

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

Final Report

November 2010

Framework Contract TREN/J2/388-2007 - Aviation Security Policy Development

Prepared by:



This study has been carried out for the European Commission and expresses the opinions of the organisations having undertaken it. The views have not been adopted or in any way approved by the European Commission and should not be relied upon as a statement of the European Commission's views. The European Commission does not guarantee the accuracy of the information given in the study, nor does it accept responsibility for any use made thereof.

Marcus Hallside
Innovative Compliance Europe Ltd
22 Melton Street
London NW1 2BW
Marcus.hallside@innovativecompliance.com

Mark O'Connor
DLA Piper UK LLP
3 Noble Street
London EC2V 7EE
Mark.O'Connor@dlapiper.com

Contents

1. Introduction	v
2. Executive Summary	viii
3. Background Context	1
4. Legal Frameworks	3
Scope	3
A description of the global underlying regime - Annex 17 to the Convention on International Civil Aviation	4
Agreements that the EU has in place with third-countries	10
Analysis of the means of enforcement of agreements and treaties in accordance with the principles of international law	14
Summary and Conclusions	18
5. Capacity Building	21
Scope	21
Background	21
EU Programmes	22
Additional Capacity Building Programmes	28
Summary and Conclusions	29
6. Review of US, Canada, France and the UK	32
Scope	32
United States	32
Canada	34
France	36
United Kingdom	38
Summary and Conclusions	39
7. The Air Safety Framework	42
Scope	42
Background	42
Summary of the Existing Air Safety Legal Framework	43
ICAO Universal Safety Audit Oversight Programme	45
Summary and Conclusions	46
8. Information Sharing Networks	49
Scope	49
Joint Situation Centre	49
FRONTEX	50
European Police Office	51
General European Rapid Alert System	52
Monitoring and Information Centre	53

Summary and Conclusions	53
9. Recommendations	55
Scope	55
Overview	55
Recommendations that relate to the ability of the EU to obtain useful information in respect of third-country compliance with security standards.....	60
Recommendations that relate to the ability of the EU to take coordinated and effective remedial action in response to such information at the "macro level"	67
Recommendations that relate to the ability of the EU to take coordinated and effective remedial action in response to such information at the "micro level"	70
Summary of Future EU Legislation or Negotiation Mandates.....	79

Table of Figures

Figure 1 - Study Recommendations	57
--	----

List of Tables

Table 1 - Future EU Legislation or Negotiation Mandates	79
---	----

1. Introduction

Purpose and Scope of Study

- 1.1 The Contractor was requested to assess the current possibilities of the EU and its Member States to address potential security risks associated with flights from third-countries to the EU and to propose how to address this risk in the future, where appropriate.
- 1.2 The following tasks were defined by the Commission:
- Collect and summarise security provisions in existing legal frameworks (international, horizontal and bilateral air transport agreements) that are or can be used to enhance the level of security of flights from third-countries into the EU by interviewing specified persons.
 - Describe and summarise the programmes that are or can be used for capacity building to enhance the level of aviation security in third-countries provided for by DG ENLARG by interviewing specified persons.
 - Examine the way these agreements and programmes are applied and how better use could be made of these agreements and programmes in order to improve the level of security of flights coming from third-countries to the EU.
 - Describe and summarise, by interviewing specified experts, the legal framework currently used by Canada, United States, United Kingdom and France to require security measures for flights coming from other countries into their country, the relation with international agreements and the lessons to be learned thereof, if any.
 - Based on the above, draw conclusions and describe ways to improve and inspect the application of aviation security standards for flights from third-countries to the EU more efficiently.
 - If appropriate, sketch out elements that should be incorporated in a proposal for possible action, for example in the form of future EU legislation or negotiation mandates. Such a proposal should also attempt to find a process for a systematic exchange of information between Member States and the Commission on threat levels and security risks.

Methodology

1.3 The methodology applied to conduct the study included:

- Desktop research performed on published materials found within a) Commission archives, b) Member State archives, c) publicly available third-country archives and d) the public domain;
- A study kickoff meeting in Brussels. This meeting discussed in detail the scope of the study brief and finalised the above approach. During the meeting the format and content of the interview questionnaires and the study deliverables were discussed and agreed;
- Interviews with the Commission, Member States and third-country authorities to gather the necessary data. A set of tailored interview scripts were authored and utilised during interview sessions, and where possible the relevant scripts were provided to the interviewees, prior to interview sessions. Questionnaire scripts were prepared for sessions with a) Commission experts on air transport agreements, b) US/Canada/EU and French aviation security experts, c) EU Commission experts on the air safety framework, d) Commission experts on DG-ENLARGE and AIDCO and e) Commission experts from DG-HOME;
- Study reviews and drafting sessions held internally between the aviation security experts and the aviation legal experts on the team established by the Contractor to perform the study. Interim and final study recommendations were discussed at meetings between the study team and the project officers of the Commission.

1.4 The formal deliverables that were prepared and submitted to the project officers were as follows:

- The kickoff meeting protocol;
- Two draft interim reports and one draft final report, each of which was submitted for review to the project officers and thereafter presented and discussed with the project officers at face to face meetings in Brussels; and
- A final study report

Outline of this Report

1.5 The remainder of this report is therefore set out as follows:

Chapter 2 provides an executive summary.

Chapter 3 describes the background context to this report regarding concerns that exist over the regulatory framework for flights departing from certain third-countries arriving in the EU.

Chapter 4 summarises the existing legal frameworks at international, EU and domestic levels.

Chapter 5 describes existing EU programmes that can or have been used for aviation security capacity building projects in third-countries.

Chapter 6 provides a description and summary of the position in the US, Canada, France and the UK.

Chapter 7 discusses the existing EU air safety legal framework.

Chapter 8 summarises existing information-sharing networks that may be accessible and useable by the EU.

Chapter 9 presents a series of recommendations based on the study conclusions.

2. Executive Summary

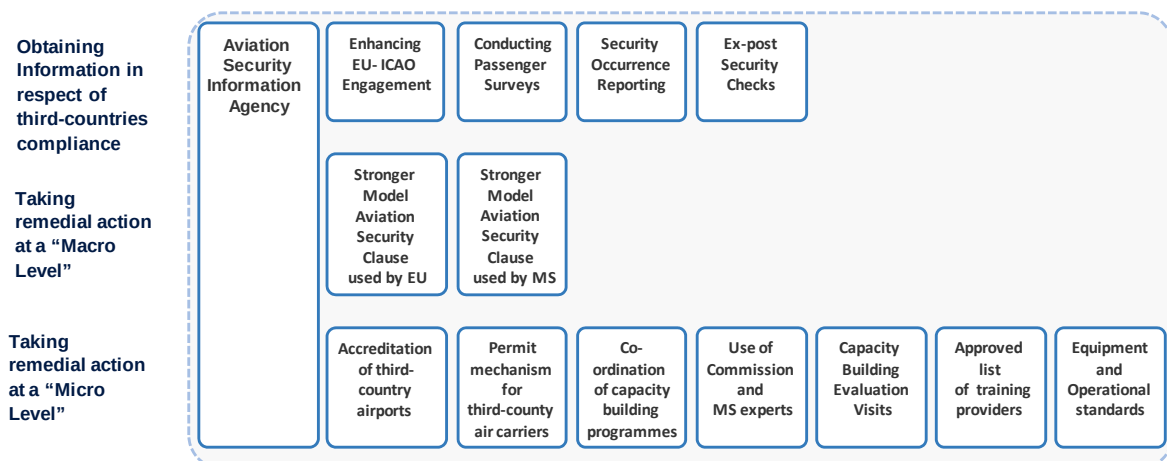
- 2.1 As discussed in more detail in Chapters 3 and 4, recent developments within Europe (including, by way of example, the creation of the European Common Aviation Area) mean that the EU is confident that it has the means to ensure a high level of aviation security in respect of flights from Member 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 report 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.
- 2.2 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 (see Chapter 6), 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.
- 2.3 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 (see Recommendations 3 and 4), or through *ex-post* security checks (see 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 (see Chapter 8), although such coordination does exist, by way of example, in respect of aviation safety concerns (see Chapter 7). Perhaps one of the most significant recommendations, therefore, is that the EU establishes a dedicated aviation security information agency ¹ (see 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 co-ordinating body could of course be incorporated into the Commission or could constitute a standalone body.

- 2.4 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 (see Chapter 4). 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 (see 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 (see Chapter 4).
- 2.5 As demonstrated in Chapter 6, 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.
- 2.6 At the macro level, Chapter 4 demonstrates that 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.
- 2.7 In particular, at the micro level it is envisaged that the establishment of a dedicated aviation security information agency (see 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 (see Chapter 5 and Recommendations 10,11 and 12).

- 2.8 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 (see Recommendations 8 and 9). Although there may be a possibility of legal challenge to such an approach in certain circumstances (see Sections 7.25 to 7.27), 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.
- 2.9 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.
- 2.10 A schematic overview of the way in which the various recommendations would be managed and implemented through an EU aviation security information agency is set out below:



- 2.11 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.

This page intentionally left blank

3. Background Context

Scope

- 3.1 The following sections will describe the background to this report concerning the legal and regulatory frameworks relevant to the application of security standards for flights departing third-countries and flying into EU airports.

Current Concerns

- 3.2 In 2008, some 798 million passengers travelled by air within the European Union, 282 million of which were on flights between an EU member state and a third-country.²
- 3.3 In recent years, there have been growing concerns within the EU that security standards applied in some third-countries regarding EU bound flights cannot be considered compliant with basic international standards, namely those contained in Annex 17 of the Chicago Convention.
- 3.4 The debate over air security is at the forefront of public consciousness at this time, as demonstrated by recent press coverage, from major airlines seeking to reduce the security burden at airports, to the more recent discovery of two explosive devices inside printer cartridges at the UK's East Midlands airport and in Dubai, bound from Yemen to the addresses in Chicago. Indeed, the UK and Germany responded by banning air freight from Yemen.
- 3.5 EU aviation security regulations and standards developed rapidly following the terrorist attacks against the United States on 11 September 2001. Common standards for aviation security have been implemented for all Member States under Regulation (EC) No. 2320/2002³ and, subsequently, Regulation (EC) No. 300/2008.⁴ The common standards have recently been supplemented by detailed implementation measures laid down by the EU, most notably through Regulation (EU) No. 185/2010.⁵

² See http://ec.europa.eu/transport/air/doc/03_2009_facts_figures.pdf

³ Regulation (EC) No. 2320/2002 of the European Parliament and the Council of 16 December 2002 establishing common rules in the field of aviation security

⁴ Regulation (EC) No. 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of aviation security repealing regulation (EC) No. 2320/2002

⁵ Resolution (EU) No 185/2010 of the European Parliament and of the Council of 4 March 2010 laying down detailed measures for the implementation of the common basic standards on aviation security

- 3.6 The EU has established frameworks for cooperation with specific third-countries in the field of aviation security, for example, through comprehensive aviation agreements with the US and Canada. Similar agreements with other major trading nations that apply high standards of aviation security, including, for example, Australia, New Zealand and Chile, are currently under negotiation. Furthermore, through the establishment of the European Common Aviation Area, the EU has concluded a multilateral aviation agreement binding neighbouring European third-countries (such as Norway, Iceland, Croatia, Macedonia, Albania, Bosnia and Herzegovina and Kosovo) to the EU's common aviation security framework.
- 3.7 The EU is, therefore, confident that it has the means to lawfully monitor and ensure a high level of aviation security not just within Member States but also within certain third-countries, including those countries that are members of the European Common Aviation Area. However, the EU is concerned that it may not have sufficient means to lawfully monitor the aviation security standards within other third-countries, or, to the extent that any third-country would not be compliant with the basic security standards set out in Annex 17 of the Chicago Convention, to ensure that flights departing from such countries meet the basic security standards set out in Annex 17.

