



AIR CARGO SECURITY POLICY NEWSLETTER

Study on the Legal Situation Regarding Security of Flights from Third-countries to the EU

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“Recent developments within Europe (including, by way of example, the creation of the European Common Aviation Area) mean that the EU is confident that it has the means to ensure a high level of aviation security in respect of flights from Member States and certain third-countries. However, in respect of other third-countries, there is a concern that the EU may not have the ability to lawfully monitor aviation security standards, nor to take remedial action if minimum standards are not met”.

This is the opening statement in a Study on the Legal Situation Regarding the Security of Flights from Third-countries to the EU

prepared for the European Commission (DG-MOVE) by Innovative Compliance Europe Ltd and the London office of DLA Piper LLP

The study sets out an analysis of the current position, and proposes a number of recommendations to enhance the ability of the EU to monitor and enforce security standards in respect of flights from third-countries.

A full copy of the report can be viewed at:
http://ec.europa.eu/transport/air/studies/doc/security/2010_11_security_flights_3rdcountries-eu.pdf



It is also available on the “what’s new” pages of the web-site of the Directorate General for Mobility and Transport at:

http://ec.europa.eu/transport/index_en.htm

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Executive Summary

The following has been extracted from the executive summary attached to the study. The recommendations cited in the summary are illustrated in Figure 1 below.

*“There are two distinct aspects to this study: firstly, the study relates to the ability of the EU to **obtain useful information** in respect of third-country compliance with security standards; and secondly, the study relates to the ability of the EU to **take coordinated and effective remedial action** in response to such information. As is demonstrated through analysis of the approach of certain countries to aviation security, an effective solution will require both of these aspects to be aligned, as remedial action can only be based on reliable, up-to-date information,*

and equally information is of no use unless there is a means of acting on it”.

“The recommendations in this report are, therefore, designed to incorporate both aspects and, as such, it may very well be the case that, in terms of effectiveness, the sum of the recommendations is greater than the individual recommendations themselves”.

*“With regard to obtaining reliable and current information, the report demonstrates that, as well as establishing new mechanisms for obtaining information (such as obtaining information from passengers and air carriers (**Recommendations 3 and 4**)), or through ex-post security checks (**Recommendation 5**)), much could be done to make better use of existing sources of information”.*

*“Indeed, the report demonstrates that, to date, there has been no centralised coordination of aviation security related information within the EU, although such coordination does exist, by way of example, in respect of aviation safety concerns. Perhaps one of the most significant recommendations, therefore, is that the EU establishes a dedicated aviation security information agency¹ (**Recommendation 1**) to channel, analyse and coordinate the various sources of information available to the EU. Such an agency may be able to produce a more accurate picture of security compliance in third-countries than would be possible if the different strands of information were not combined, and could, when required, target its information gathering activities (such as ex-post security checks) in response to intelligence”.*

¹ Although described herein as an “agency”, such a central coordinating body could of course be incorporated into the Commission or could constitute a standalone body.



*“The report also demonstrates the extent to which the International Civil Aviation Organization (“ICAO”) has not, historically, shared the wealth of information it may possess (particularly information derived from its Universal Security Audit Programme) regarding compliance with security standards with its Contracting States let alone with international organizations such as the EU. The report therefore recommends that, in addition to establishing and coordinating its own sources of information, the EU should continue to seek to establish a mechanism by which it is able to access ICAO information, for example through enhanced engagement with ICAO (**Recommendation 2**). In this regard, the report notes that ICAO is showing an increasing willingness to share at least a degree of pertinent information with its Contracting States”.*

*“As demonstrated in the report, information is only beneficial if it provides the basis for taking targeted and effective remedial action. In this regard, the report seeks to break down remedial action into its two primary constituent parts: enforcement at the **macro level** and enforcement at the **micro level**. This distinction is further analysed in Chapter 9 but, in summary, enforcement at the macro level is conducted at a government or State level and involves the enforcement of treaties or international agreements, whereas enforcement at the micro level involves alternative measures that do not seek to enforce rights directly against a sovereign State”.*

“At the macro level, the EU (or indeed its Member States) may have or be able to obtain the theoretical right to take enforcement against States who fail to establish and follow minimum aviation security standards. Indeed, such a right may be derived (in respect of individual Member States) from the Convention on International

Civil Aviation (the “Chicago Convention”), or may be derived from bilateral or multilateral air service agreements. In theory, the EU (either directly or indirectly through its Member States), may therefore have the right to resort to a prescribed dispute resolution process, revoke an international agreement, or to implement “retorsions” or “countermeasures” against the offending State. However, as the report makes clear, it is difficult to see that enforcement at this level is likely to be an appropriate or effective solution to aviation security concerns in all but the most severe situations, and as such - whilst the report does recommend that air service agreements between the EU and third-countries are established and enhanced (see Recommendations 6 and 7) - the report recommends various solutions that the EU may instead pursue at a micro level”.

