Luis Pinedo del Rio