4. Legal Frameworks

Scope

- 4.1 The following sections summarise the existing legal frameworks that are being used, or which could be used, to enhance aviation security. This section takes the following, cascading approach to the description of the existing legal framework:-
- a description of the global underlying regime, as represented by Annex 17 to the Chicago Convention;
 - a description of the agreements that the EU has in place on behalf of all Member States with third-countries (including agreements between the EU and EU neighbouring countries and between the EU and certain key partners such as Canada and the US) and analysis of relevant provisions; and
 - a summary of the relevant provisions from bilateral agreements that certain Member States have with certain third-countries.
- 4.2 The report then contains an analysis of how international agreements and treaties may be enforced in accordance with the principles of international law (sections 4.55 to 4.64).
- 4.3 The purpose of this section of the report is to identify provisions within these agreements and frameworks that could be used to enhance security, identify obvious gaps which could be addressed, and to identify the features of an 'exemplar' aviation security clause which could be included in future agreements.
- 4.4 At the end of this section, we set out our conclusions from our research and study, which summarise the provisions in existing legal frameworks that are or that could be used to enhance security of flights from third-countries into the EU.

A description of the global underlying regime - Annex 17 to the Convention on International Civil Aviation

ICAO and the Convention on International Civil Aviation

- 4.5 The Convention on International Civil Aviation (the "Chicago Convention") established certain principles and arrangements relating to civil aviation, in order that *"international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically"*.⁶ Originally signed on 7 December 1944 and ratified on 5 March 1947, the Chicago Convention is now in its ninth edition and currently has 190 signatories (known as "Contracting States").
- 4.6 The Chicago Convention established the International Civil Aviation Organisation ("ICAO") as a means of securing international co-operation and uniformity in respect of civil aviation matters. ICAO is composed of the 'Assembly' (the sovereign body made up of a representative from each contracting State), the 'Council' (the governing body made up of 36 contracting States elected by the Assembly), and the 'Secretariat' (which is divided into various administrative divisions).

Status of ICAO

- 4.7 The Chicago Convention provides for ICAO to have such legal capacity as may be necessary for the performance of its functions in the territory of each global Contracting State. Full juridical personality is granted to ICAO in each Contracting State, and as a specialised UN agency, in the territories of state parties to the UN Convention on Privileges and Immunities of the Specialised Agencies. As such, the body enjoys various diplomatic immunities and may bring international claims and incur responsibility.
- 4.8 Although ICAO does not have law making powers, the ICAO Council is vested with extensive powers and duties, including international administrative and juridical functions (including in relation to dispute settlement and implementing sanctions for default), legislative functions (including adopting and amending the "Annexes" to the Chicago Convention), and research and investigation functions (including in respect of the USAP audit programme detailed below).

SARPs

- 4.9 The Annexes to the Chicago Convention contain international standards and recommended practices ("SARPs"), which have a different status to the provisions of the Chicago

⁶ Preamble to the Convention on International Civil Aviation signed at Chicago on 7 December 1944.

Convention itself. A "Standard" means any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognised as **necessary** for the safety or regularity of international air navigation and to which contracting States will conform in accordance with the Chicago Convention, and "Recommended Practices" are identically categorised, but deemed to be **desirable**, rather than **necessary**.

- 4.10 Annex 17 of the Chicago Convention is concerned with administrative and co-ordination aspects of, as well as with technical measures for, the protection of the security of international air transport, including by requiring each contracting State to establish its own civil aviation security programme that applies the listed SARPs. Compliance with Annex 17 is assessed through obligations to notify and periodic audits, described below.

Notification Obligations

- 4.11 Article 38 of the Chicago Convention states that *"any State which finds it impracticable to comply in all material respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter... shall give immediate notification to the International Civil Aviation Organisation of the differences between its own practice and that established by the International Standard."* Once ICAO has been notified, it *"shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State"*.
- 4.12 Annex 17 states that *"Contracting States are **invited** to keep the Organisation currently informed of any differences which may subsequently occur," (emphasis added) and "a specific request for notification of differences will be sent to Contracting States immediately after the adoption of each amendment to this Annex [17]."*
- 4.13 The legal obligation to notify ICAO of differences contained in Article 38 appears to refer to the differences which arise either on adoption or amendment of SARPs. The Chicago Convention does not make reference to differences arising on an ongoing basis. This is dealt with by Annex 17, which provides that contracting States are merely "invited" to inform ICAO of the differences arising on an ongoing basis.

Enforcement

- 4.14 Enforcement of the Chicago Convention can be initiated only by a Contracting State, and is governed by Articles 84 to 88, under which disputes relating to the *"interpretation or application"* of the Chicago Convention can be escalated to the ICAO Council to be decided by way of a vote (in which disputing parties may not participate). Decisions of the ICAO Council can thereafter be appealed to the International Court of Justice in the Hague or to an

agreed arbitral tribunal. Decisions of both are final and binding on the parties. If the decision of the ICAO Council is not followed by a relevant air carrier, all contracting States undertake not to allow that air carrier to fly through their airspace,⁷ and if a Contracting State does not follow a decision of the ICAO Council, its right to vote in the Assembly becomes suspended.⁸

4.15 In practice, however, Contracting States generally shy away from invoking the dispute resolution. Often this is because of political and diplomatic considerations and/or because of the risk of retaliatory action by the other Contracting State. Indeed, it appears that ICAO has been asked to exercise its quasi-judicial dispute resolution functions on only a few occasions:

- India v. Pakistan (1952) - involving Pakistan's refusal to allow Indian commercial aircraft to fly over Pakistan;
- United Kingdom v. Spain (1969) - involving Spain's restriction of air space at Gibraltar;
- Pakistan v. India (1971) - involving India's refusal to allow Pakistan's commercial aircraft to fly over India;
- Cuba v. United States (1998) - involving the US refusal to allow Cuba's commercial aircraft to fly over the United States; and
- United States v. Fifteen European States (2003) - involving EU noise emission regulations.

4.16 A Contracting State may also be able to enforce its rights under the Chicago Convention through application of the international law of state responsibility (see sections 4.55 to 4.64).

International Cooperation and Information Sharing

4.17 Contracting States are obliged to ensure that *"requests from other Contracting States for additional security measures in respect of specific flight(s) by operators of such other States are met, as far as practicable"*.⁹

4.18 In addition Contracting States are obliged to cooperate with each other in *"the development and exchange of information concerning national civil aviation security programmes, training programmes and quality control programmes"*¹⁰ and to *"establish and implement procedures to share with other Contracting States threat information that applies to the aviation security interests of those states, to the extent practicable"*.¹¹

⁷ The convention on International civil Aviation, Article 87

⁸ *Ibid.* Article 88

⁹ The Convention on International Civil Aviation Annex 17, Art. 2.4.1 (a "Standard")

¹⁰ *Ibid.* Annex 17, Art. 2.4.2 (a "Standard")

¹¹ *Ibid.* Annex 17, Art. 2.4.3 (a "Standard")

- 4.19 Annex 17 also contains several Recommended Practices concerning the sharing of information. In particular, each Contracting State should, when so requested, "*share, as appropriate and **consistent with its sovereignty**, the results of the audit carried out by ICAO and the corrective actions taken by the audited State*"(emphasis added).¹² Also, each Contracting State should "*include in each of its bilateral agreements on air transport a clause related to aviation security, taking into account the model clause developed by ICAO*",¹³ and each State should, on request, make available appropriate parts of its national aviation security programme.¹⁴

The Universal Security Audit Programme

- 4.20 The Universal Security Audit Programme ("USAP") was launched by ICAO in June 2002 to ascertain the level of implementation of Annex 17 standards in all Contracting States by conducting regular, mandatory, systematic and harmonised audits.¹⁵ The first cycle of audits, in which 182 audits were conducted, was completed in December 2007, and the second cycle of expanded audits, which commenced in 2008, is expected to complete in 2013.
- 4.21 Each ICAO audit is conducted in a transparent manner with the cooperation of the audited State. Indeed, the State will usually have four to six months notice of the audit, and will enter into a customized memorandum of understanding with ICAO that sets out the audit's scope and implications. Typically, a team of three or four ICAO auditors will conduct the audit over a period of about one week in accordance with ICAO's standard auditing procedures and protocols before providing the State concerned with a confidential audit report. Following receipt of the audit report, the State typically has 60 days to submit a "corrective action plan" detailing how it intends to rectify any deficiencies identified by the audit. The implementation of the corrective action plan is then monitored by ICAO. In 2005 a series of "follow-up visits" (172 in total) were initiated to verify compliance with corrective action plans and provide further assistance in respect of outstanding deficiencies, and according to ICAO such visits "*confirmed that, overall, states made progress in the implementation of their corrective action plans*".¹⁶ In respect of audits starting in 2011 (and some to be undertaken in 2010), ICAO will notify the State of any 'significant security concerns' ("SSECs") within 15 days, after which the State is required to implement immediate corrective action.¹⁷ Failure to do so within 15 days will result in a notification to all Contracting States relating to the SSECs that is published on the USAP secure website (see below).