*“In particular, at the micro level it is envisaged that the establishment of a dedicated aviation security information agency (**Recommendation 1**) would enable the EU to operate an effective, coordinated programme of targeted action. Indeed, based on the information that the agency receives, the EU may decide to undertake a targeted capacity building programme, which (as is demonstrated in Chapter 5) may have the advantage not only of raising security standards in the recipient third-country, but also of enhancing the relationship between that country and the EU, potentially creating an additional source of security related information. To be effective, however, the report recognizes that capacity building programmes*

must be better targeted and coordinated, not just within the EU but also at a global level in conjunction with other States and organisations (such as ICAO) that undertake aviation security



related capacity building (**Recommendations 10,11 and 12**)”.

“Alternatively, where capacity building is not appropriate, or where information obtained by the dedicated aviation security information agency suggests that the situation in a third-country may be particularly serious or require urgent intervention, the report recommends that the EU establishes a mechanism whereby it is able to prevent flights from entering into the EU from offending States or airports. This could be done (in a similar way to programmes currently operated by other countries, and indeed by the EU in the context of aviation safety) through the creation of a system of air carrier permits or accreditation of third-country airports, providing the EU with the ability to revoke rights of access into the EU in certain circumstances (**Recommendations 8 and 9**). Although there may be a possibility of legal challenge to such an approach in certain circumstances), such a risk is believed to be small and in any event there appear to have been no successful challenges to similar programmes (such as that operated by the EU in respect of aviation safety) currently in operation”.

“It is envisaged that banning flights would, inevitably, constitute an action of last resort; nonetheless the report demonstrates that in many cases the very threat of being subject to a ban may provide sufficient incentive for third-countries to seek to work with the EU to resolve security concerns, perhaps agreeing to participate in capacity building exercises or permitting the EU to conduct an airport

inspection or establish additional plane-side security measures. In a sense, a "guilty until proven innocent" approach may serve to mitigate the fact that information relating to third-

countries may inevitably be incomplete, as a third-country about which the EU has concerns could be required to demonstrate compliance with security standards or face being subject to a flight ban”.

“As discussed in detail within this report, the possible options available to the Commission vary in a number of ways, including cost of implementation, timeframe for completion, the extent to which international consensus needs to be established and degree of legal process to be followed. In providing recommendations for enhancing the EU's ability to monitor and enforce compliance with basic aviation security standards, this report acknowledges that there are a number of competing pressures that need to be considered. In particular, given the triumvirate of (1) security concerns, (2) economic considerations (including any impact on trade and tourism), and (3) international political support, it is unlikely that any one solution will be universally popular.”



Figure 1 provides a schematic overview of the way in which the various recommendations would be managed and implemented through an EU Aviation Security Information Agency.

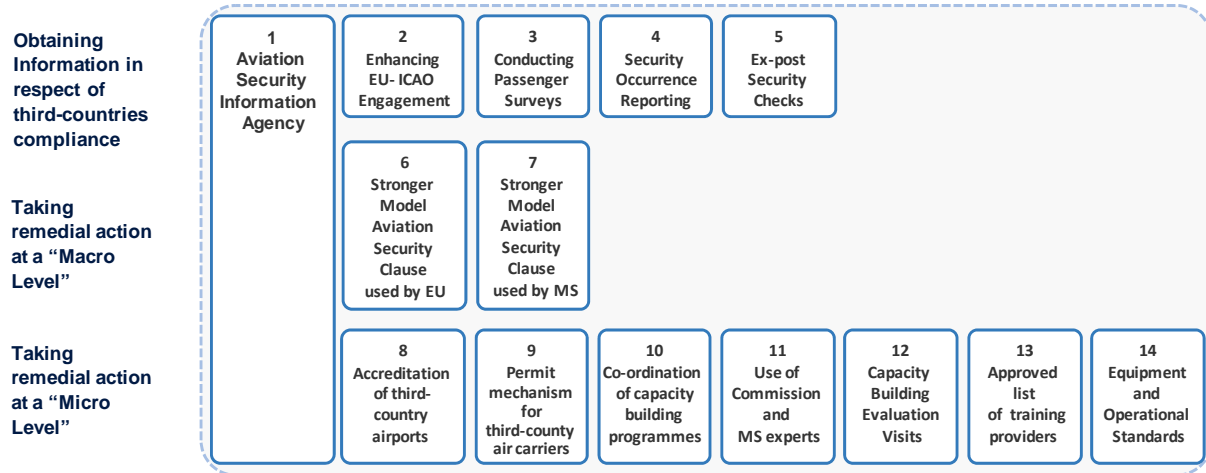


Figure 1 – Overview of Study Recommendations