¹² *Ibid.* Annex 17, Art 2.4.5 (a "Recommendation")

¹³ *Ibid.* Annex 17, Art 2.4.6 (a "Recommendation")

¹⁴ *Ibid.* Annex 17, Art 2.4.7 (a "Recommendation")

¹⁵ USAP was established pursuant to the ICAO Assembly Resolution A33-1 (the 'Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation'), which required the ICAO Council to establish an audit programme to evaluate the civil aviation security programmes and airport security arrangements in each contracting state as a means of countering the heightened threat perceived to be posed by international terrorism.

¹⁶ *ICAO Annual Report of the Council 2009*, Doc 9921

¹⁷ The ICAO Council approved the definition of SSECs during its 189th Session (C-DEC 189/3), and subsequently approved an amendment to the model memorandum of understanding that States enter into with ICAO in advance of an audit, to allow for the identification and publication of SSECs. This will apply to all audits commencing in 2011, and ICAO has invited (but not mandated) States with an audit scheduled to commence in 2010 to agree to amend the existing memorandum of understanding. ICAO Electronic Bulletin, 'Security Risk Indicators and Significant Security Concerns', 23 August 2010, EB 2010/31

- 4.22 USAP audit reports are strictly confidential and are not made available to other Contracting States. Indeed, as ICAO states, *"the assurance of confidentiality is important to the USAP audit process because of the special sensitivity of aviation security-related information."*¹⁸ Although ICAO recommends that States share USAP audit reports (see section 4.19), research suggests that that States may be reluctant to request such information on the grounds that they would not wish to reciprocate disclosure.
- 4.23 However, ICAO has recognised that the need for a degree of confidentiality must be balanced with *"the need for States to be aware of unresolved security concerns"*, and as a result it advocates *"a limited level of transparency with respect to ICAO aviation security audit results"*.¹⁹
- 4.24 It is on this basis that, since the commencement of the second cycle of audits in 2008, ICAO has disseminated a limited amount of information relating to USAP audits to all Contracting States, which is available on a restricted website. This information sets out numerically, as a percentage figure, the level of implementation by the audited State in respect of eight "critical elements" of an aviation security oversight system, being: (i) aviation security legislation; (ii) aviation security programmes and regulations; (iii) state appropriate authority for aviation security; (iv) personnel qualifications and training; (v) provision of technical guidance, tools and security critical information; (vi) certification and approval obligations; (vii) quality control obligations; and (viii) resolution of security concerns.²⁰ According to ICAO, such *"increased transparency will promote mutual confidence in the level of aviation security amongst states"*, however, research suggests that the disseminated information may not, in fact, be sufficiently detailed to enable a thorough analysis of an audited State's compliance with Annex 17. Indeed, ICAO has stated that the information shared through the USAP secure website will not include *"sharing detailed security information of the level of implementation of Annex 17 at individual airports"*²¹ (although, such information may, to a limited degree, be shared in future in light of ICAO's new approach to unremedied SSeCs (see sections 4.23 and 4.25)). In addition to the information regarding an audited State's security oversight capabilities, the secure USAP website will, in future, also contain information pertaining to SSeCs identified during an ICAO audit, if the audited State has failed to implement corrective action within the required 15 days. It is envisaged that such an approach will *"enable States which have operations to/from the State in question to determine whether compensatory security measures are required."*²²

¹⁸ <http://www2.icao.int/en/AVSEC/usap/Pages/Confidentiality.aspx>

¹⁹ Appendix E "The ICAO Universal Security Audit Programme" of the 'Report Of The Executive Committee On Agenda Items 13, 14 And 15' (A37-WP/359, P/33, 4/10/10) http://www.icao.int/icao/en/assembl/a37/wp/wp359_en.pdf

²⁰ An example of the information that is displayed on the USAP secure website is set out in 'Annex B' of ICAO Working Paper 'progress report on ICAO audit activities: usoap and usap' (C-WP/13298 8/01/09) <http://www.icao.int/ICDB/HTML/English/Representative%20Bodies/Council/Working%20Papers%20by%20Session/186/C.186.WP.13298.EN/C.186.WP.13298.EN.HTM>

²¹ ICAO Working Paper A37-WP101 26 August 2010 (http://www.icao.int/icao/en/assembl/a37/wp/wp101_en.pdf)

²² *Ibid.*

- 4.25 It is important to note that the USAP audit process is designed to periodically sample and assess (albeit at long intervals) a State's implementation of the Annex 17 requirements. As such, the audit results are indicative rather than a definitive measure of that State's day to day compliance. Consequently, such audits may not be sufficiently responsive to more immediate security threats/concerns given that the cycle of audits is planned well in advance. Significantly, the ICAO Council has recently directed the Secretary General to undertake a study to assess whether a 'continuous monitoring approach' ("CMA"), which has already been established in respect of aviation safety inspections, could feasibly be incorporated into the ICAO security audit programme.²³ It is not clear whether such an approach would mitigate the existing limitations of USAP if it were adopted.

Role of the EU within ICAO

- 4.26 The EU does not have Contracting State status under the Chicago Convention nor is it officially represented in ICAO, and therefore has no rights (or obligations) under the Chicago Convention, whether in relation to initiation of enforcement, influencing common standards, accessing the published USAP audit compliance summary or otherwise. Therefore, the EU can only exercise rights under the Chicago Convention if such rights are assigned to it by Member States²⁴ (which may not be possible in any event unless approved by Contracting States generally) and if the ICAO Assembly, acting with the required majority, amends the Chicago Convention²⁵ to grant the EU status within ICAO.
- 4.27 The EU has, however, established a certain degree of cooperation with ICAO. Indeed, since 1989, the European Commission has participated (at ICAO's invitation) as an observer in the ICAO Assembly and in ICAO committees, technical panels and study groups. By way of example, the Commission regularly takes part in meetings of the ICAO AvSec panel.²⁶ In 2008 ICAO and the EU entered into a Memorandum of Cooperation in respect of aviation security audits and inspection (following which the Commission entered into a related Memorandum of Understanding with ICAO), under which the Commission provides ICAO with information (obtained by it through its own security audits) relating to Member States' compliance with relevant security standards. This is designed to avoid duplication of effort, as such information is provided in lieu of an additional ICAO audit.
- 4.28 EU membership of ICAO was recommended by the Commission in 2002,²⁷ and indeed Article 302 of the Treaty establishing the European Community states that *"it shall be for the Commission to ensure the maintenance of all appropriate relations with the organs of the United Nations and its specialized agencies"* (ICAO is a specialized agency of the UN).

²³ ICAO Working Paper A37-WP32 26 August 2010 (http://www.icao.int/icao/en/assembly/a37/wp/wp032_en.pdf)

²⁴ For example, in 2003 when the ICAO Council granted the Commission a mandate for the purpose of negotiating an Open Skies Agreement / Open Aviation Area on behalf of Member States.

²⁵ The Convention on International Civil Aviation Article 49(f) and Article 49(i)

²⁶ European Commission, 'Fourth Report of the Implementation of Regulation (EC) No. 2320/2002 establishing common rules in the field of Aviation Security', COM (2009) 518 Final

²⁷ Recommendation from the Commission to the Council in order to authorize the Commission to open and conduct negotiations with the ICAO on the conditions and arrangements for accession by the European Community / *SEC / 2002 / 0381 final*

However, Article 92 of the Chicago Convention only permits adherence to ICAO for individual States rather than regional integration organisations such as the EU. An amendment would, therefore, be required to the Chicago Convention.

- 4.29 All Member States are Contracting States under the Chicago Convention, and the EU has sought to introduce a degree of regional coordination amongst all Member States in their dealings with ICAO. Indeed all Member States are also members of the European Civil Aviation Conference (ECAC), and a degree of coordination takes place through that organisation in advance of an ICAO Assembly meeting.²⁸ Furthermore, a degree of Member State coordination also takes place in advance of ICAO Council meetings, supported in part by a Commission representative located in Montreal.²⁹ There is a degree of precedent, therefore, for the EU acting a single voice within ICAO through its Member States.

Agreements that the EU has in place with third-countries

- 4.30 In the field of civil aviation, there a number of different types of agreement that the EU has, or could establish, with third-countries, namely: horizontal agreements, comprehensive agreements with neighbouring countries, and 'traditional' comprehensive agreements.
- 4.31 Horizontal agreements between the EU (on behalf of and with the authority of Member States) and third-countries have been used for the purpose of amending such countries' bilateral ASAs with all Member States to ensure they were aligned with certain principles of EU law as upheld by the ECJ (such as in respect of the 'community carrier' designation). As such, horizontal agreements have not contained provisions relating to aviation security, and are not considered further in this report.
- 4.32 This section sets out an analysis of typical provisions relating to aviation security in respect of both comprehensive agreements with European countries and European neighbouring countries, and 'traditional' comprehensive agreements with other third-countries.
- 4.33 This section then provides an analysis of the means of enforcement of international agreements and treaties in accordance with international law.

²⁸ *Ibid.*

²⁹ See http://ec.europa.eu/transport/air/international_aviation/european_community_icao/european_community_icao_en.htm

Analysis of the relevant provisions from comprehensive agreements: agreements with neighbouring countries

- 4.34 Broadly speaking, there are three categories of neighbouring States that need to be addressed: (1) EU accession and candidate accession States ('Candidate States'); (2) States that, although not necessarily Candidate States, have a particularly close relationship with the EU; and (3) other States that are in close proximity to the EU. The extent to which the EU is able to secure rights in respect of its ability to monitor and enforce compliance with specified aviation security standards will depend upon the nature of the relationship that the EU has with a particular neighbouring State.
- 4.35 With regard to Candidate States, regulatory convergence is a primary requirement and the implementation of EU acquis is laid out in their respective accession plans. Consequently, in the field of aviation security, the EU is able to mandate through the accession process similar rights of audit and inspection to those that the EU has in respect of Member States. The EU therefore has the ability to monitor and enforce compliance with Annex 17 of the Chicago Convention (and indeed, with the more detailed requirements set out in EU regulation), and as such Candidate States are outside the scope of this report.
- 4.36 Further, the EU has also concluded agreements with States that, although not necessarily Candidate States, have a particularly close relationship with the EU such that they are willing to cede a certain degree of authority to the EU in respect of aviation security. Indeed, an example of such an agreement is the European Common Aviation Area multilateral agreement ('ECAA Agreement'), which takes the following form:
- a common multilateral main text applicable to all signatories;
 - supplemented by a series of protocols which accommodate specific needs for each country joining the ECAA including transitional arrangements; and
 - an annex which lists EC aviation legislation that would be applicable to signatories to the ECAA Agreement (including Regulation (EC) No. 2320/2002 (as amended and replaced by (EC) No. Regulation 300/12008, although ECAA does not refer expressly to Regulation 300/2008), Regulation (EC) No. 622/2003³⁰ (as amended); Regulation (EC) No. 1217/2003; and Regulation (EC) No. 1486/2003³¹ (which lays down procedures for conducting Commission inspections)).
- 4.37 The ECAA Agreement does, to an extent, provide the EU with a strong position in respect of monitoring and enforcing compliance with aviation security requirements in signatory third-

³⁰ Regulation (EC) No. 622/2003 of 4 April 2003 laying down the measures for the implementation of the common basic standards on aviation security

³¹ Regulation (EC) No. 1486/2003 of 22 August 2003 laying down the procedures for conducting Commission inspections in the field of civil aviation security

countries, however it is not a position that the EU is likely to be able to achieve with other third-countries, even other neighbouring States. Indeed, with regard to agreements that the EU has in place with other neighbouring states (such as, by way of example, the comprehensive agreements with Morocco and Georgia), there is no direct application of EU law nor does the EU obtain the right to conduct audits or inspections within that State's territory.

**Analysis of the relevant provisions from comprehensive agreements:
traditional comprehensive agreements**

- 4.38 With regard to the comprehensive agreements that the EU has in place (or is in the process of establishing) with third-countries that are not EU neighbouring States, a more 'traditional' style of agreement tends to be adopted although such agreements will of course vary from State to State. In general, traditional comprehensive agreements seek to open market access and establish operational frameworks for discussion and negotiation, although such agreements are becoming increasingly robust particularly in respect of aviation security.
- 4.39 The EU has formally concluded a comprehensive aviation agreement with Canada, and is negotiating new or extended comprehensive agreements with specific third-countries, currently understood to be the US, Australia, New Zealand and Chile, and potentially China, South Africa and India. It is understood that the agreement with Canada is the only comprehensive agreement that has been fully concluded and is publicly available at the date of this report. A summary of the relevant provisions within that agreement is set out at section 4.40 below as a point of reference, although it should of course be noted that equivalent provisions in other comprehensive agreements may vary (particularly in respect of achieving one stop security).
- 4.40 In summary, the comprehensive aviation agreement between the EU and Canada contains the following relevant provisions:
- Mutual obligation to comply with all international conventions (including the Chicago Convention and Annex 17);
 - Requirement that national operators and operators of aircraft in Canada comply with certain aviation and security provisions;
 - Requirement to notify the other party in relation to any deviation or difference from Annex 17 of the Chicago Convention;
 - Commitment to adequate measures regarding protection of aircraft, security controls on passengers, crew members, baggage, carry-on items, cargo, mail and aircraft stores prior to boarding;

- Agreement to work towards mutual recognition of each other's security standards and implementing one-stop security for flights;
- Agreement to cooperate on security inspections, including reciprocal exchange of information on security inspections and the ability of each to participate as observers; and
- The ability to suspend or revoke the agreement or impose conditions on any authorisations of airlines of the other party in the event that there is any departure from these conditions.

- 4.41 The agreement therefore establishes a framework for cooperation in respect of civil aviation security, including in respect of a useful, proactive mechanism for reciprocal exchange of information regarding inspections, and serves to contractualise (amongst other things) the standards and recommended practices contained in Annex 17 of the Chicago Convention. It also serves to provide the EU with specific rights in the event that Annex 17 is not complied with. The agreement does not, however, grant the EU the right to unilaterally conduct inspections in Canada (or vice versa).
- 4.42 The comprehensive aviation agreement between the EU and the US is not yet concluded and is not in the public domain. We understand that there is a broad framework for sharing threat information and for receipt of classified information by the EU through the US Embassy.
- 4.43 The EU and US cooperate in joint inspections of both EU and US airports. Both parties have developed protocols and methodology for conducting these inspections building on a comparison of the US regulation with Regulation (EC) No. 300/2008.
- 4.44 It is understood that the EU conducts regular joint inspections with Transport Security Administration ("TSA") at US airports through the provisions of the comprehensive agreement. These inspections are part of the effort to achieve one stop security.

Bilateral agreements between Member States and third-countries

- 4.45 In addition to the agreements that the EU has in place with third-countries, there is also an array of bilateral ASAs between individual Member States and third-countries. These require brief discussion for two reasons: (i) certain provisions within those bilateral ASAs relating to aviation security may serve as useful benchmark for the EU in developing its own security clauses; and (ii) the EU may, theoretically, be able to indirectly enforce such bilateral ASAs through the relevant Member State (although see section 4.51 to 4.54).
- 4.46 Publication by Member States of details (or copies) of their individual bilateral ASAs with third-countries is not commonplace, and it is therefore not clear how many bilateral ASAs contain

security related clauses. However, research suggests that since 2001 bilateral ASAs have tended to include provisions relating to aviation security, and incorporate Annex 17 of the Chicago Convention by express reference.³² Indeed, this is consistent with the ICAO's recommendation that each contracting State should *"include in each of its bilateral agreements on air transport a clause related to aviation security, taking into account the model clause developed by ICAO"*.³³

4.47 In general, analysis shows that typical, modern bilateral agreements containing aviation security clauses share the following characteristics:

- reaffirmation of obligations under international conventions;
- requirement that national operations comply with Annex 17 of the Chicago Convention (for example, a mutual commitment to implementing effective measures to protect aircraft, screen passengers, baggage, crew, cargo and aircraft stores prior to boarding);
- direct notification obligation of any departure from Annex 17 standards; and
- mutual commitment to facilitate communications and other measures to terminate any security threat or incident.³⁴

Analysis of the means of enforcement of agreements and treaties in accordance with the principles of international law

4.48 Most third-countries are legally bound to apply Annex 17 of the Chicago Convention, whether as a signatory to the Chicago Convention or following incorporation of Annex 17 within an applicable aviation agreement. In the event that a third-country is found to be non compliant with Annex 17, the EU may therefore have the ability to take enforcement action (either directly or indirectly) under the existing legal framework. The scope of such enforcement action is analysed below, as follows:

- direct enforcement pursuant to an agreement (such as a comprehensive aviation agreement) between the EU and the offending third-country;
- indirect enforcement under the Chicago Convention, or pursuant to a bilateral agreement between a Member State and the offending third-country; and
- enforcement through the application of the international law of state responsibility.

³² See, for example, the bilateral ASAs between the UK and Australia and between the UK and New Zealand

³³ The Convention on International Civil Aviation Annex 17, Recommendation, Art 2.4.6

³⁴ See for example the Bilateral agreements between the UK and New Zealand, the UK and Panama, and between Greece and Australia

Direct enforcement pursuant to an agreement between the EU and the offending third-country

- 4.49 If the provisions of Annex 17 of the Chicago Convention have been incorporated into a comprehensive aviation agreement between the EU and a third-country, then a breach of Annex 17 by that third-country will entitle the EU to invoke whatever dispute resolution procedure and/or enforcement rights contained within that agreement.
- 4.50 By way of example, in the EU-Canada comprehensive aviation agreement each party has a limited right to suspend and revoke the agreement or impose conditions on the authorisations of airlines of the other party.

Indirect enforcement under the Chicago Convention pursuant to a bilateral agreement between a Member State and the offending third-country

- 4.51 Where the EU does not have a direct legal relationship with a third-country, it may require a Member State to invoke any dispute settlement provisions contained within a bilateral ASA between the Member State and such third-country.
- 4.52 Of those bilateral ASAs that have been reviewed, the dispute settlement provisions usually provide for the settlement of disputes by negotiation, followed by compulsory binding arbitration if negotiation fails.³⁵ This type of dispute settlement provision is more flexible than many international treaties which simply provide for the settlement of disputes by negotiation, and then non-binding conciliation if negotiations do not resolve the dispute, which can leave both States at an impasse if the non-binding conciliation fails.
- 4.53 However, such an approach of indirect enforcement may in practice be neither practicable nor desirable. Indeed, for largely political reasons, bilateral ASA dispute resolution procedures are rarely invoked by States, even in the case of apparent breaches which are serious in nature. Furthermore, given that each bilateral ASA will have been concluded on its own terms (and many - particularly those concluded before 2001 - may not contain the relevant security provisions), seeking to invoke each Member State's bilateral ASA with a particular third-country is unlikely to result in a coherent, uniform approach across Europe. Indeed, such an approach could well result in the situation where the offending third-country is being sanctioned by certain Member States but not others.
- 4.54 A Member State that is a signatory to the Chicago Convention will be able to pursue the specific dispute resolution provisions contained within the Convention itself; this is discussed above (see section 4.14) and is not repeated in this section.

³⁵ See, for example, Article 16 of the Netherlands - Tanzania bilateral ASA (http://untreaty.un.org/unts/60001_120000/23/25/00045238.pdf)

International law of state responsibility

- 4.55 In addition to pursuing dispute resolution provisions contained in relevant international agreements or treaties, a State may also be able to take enforcement action through the application of the law of State responsibility or the application of the law regarding suspension of treaties.
- 4.56 The law of State responsibility entitles an “injured State”, being a State which is the victim of an “internationally wrongful act” (such as the breach of a treaty obligation owed to it) to take certain measures directed at the “responsible State”, being the State which is responsible for, or which caused, the “internationally wrongful act”. The law of State responsibility is largely codified in the International Law Commission’s (“ILC”) Articles on State Responsibility.³⁶
- 4.57 Although the ILC’s Articles are not a binding convention, they are widely regarded as reflecting customary international law.
- 4.58 Under Article 49, an “injured State” is permitted to *“take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations”*. Countermeasures consist of (and are limited to) *“the non-performance for the time being of international obligations of the State taking the measures towards the responsible State”*. So, for instance, a Member State, as an “injured State”, could decide not to comply with other international obligations it owed to a third-country where that third-country is not in compliance with its aviation security obligations under a bilateral agreement.
- 4.59 Importantly, the obligations that an injured State could decide not to comply with are not limited to those contained in the bilateral agreement, and may therefore include, by way of example, market access obligations or obligations under another bilateral agreement.
- 4.60 However, there are some important restrictions on the scope and application of countermeasures. Countermeasures must be “proportionate” and must not affect certain significant obligations under international law, such as the obligation not to use force and the obligation to comply with international humanitarian law and human rights. There are also notification and other procedural requirements with which the State must comply.³⁷
- 4.61 So, in theory, a Member State, as an “injured State”, could decide not to comply with other international obligations it owed to a third-country where that third-country is not in compliance with the aviation security obligations that it owes under a bilateral ASA. However, it seems

³⁶ In particular Articles 49-54. (http://untreaty.un.org/ilc/summaries/9_6.htm)

³⁷ The restrictions and required procedure for implementing countermeasures are set out in Articles 50-53, International Law Commissions Articles on State Responsibility.

unlikely that Annex 17 security measures could ever justifiably be regarded as being as sufficiently serious to follow this option which, even in very serious cases, is rarely used by States in practice.

- 4.62 A "retorsion" may also be used as a less severe alternative to the extreme solution of countermeasures. A retorsion does not involve the non-performance of international obligations, but instead is the adoption by an injured State of a lawful act that is harmful or unfriendly towards an offending State. By way of example, a retorsion may include suspending or downgrading of diplomatic relations.
- 4.63 The law regarding the ability of international organisations (such as the European Union), as opposed to States, to take countermeasures is largely untested. The International Law Commission's Draft Articles on the Responsibility of International Organisations, as adopted on first reading in 2009, do not deal directly with this point,³⁸ and nor do the International Law Commission's Articles on State Responsibility make provision for the possibility of international organisations taking countermeasures.³⁹ However, it seems likely, considering recent developments in the recognition of international organisations and their international legal personality, that the EU would be able to adopt such measures against third States in respect of breaches by such third States of obligations arising under an international treaty or agreement to which they were bound, assuming that the EU complied with the conditions for taking countermeasures, as codified by the ILC.⁴⁰
- 4.64 Finally, The Vienna Convention on the Law of Treaties ("VCLT"),⁴¹ article 60(1) permits a party to a bilateral treaty to suspend the operation of that treaty in the event of a "material breach". The consequences of suspension are set out in Article 72 of the VCLT. Essentially the States are released from their obligations under the relevant treaty so long as it remains suspended. There is a procedure to follow if a State wishes to suspend the operation of a treaty (in Articles 65-66), but the practical effect of this, is that no aircraft may take off from the relevant third-country and land in the relevant Member States and vice versa. This may provide a persuasive "stick" for offending third-countries to bring themselves into compliance.

³⁸ See *Report of the International Law Commission on the Work of its Sixty-first Session (4 May to 5 June and 6 July to 7 August 2009)*, ch 4, p 19 (Draft Art 1), and pp 34-36 (Draft Arts 50-56), with the ILC's commentary on these provisions at pp 39-43, and pp 147-158, respectively, available at <www.un.org/law/ilc>. The provisions in the ILC's Draft Articles on the Responsibility of International Organisations only seeks to codify and progressively develop international law as regards the ability of States and international organisations to take countermeasures as against other international organisations. See especially Arts 1, 50, 54.

³⁹ See James Crawford, *The International Law Commission's Articles on State Responsibility* (2002), pp 281-305 (Arts 48-54), which only cover the possibility of States taking countermeasures.

⁴⁰ These conditions are contained in the ILC's Articles on State Responsibility, Arts 48-54, and the ILC's Draft Articles on the Responsibility of International Organisations, Arts 50-56, which are essentially the same.

⁴¹ The Vienna Convention on the Law of Treaties 1969 (http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

Summary and Conclusions

ICAO-related summary and conclusion

- 4.65 The standards and recommended practices contained within Annex 17 are to be applied by all Contracting States (in the latter case these are desirable, not mandatory, and are therefore not enforceable (see section 4.9). To the extent that any Contracting State is not compliant, another contracting State may take steps to enforce compliance through either the dispute resolution procedure set out in the Chicago Convention or through the general principles of international law regarding the enforcement of treaties. However, such measures of enforcement are rarely used in practice, and there is unlikely to be any real prospect that such measures would be invoked (or be deemed to be suitable) in the situation where one contracting State is not fully compliant with aviation security SARPs.
- 4.66 Compliance with Annex 17 of the Chicago Convention is monitored by ICAO through its Universal Security Audit Programme. As audits are carried out in cycles with long intervals between each audit, they may be of limited use in providing information on a State's actual compliance (as opposed to that State's means of compliance), however this may be addressed by ICAO in the next cycle of audits if a 'continuous monitoring approach' is adopted. Furthermore, ICAO has recently introduced the concept of 'significant security concerns', which if identified during an audit must be immediately corrected. ICAO (and its Contracting States) remain committed to USAP, and to adapting the process to meet changing security concerns.
- 4.67 Despite the limitations of the ICAO audit process, it is difficult to see how a more thorough global audit regime could be established without (i) each Contracting State agreeing to cede an element of sovereignty, and (ii) increasing the cost and resource burden on each Contracting State. Certainly it seems unlikely that the EU would find it practicable to establish a more effective parallel audit programme in respect of third-countries with flights into the EU. USAP audits do, therefore, represent a potentially invaluable source of information for the EU relating to third-country compliance with Annex 17.
- 4.68 The extent to which ICAO passes information relating to one State's compliance with Annex 17 to other Contracting States is limited, and most of the detailed findings obtained through USAP remain confidential. Although Contracting States are encouraged to share audit results, such sharing does not appear to take place. However, ICAO has recognised that a degree of information should be made available to Contracting States, in particular high-level information relating to a State's security oversight capabilities and unresolved 'significant security concerns', and is making such information available through a secure website.

- 4.69 The EU may seek to exert its influence within ICAO to increase the degree to which security information is shared, or alternatively may seek to obtain such information through additional routes, such as by way of an agreement with the relevant third-country **[see Recommendation 6]**.
- 4.70 The EU is not a Contracting State under the Chicago Convention nor is it a member of ICAO, and is prima face unable to directly enforce any of the provisions of the Chicago Convention or benefit from information provided by ICAO. However, the EU has established an element of coordination amongst Member States within ICAO and has succeeded in establishing a collaborative relationship with ICAO on various fronts, such that it does, to an extent, have the ability to exert a degree of influence within ICAO. There is, therefore, precedent for the EU further securing its relationship with ICAO, whether through membership (which would be a lengthy process requiring amendment to the Chicago Convention itself) or otherwise through seeking to enhance its role within ICAO, for example as a recognized “regional organization” **[see Recommendation 2]**.
- 4.71 To the extent that the EU considers it desirable that third-countries comply with Annex 17 recommended practices (which, under the terms of the Chicago Convention, are not mandatory), it would need to contractualise those practices through agreement with that third-country, which would provide for the right to enforce such practices in accordance with international law **[see Recommendation 6]**. In this regard, an obligation to act in conformity with the aviation security provisions in Annex 17 (as is contained in the EU-Canada comprehensive aviation agreement) would not, in itself, be sufficient.

Agreement-related summary and conclusions

- 4.72 The EU is in the process of establishing comprehensive aviation agreements with a number of third-countries. Such agreements tend to contractualise the application of Annex 17 of the Chicago Convention, providing the EU with a direct mechanism for taking certain action against the State in the event of non-compliance (in the case of the EU-Canada agreement, the EU has a limited right to suspend and revoke the agreement or impose conditions on the authorisations of airlines of the other party).
- 4.73 Comprehensive agreements may also provide the EU with the direct ability to obtain certain information in respect of compliance, although (other than in respect of candidate accession States who may be willing to cede a certain degree of sovereignty to the EU) the EU is unlikely to have the right to undertake unconditional security inspections. Where inspection rights do exist (as is the case in the EU-US comprehensive agreement), such rights are limited and tend to relate primarily to joining the host authority’s inspection under an agreed protocol of inspection. Such rights are limited and tend to relate primarily to participation (as an observer) in the host State’s own inspections for the purpose of verifying particular requirements relating to one-stop security.

- 4.74 Where the EU does not have a direct legal relationship with a third-country, it could seek to require a Member State to invoke any dispute settlement provisions contained within a bilateral ASA between the Member State and such third-country. However, such indirect enforcement is unlikely to result in a harmonised approach across Europe (given that many bilateral ASAs may not contain the relevant security provisions), and may result in the situation where the offending third-country is being sanctioned by certain Member States but not others **[see Recommendation 7]**.
- 4.75 There is scope for the EU to seek to establish a direct agreement with all third-countries incorporating provisions that are based on, and further enhance, those provisions which are already used in existing agreements. Such provisions could give the EU the lawful ability to obtain information relating to third-country compliance with Annex 17 of the Chicago Convention, and provide the EU with certain rights in the event of non-compliance (namely, the right to suspend the agreement and/or impose conditions on air carriers). Of course, the extent to which the EU is able to obtain agreement to such terms will depend largely on the relationship that the EU has with the relevant third-country **[see Recommendation 6]**.
- 4.76 In extreme cases, the EU may be able to suspend an applicable treaty, or adopt countermeasures or retorsions against an offending State in the event of non-compliance with security obligations. Such measures are, however, largely untested (at least with regard to invocation by an international organisation such as the EU) and may not be regarded as being justified in respect of non-compliance with Annex 17 of the Chicago Convention.

5. Capacity Building

Scope

- 5.1 The following section of the report describes existing EU programmes that can or have been used for aviation security capacity building projects in third-countries. For each of the programmes covered the report provides an overview of the legal basis, available instruments and implementation principles. Finally the report draws on lessons learned and expert interviews to identify whether similar frameworks are applicable to a wider scope of third-countries and whether or not new programmes are required.
- 5.2 The capacity building programmes referred to in the study terms of reference are the TAIEX and CARDS programmes provided by DG-Enlarge focusing primarily on accession and candidate States. At the request of the Commission, the scope was widened to include EuropeAid projects in the European Neighbourhood such as the EUROMED aviation project.

Background

- 5.3 Programmes that offer third-countries technical assistance and training are often seen as an important component within international aviation security policy. Indeed, "*assisting states in the training of all categories of personnel involved in implementing aviation security measures*" and "*assisting states in addressing security-related deficiencies*" were two stated elements of ICAO's 'Strategic Objective B' to enhance the security of global civil aviation, as set out in its 2009 Annual Report.⁴² This is achieved in part through its 'Implementation Support and Development Programme', of which "*aviation security continues to be a major function*", and through its 'Technical Cooperation Programmes', under which two regional and eight national projects in 2009 helped civil aviation administrations and international airports improve their security systems.⁴³ By way of example, technical cooperation programmes in 2009 included assisting Equatorial Guinea in establishing an autonomous Civil Aviation Authority appropriately staffed to perform security oversight functions; assisting with a project to enhance Indonesia's capabilities in the field of aviation security; and assisting the Civil Aviation Authority of Panama in acquiring technical, operational and management expertise in (amongst other areas) aviation security.⁴⁴

⁴² ICAO, Annual Report of the Council 2009, Doc 9921

⁴³ *Ibid.*

⁴⁴ *Ibid.*

- 5.4 Such programmes are by no means the preserve of ICAO. Indeed, the US has set aside some \$40 million in its 2011 TSA budget allocation for investing in collaborative capacity building programmes in third-countries, providing resources, personnel, expertise and advice to third-countries to facilitate the advancement of aviation security standards.⁴⁵ Similarly, the UK has a relatively large budget available for undertaking capacity building projects in third-countries. At a 2003 summit of G8 leaders, it was agreed that a key measure for enhancing air transport security was to "*co-ordinate aviation security capacity building projects for non-G8 countries*".⁴⁶
- 5.5 It is important to note that capacity building programmes are not exclusively a charitable venture, but are often funded by the state that is receiving assistance. Indeed, approximately 98% of ICAO's 2009 Technical Cooperation Programme (which amounted to some \$129.3 million) was financed by the recipients, with the remaining 2% being financed by voluntary contributions and donors (including development banks).⁴⁷ Equally, the capacity building projects undertaken by the French government are often funded by the recipient state.
- 5.6 In essence, the perceived advantages of capacity building programmes are twofold. Firstly, capacity building may provide a direct means of actually increasing the level of aviation security in third-countries, and secondly the process of undertaking capacity building programmes may provide a state with the means of establishing direct or indirect channels of communication and information sharing with that third-country.

EU Programmes

- 5.7 The EU has a history of providing assistance to third-countries, and indeed claims to be the world's biggest aid donor, with the Commission's EuropeAid office managing external aid and assistance programmes.⁴⁸ A large part of this aid, about one-fifth of the overall official development assistance managed by EuropeAid, is spent supporting infrastructure policies, investment and services in the field of infrastructure and transport.⁴⁹ Further, the EU has invested heavily in capacity building programmes with the aim of facilitating the integration of accession States within the EU. This study has analysed existing and completed capacity building programmes undertaken by the EU, with a view to establishing firstly whether any such programmes relate directly to the field of aviation security, and secondly to establish whether the principles are applicable to other third-countries.

⁴⁵ Budget in Brief, fiscal year 2011, US Department of Homeland Security (http://www.dhs.gov/xlibrary/assets/budget_bib_fy2011.pdf)

⁴⁶ 'Enhance Transport Security And Control Of Man-Portable Air Defence Systems (Manpads) - A G8 Action Plan' (http://www.g8.fr/evian/english/navigation/2003_g8_summit/summit_documents/enhance_transport_security_and_control_of_man-portable_air_defence_systems_-_a_g8_action_plan.html)

⁴⁷ ICAO, Annual Report of the Council 2009, Doc 9921

⁴⁸ See http://ec.europa.eu/europeaid/who/index_en.htm

⁴⁹ *Ibid.*

Community Assistance for Reconstruction, Development and Stabilisation ("CARDS")

- 5.8 In 2000, the EU launched a new aid programme under DG-Enlarge designed to streamline aid to Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia. The programme was legally adopted through Council Regulation (EC) No. 2666/2000,⁵⁰ and although the programme has now closed it does demonstrate how similar programmes could be implemented.
- 5.9 Regulation (EC) No. 2666/2000 stated that CARDS was focused on *"building up an institutional, legislative, economic and social framework directed at the values and models subscribed to by the European Union"*. Under the conditions set out in Regulations (EC) No. 2666/2000, assistance was made available for distributing to various bodies within the specified countries (including NGOs). CARDS requires that the country receiving assistance has *"a formal contractual relationship with the EU"* in the form of a Stabilization and Association Agreement. CARDS provided assistance in respect of a number of areas, including justice and home affairs (which included updating legislation, and advising on proper enforcement of laws and how borders can be more effectively managed), economic and social development, democratic stabilisation, and administrative and capacity building. It is important to note that specific capacity building projects included strengthening national authorities responsible for civil aviation, *"ranging from senior staff appointments to upgrading air traffic control operations"*.
- 5.10 Of particular applicability to this study is the 2006 Regional Aviation Project which provided assistance in the following areas:
- Surveys and reviews of recipient state national authorities operations, legislation, and measures;
 - Translation of European regulation and legislation to recipient state national languages;
 - Workshops, seminars and technical "on the job" training sessions; and
 - On site and off site support.
- 5.11 A primary focus of CARDS training activities has been the training of inspectors. Over 360 inspectors have been trained on cargo and airline security and topics. Inspectors and airport screening staff have been trained on technical topics such as X-ray equipment operation.

⁵⁰ Regulation (EC) No. 2666/2000 on assistance for Albania, Bosnia, Herzegovina, Croatia, the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia repealing regulation (EC) No. 1628/96 and amending Regulations (EEC) No. 3906/89 and (EEC) No. 1360/90 and Decisions 97/256/EC and 1999/1311/EC.

5.12 Between 2006 and 2010 the budget for CARDS was 985,000 Euro. This sum included the cost of translating more than 50 regulations into Western Balkan regional languages. Now that this program is no longer active further funding for accession state capacity building will be made available through the Instrument for Pre-accession Assistance (IPA). DG-Enlarge will be replacing CARDS with a new program in 2012 that will continue to support all aspects of aviation, security included.

5.13 Recommendations for follow up activities to CARDS in the field of aviation security include:

- Provide additional technical support to the Western Balkan Countries to complete Phase 1 of the ECAA Agreement in the process of harmonisation of the national legislative with the EU acquis;
- Assist Croatia to complete the Phase II requirements;
- Support and promote the cooperation between the Western Balkan countries; and
- Assist the Western Balkan countries in enhancing the safety and security levels by providing adequate training to the personnel of concern.

5.14 It is noteworthy in the context of the follow-up activity that to date only Croatia has achieved the phase 1 aviation security objective (European Civil Aviation Conference ("ECAC") doc 30 compliance) outlined in the ECAA agreement.

5.15 The "CARDS-ASACT Phase II project" is designed to establish an effective and efficient Civil Aviation Authority in each of the five countries. This primarily includes training, providing advice, and assistance with drafting legislation.

Technical Assistance and Information Exchange ("TAIEX")

5.16 TAIEX is an instrument managed by the DG-Enlarge of the European Commission, to support partner countries by providing technical assistance and information to assist in the application and enforcement of EU legislation. The TAIEX beneficiaries include not just potential accession States, but also members of the European Neighbourhood Policy (being Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria, Tunisia, Ukraine) and Russia. It is stated that TAIEX is a "*crucial tool to facilitate and intensify cooperation with these countries across a wide spectrum of policy areas*".⁵¹

⁵¹ See TAIEX 2008 Activity Report (http://ec.europa.eu/enlargement/taix/pdf/report-2008/tar08_en.pdf)

- 5.17 One such policy area includes *"the aligning of aviation standards and regulations, aviation security and safety and the creation of a single market for aviation under the European Civil Aviation Agreement (ECAA) which allows for the legal extension of the EU's Single European Sky (SES) programme under the SES-South-East Europe to include the Balkan region"*.⁵² Further, in 2008 a series of multi-country workshops were organised on the "South East Europe Functional Airspace Block", involving Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the former Yugoslav Republic of Macedonia, Kosovo (UNSCR 1244), Montenegro, Romania and Serbia, and a series of assessment missions on the European Civil Aviation Agreement were organised in Croatia, the former Yugoslav Republic of Macedonia, Kosovo (UNSCR 1244), Serbia, Montenegro and Albania.⁵³ Aviation security was covered in a workshop and notably one multi country workshop held in Austria in 2007.⁵⁴ Joint actions were held in 2007 with partners such as the European Civil Aviation Conference (ECAC).
- 5.18 TAIEX assistance is mainly demand driven.⁵⁵ It is given in response to requests sent by officials working for the administrations of the beneficiary countries. The main target groups for assistance are: civil servants, interpreters and legislative translators, judiciaries and law enforcement, parliaments and legislative councils and professional and commercial associations representing social partners.
- 5.19 TAIEX seminars and workshops present aspects of EU acquis to a wider audience as well as to explaining any legislative issues. Seminars may be thematic and relate to the acquis in substance, or they may be more practical dealing with infrastructures and the enforcement of the acquis. They may address the needs of a single country, or those of a group of countries facing similar challenges.
- 5.20 The experts and study visits⁵⁶ are designed to provide short term assistance to beneficiary countries on the approximation and implementation of EU legislation. Study visits are visits made by a limited number of officials of the beneficiary countries to Member State administrations. They give an opportunity to the beneficiaries to work alongside Member State officials to discuss legislation, experience first-hand administrative procedures and infrastructure and see examples of best practices. Expert missions on the other hand involve usually one or two Member State experts travelling to beneficiary partner countries. They provide an opportunity to discuss draft legislation, present examples of best practices and lend assistance where requested.
- 5.21 The program maintains a TAIEX Expert Database⁵⁷ that is a consolidated pool of EU-wide expertise in the acquis communautaire. It is made up of Member State officials who have

⁵² See http://ec.europa.eu/enlargement/taix/dyn/activities/infrastructure_en.jsp

⁵³ See TAIEX 2008 Activity Report http://ec.europa.eu/enlargement/taix/pdf/report-2008/tar08_en.pdf

⁵⁴ See TAIEX 2007 Activity Report (http://ec.europa.eu/enlargement/taix/pdf/report-2007/taix-activity-report-07_en.pdf)

⁵⁵ See ABC guide to TAIEX (http://ec.europa.eu/enlargement/taix/abc-guide/index_en.htm)

⁵⁶ See (http://ec.europa.eu/enlargement/taix/dyn/activities/individual_mobilisation_en.jsp)

⁵⁷ See (http://ec.europa.eu/enlargement/taix/experts/index_en.htm)

proven expertise either in the legislation itself, and the approximation of national legislation to EU norms, or on the subsequent administration, implementation and enforcement of such legislation. The expert stock exchange is an electronic platform whereby TAIEX advertises approved requests for technical assistance from beneficiary countries. This provides for the matching of requests from the administrations with offers of expertise from experts and Member State public institutions.

- 5.22 In the wider aviation field (not necessarily pertaining to security), the 2008 TAIEX activity report⁵⁸ mentions an aviation workshop held in Brussels on aviation in which 12 countries participated and a series of assessment missions on the ECAA held in Croatia, the Former Yugoslav Republic of Macedonia, Kosovo, Serbia, Montenegro and Albania. Among the topics for which study visits were organised the single aviation market was mentioned.⁵⁹

The Euro-Mediterranean Partnership ("EUROMED")

- 5.23 EUROMED was launched in 1995 and aims to establish a common area of peace, stability, and shared prosperity in the Euro-Mediterranean region. The EU works closely with each of its Southern Mediterranean partners to support economic and social transition and reform, taking into account each country's specific needs and characteristics. These programmes are funded under the European Neighbourhood and Partnership Instrument ("ENPI") according to the priority objectives identified in the regional and country strategy papers in order to support the achievement of key policy goals outlined in the 'Action Plans' that each country has adopted with the EU.
- 5.24 With the exception of Syria, each of the Mediterranean countries that belonged to the Euro-Mediterranean partnership (now integrated in the Union for the Mediterranean) has concluded a legally binding 'Association Agreement' with the EU.
- 5.25 In general terms, the framework focuses on reinforcing the Euro Mediterranean Civil Aviation Authorities competency and assuring a regulatory convergence with the international and European regulations. In terms of security, the objective of technical assistance plan is the promotion of air transport security in the region.
- 5.26 The EUROMED aviation technical assistance plan activities were based on outcomes and agreed final conclusions from seminars, comments made by participants and comments made at the EUROMED Advisory Group Meetings. During the first phase of the project,

⁵⁸ See TAIEX 2008 Activity Report (http://ec.europa.eu/enlargement/taiox/pdf/report-2008/tar08_en.pdf)

⁵⁹ See the ECAA and the Western Balkans "Domestic" Reforms and Regional Integration in Air Transport, February 2007 (http://ec.europa.eu/transport/air/studies/doc/international_aviation/2007_02_09_see_air_transport_en.pdf)

between October 2008 and the end of 2009 focus was disseminating knowhow supporting the efforts of beneficiary MEDA countries. Three security areas of assistance were selected: The National Civil Aviation Security Programme ("NCASP"), Security Quality Control (Audits) and Access Control Measures. NCASP reviews considered the status, structure and content of the plan and assess compliance with EU/ECAC template programs. Inconsistencies or areas requiring improvement are identified with the aim of providing suggestions for plan amendments. Further, a review of airport and air carrier security programs for status, structure and content assessing operators level of compliance took place with ECAC template programmes.

- 5.27 Quality control and audit reviews examine the legal framework relating to aviation security; legislation and draft National Civil Aviation Security Quality Control Programmes ("NCASQCP"), the organisation of the Authority, resources available and monitoring of the activities carried out by the consultants. Expertise is provided on establishing the legal framework, defining the activities (tailored to the country) methodologies for audits/inspections, rectification and the training and selection of national auditors.
- 5.28 Assistance on access control measures examines the NCASP provisions for access control and physical airport security. On site visits covered key aspects such as airside/landside boundaries, restricted areas and their access points (location, numbers, procedures and staff screening), terminal facilities and airport perimeter fences and access gates. Levels of compliance with national and international standards and recommendations for improvement and remedial actions both to the NCASP and the physical measures at the airports.
- 5.29 A total of 90 man days were allocated to the security technical assistance (TA) actions out of a total of 630. In order to maintain the principle of equity among the beneficiary countries, the total assistance (either in number of TA or in man days) is similar per country. Each technical assistance to undertake in a specific MEDA country is described in a task sheet which is approved by the Commission. The task sheet includes an identification of the country and the TA, a context and current situation, objectives, prerequisites, actions to be performed and outcomes to be delivered by the expert.
- 5.30 The TAs proposed with their respective man-days are sent to the Commission for approval. Once approved, the list of all the TA, as well as the TAs proposed by the core team for each beneficiary country, are sent the National Coordinator, who is invited to approve or amend this choice. In the latter case, the new option he/she raises must not go beyond the total amount of man-days set by the initial proposal. Besides, he/she is asked to explain the reasons of this amendment.
- 5.31 The core team presents the TAs to perform to the Consortium which selects them by proposing CV's experts. The core team selects at least two CVs per TA when applicable. As

far as possible, the experts have to tackle several tasks, which might be a same TA on different countries and/or different TAs.

- 5.32 Experts are expected to contact the European Delegation of the visited country to inform about their mission onsite and the Expert pays a visit to the Delegation if the Delegate wishes so.

Additional Capacity Building Programmes

- 5.33 The ENPI instrument through which funding is provided for the EUROMED aviation programme is also used to fund capacity building projects in the former Soviet republics of Eastern Europe. The Mediterranean projects are referred to as ENPI - South and the Eastern European ones as ENPI - East. Under the latter, a new EuropeAid programme is currently at the initiation stage.
- 5.34 ENPI–East also provides funding for the TRACECA civil aviation safety security and environment programme. This is part of the wider, regional TRACECA programme promoting the connection of the international TRACECA corridor into Pan European Corridors and Trans-European Networks (TEN-T) among its beneficiary countries, including Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Ukraine and Uzbekistan.
- 5.35 The TRACECA civil aviation capacity building programme includes training for personnel working in the areas of safety and security introducing relevant EASA and ICAO standards and preparing the authorities for closer relations and integration into pan-European aviation structures.
- 5.36 The European Development Fund ("EDF") aid instrument is primarily used to fund assistance for the former European colonies in Africa and Latin America. In Zambia, an aviation sector support program is currently at the contracting stage. A program promoting civil aviation safety and security oversight agencies is at strategic planning stages for Eastern Africa and there is also an on-going aviation project for Central Africa.
- 5.37 Elsewhere in the world capacity building is funded through the Development Cooperation Instrument ("DCI"). There are currently EuropeAid projects at various initiation and implementation stages for India, South Asia, South East Asia and China.
- 5.38 EuropeAid aviation capacity building programs are implemented on the basis of external European policy decision coming out of DG-RELEX. With policy and funding in place, EuropeAid can then begin the consultations with the beneficiary States. Throughout the

initiation and planning stages Commission's aviation experts are invited to participate in reviews and meetings. These meetings are generally attended by representatives from the internal market, air transport agreements & multilateral relations unit (E1).

Summary and Conclusions

- 5.39 The programmes analysed under the terms of reference provide instruments that are applicable to third-countries outside the European and neighbouring regions. On the larger scale, the CARDS program demonstrates how Member State expertise reviewing the regulatory gaps and assisting the West Balkan States supported the institutional and legislative build-up towards EU accession. On a smaller scale, the EUROMED aviation project targeted specific dimensions of the NCASPs definition and implementation through provision of prioritised technical assistance tailored to the individual needs of MEDA beneficiary States. Finally, TAIEX complements the direct provision of assistance as a framework for solicitation of assistance by beneficiary States in the form of workshops seminars and visits. Although these programmes have primarily provided assistance to neighbouring States the scope could be enlarged to include additional third-countries and regions.
- 5.40 Research has shown that the aid and assistance frameworks are a source of both direct and indirect information regarding the existing standards. Programs such as CARDS are underpinned by the recipient State's Stabilization and Association Agreement. The accession programs are based on regular assessment and review visits aimed at identifying and prioritising the aspects of the acquis including aviation security per EU standards. Furthermore, in most cases the accession candidates are also ECAA Contracting States where the Commission has direct airport inspection rights.
- 5.41 The CARDS program in the accession context is by far the exception in this respect. Other aid frameworks, such as the EUROMED aviation project do not require recipient implementation of EU acquis and at best, aspire to strengthen aviation security standards in the wider context of promoting the regional aviation agreement. The legal basis in the regional aid context and existing aid recipient comprehensive agreements do not provide for inspection rights. Further afar, outside the European Neighbourhood, third-country aid programs may have no framework agreement in place at all.
- 5.42 Research has found that often, transport and aviation aid recipients do not necessarily mention security as a priority in their formal requests for assistance. When assistance in the wider aviation context is negotiated it is the Commission that insists that both safety and security are included in the package. As these projects are managed by disparate Commission bodies and contractors reporting to other DG's, the DG-MOVE aviation security experts may have **only** indirect involvement in identifying the areas of concern and setting priorities.

- 5.43 By comparison, safety standards have been enhanced through successful aid programs. Research has suggested that third-countries see the economic benefits more clearly in safety than in security. The same is true of aviation maintenance hubs, third-countries see the advantages of becoming an off-shore maintenance provider to EU carriers if it can satisfy EASA and international safety requirements.
- 5.44 Presently, a number of technical assistance projects are underway in India, South Asia, South East Asia and China. These aviation specific projects are run through AIDCO and include both safety and security topics. The European Aviation Safety Agency ("EASA") is the Commission agency that defines the aviation safety objectives and terms of reference for these aid projects.
- 5.45 Research has indicated that Commission aviation experts hold the view that aid recipients will resist attempts to integrate inspection rights into aid terms of reference. Alternative sources of information on compliance, such as assessment visits used to establish areas for assistance in the recipient States and progress monitoring activities, may achieve the same objective where aviation security experts are involved in the process.
- 5.46 At earlier stages of each project the opportunity exists to influence the scope and lay down the terms for the engagement. For example in the EUROMED project each technical assistance proposal and effort is submitted by the project management to the Commission. Terms of reference are established, then the fulfilment of the assistance is tendered and in many cases a third party provider undertakes the assistance. This is the "intervention point" at which security concerns should be raised and addressed. Research has shown that Member States' that provide technical assistance to third-countries often prefer to send out their own experts instead of contracted experts. Using national assets ensures that practices and standards observed on site finds their way back the aviation security experts and direction and priorities can be closely monitored **[see Recommendation 11]**. For training purposes a pool of approved contractors, accredited by Member State's national aviation security authorities are utilised **[see Recommendation 13]**.
- 5.47 Research indicated concerns relating to co-ordination across appropriate authorities and the EU both with respect both to the implementation of existing and the planning of new capacity building programs **[see Recommendation 10]**.
- 5.48 The vast majority of security assistance is being delivered by independent consultants, and this may even impact the determination of the contents of the aid package, (where this is defined by the consultant) resulting in a lack of consistency in the content of training and other support measures and a lack of visibility and programme feedback. **[see Recommendations 11 and 13]**.

- 5.49 The absence of a formal process of evaluation and assessments visits for the existing programmes was a further issue identified in this study. This limited the ability of the EU to contribute towards the effective management and oversight of these programmes [**see Recommendation 12**].

6. Review of US, Canada, France and the UK

Scope

- 6.1 In this section of the report the relevant legal frameworks in the US, Canada, France and the UK are analysed to identify measures that are being taken to enhance aviation security in respect of flights arriving from third-countries.

United States

- 6.2 Promoting aviation security is a high priority for the US, and as such it is an area in which the US government invests heavily. By way of example, the TSA,- a large part of whose remit concerns aviation security, has approximately \$8.2 billion in budget authority for the fiscal year 2011, and employs over 56,000 full time equivalents.⁶⁰
- 6.3 As in the EU, the US has implemented ancillary legislation and regulations which serve to add various levels of detailed requirements and procedures to the basic aviation security standards set out in Annex 17 of the Chicago Convention. Although the US approach is not always aligned with that of the EU, there is a large degree of compatibility.
- 6.4 The TSA pursues a "legislate and verify" approach to aviation security, by which it seeks to proactively ensure compliance with security requirements through a programme of inspections and audits. It is able to do this in part through establishing direct regulatory oversight of air carriers that fly into the US. Indeed, the approval by the TSA of an air carrier-specific US security programme, and the verification of compliance with that programme through site inspections, are basic conditions for granting the non-US carrier permission to fly into the US. If the US is not satisfied with security standards on the ground employed by the host state it will either issue an update requiring air carriers to undertake additional security measures (for example, through additional gate screening) on all US bound flights, or it may in extreme circumstances revoke carriers' operating from the third-country's right to enter US airspace. This could lead to the situation where certain air carriers are permitted to fly into the US from a particular airport, whilst other carriers operating from the same airport are prohibited.

⁶⁰ See Budget in Brief, fiscal year 2011, US Department of Homeland Security(http://www.dhs.gov/xlibrary/assets/budget_bib_fy2011.pdf)

- 6.5 Through establishing a direct contractual relationship with an air carrier, the TSA establishes the right to conduct limited security inspections even on foreign soil. For example, in 2009, the TSA conducted 5,600 foreign air carrier inspections.⁶¹ There are, of course, limitations on the scope of such audits, as the TSA inspectors may be restricted to inspecting an air carrier's US security programme implementation and may not have a mandate to undertake a wider inspection of the airport's Annex 17 compliance. Furthermore, inspections require the consent and collaboration of foreign authorities. However, air carriers (and indirectly foreign authorities) are heavily incentivized to collaborate with the TSA air carrier inspections for fear that the US will otherwise refuse entry. According to the TSA, the threat of suspension of flights is sufficient motivation for the air carrier to comply with the US's stringent security measures.
- 6.6 In suspending the flights of non-complaint carriers, the US may face similar legal issues to those faced by the EU in respect of the Community list of air carriers which, for safety reasons, are subject to an operating ban (see Chapter 7). The legal position is further explored at sections 7.25 to 7.27.
- 6.7 The emphasis on air carriers' US security programmes as the air carrier's contractual commitment to TSA has resulted in additional sets of security measures being applied to US bound flights in airports all over the world. Depending on the level of security measures at the airport provided by the host state additional passenger and baggage screening may be performed at departure gates and at check-in areas.
- 6.8 The US, through its approach to aviation security, and its regulation of the carrier (in addition to the relationship with the host state), can move swiftly and respond to threats by putting in place additional security measures. The US air carrier security programmes are regularly amended and security directives issued from time to time in response to security incidents such as the 2009 Christmas Day terrorist attack on Delta Air Lines Flight 253. The directive prescribed, amongst other measures, boarding gate pat-down checks of all passengers and in-flight restrictions on passenger movement starting one hour prior to arrival at the destination.⁶²
- 6.9 As a supplement to third-country Annex 17 requirements in the Chicago Convention the US also exercises its rights as a member of ICAO to request other Contracting States to implement specific security measures at airports operating US bound flights. This allows the US to formally request a higher standard of security for US bound flights from the host state that is consistent with the additional requirements laid on the air carriers.

⁶¹ *Ibid.*

⁶² TSA Security Directive SD 1544-09-06 25 December 2009

- 6.10 The US also invests in collaborative capacity building programmes in third-countries, with the goal of improving global international aviation security standards in the long term. Indeed, in its 2011 budget allocation, the TSA had set aside \$40 million to manage international programs around the globe. This included establishing 74 new positions in 15 of the TSA's 19 international offices, including transportation security specialists, to be "*strategically placed in high risk areas such as the Middle East and Africa*".⁶³ The US provides resources, personnel, expertise and advice to third-countries to facilitate the advancement of aviation security standards.
- 6.11 According to the TSA, international information sharing in respect of aviation security concerns could be considerably improved. Save for the information available on the secure ICAO website, at present the TSA has no formal means of obtaining information relating to the findings of an ICAO audit of a third-country, and to the extent that it obtains such information on an informal basis it may be unable to take direct action. Consequently, verification efforts are often duplicated and a State's ability to take enforcement action may be restricted. The TSA considers that a formal system for sharing information between those States who are equally concerned about aviation security would increase the efficiency and effectiveness of international efforts to achieve global compliance with the Annex 17 security standards.

Canada

- 6.12 Canada recognises "*terrorism is a long-term global challenge*" that "*demand[s] a consistent, comprehensive, coordinated, international response based on agreed common goals, norms, standards, values and institutions*."⁶⁴ In recognition of this, since 2001, the Canadian government has committed more than C\$ 2.6 billion to enhancing aviation security.⁶⁵ Furthermore, the protection of the aviation system against unlawful interference, terrorist attacks and use as a means of attacking elsewhere was allocated an additional C\$ 355 in the 2009 budget.⁶⁶
- 6.13 The Aeronautics Act R.S., 1985, c. A-2 ("Aeronautics Act") establishes the legal basis for aviation security regulation in Canada. The Aeronautics Act outlines the Minister's responsibility regarding the certification of foreign air carriers: "*...no operator of an aircraft registered outside Canada shall land the aircraft at an aerodrome in Canada unless the aircraft and all persons and goods on board the aircraft have been subjected to requirements that are acceptable to the Minister*".⁶⁷ In addition to the Aeronautics Act, the Canadian

⁶³ See Budget in Brief, fiscal year 2011, US Department of Homeland Security. (http://www.dhs.gov/xlibrary/assets/budget_bib_fy2011.pdf)

⁶⁴ <http://www.international.gc.ca/crime/terrorism-terrorisme.aspx>

⁶⁵ See <http://www.tc.gc.ca/eng/aviationsecurity/menu.htm>

⁶⁶ See Transportation in Canada - an Overview, 2009 (<http://www.tc.gc.ca/media/documents/policy/overview2009.pdf>)

⁶⁷ Aeronautics Act (R.S., 1985, c. A-2) Section 4.75

Aviation Regulations, produced in 1996 as a revision of the aviation safety regulations, are designed to enhance safety and the competitiveness of the Canadian aviation industry.⁶⁸

- 6.14 Transport Canada, a Canadian Government department responsible for developing regulations, policies and transportation services, is responsible for enforcing the Aeronautics Act within Canada. Additionally, the Canadian Air Transport Security Authority ("CATSA"), established as part of the Canadian government's response to the events of September 11, 2001, is responsible for security screening at airports throughout Canada and sharing responsibility for civil aviation security with government departments, air carrier and airport operators.⁶⁹
- 6.15 Canada operates a foreign air carrier operator certification programme, whereby third-country air carriers are only granted access rights on certification, which is subject to compliance with a number of requirements including that *"the foreign air operator shall conduct flight operations in accordance with the ICAO standards"*.⁷⁰ Although Canada may be entitled to revoke such certification for non-compliance with security standards, such a measure would only ever be used as a last resort in severe circumstances.
- 6.16 Additionally, a bilateral ASA will be established with the host State that will normally include wording regarding aviation security that is based on the ICAO model bilateral clause. Such provisions will, however, inevitably vary in each bilateral ASA, although generally each State will reaffirm its obligations to comply with Annex 17 of the Chicago Convention, and the States will usually agree some degree of reciprocal cooperation in respect of aviation security. Such cooperation may include verification audits of security standards of other State's airports, although any such visits will always be subject to the agreement, consent and collaboration of the inspected State on each occasion. Foreign airport verification visits generally cover all air carriers operating flights to Canadian destinations from the airport, and are coordinated by personnel from the local civil aviation authority.
- 6.17 Where Canada does undertake verification visits, these fall within the remit of Transport Canada, and are prioritised in accordance with threat and risk assessment activities, focusing on States in the process of establishing new flight operations or systems into Canada, or States that have experienced incidents, disasters or other significant security related events. Canada may seek to verify compliance with Annex 17 requirements and, in certain circumstances, compliance with specific Canadian requirements such as the pre-boarding screening of passenger identity and verification against the applicable "no-fly" lists.

⁶⁸ See <http://www.tc.gc.ca/eng/civilaviation/regserv/cars/menu.htm>

⁶⁹ See <http://www.tc.gc.ca/eng/aviationsecurity/page-166.htm>

⁷⁰ See <http://www.tc.gc.ca/eng/civilaviation/regserv/cars/part7-701-407.htm>

- 6.18 Transport Canada may request access to previous ICAO audits performed at the airport as part of the review and may also reciprocate providing access to ICAO audits of Canadian airports. Any such exchange of audit reports is subject to maintaining the confidential nature of the information on behalf of both parties. Where required, a follow-up visit may be scheduled between six months to one year after an initial visit in order to review the application of corrective actions.
- 6.19 The Canadian approach appears to focus on collaboration with the applicable third-country to ensure and promote the application of ICAO Annex 17 standards, and concerns regarding compliance in third-countries are generally resolved through cooperation with the responsible national authority. Indeed, there have been no recent cases (in the public domain) where bilateral ASA provisions for conflict resolution have been invoked in order to enforce aviation security standards, and cooperation appears to be achieved without having to resort to severe measures such as the suspension of rights granted by the bilateral ASA or the revocation of air carrier foreign operator certificates.
- 6.20 Concerns regarding the application of security standards are also addressed through capacity building programmes. Training and technical expertise is provided by Transport Canada inspectors through a budget instrument for anti-terrorism capacity building. Canadian experts provide assistance in third-countries and study visits for local authority personnel to Canada are funded. These efforts are coordinated through ICAO capacity building committees in order to avoid duplication of efforts with other donor states.

France

- 6.21 France is acutely aware of the threats posed to it by global terrorism, and consequently aviation security is a key national concern. As stated in its 2006 'White Paper on Domestic Security against Terrorism', *"the global terrorist threat will likely prove long-lasting. It has acquired a strategic dimension. France is one of its targets. Many French nationals have been among its victims abroad"*.⁷¹
- 6.22 As a Member State France is subject to the applicable European regulations concerning aviation security, and consequently the security standards at its airports and in respect of flights departing France exceed those set out in Annex 17. Internally, France's regulatory framework has been updated in recent years to account for the changing nature of perceived threats. For example, France sought to reinforce its means of preventing terrorism in the Counter Terrorism Act No. 2006-64 of 23 January 2006, introducing new provisions for security and border checks. It is perceived that preventing dangerous passengers from boarding aircraft, and preventing suspicious cargo from being loaded aboard, are essential

⁷¹ 'White Paper on Domestic Security against Terrorism' (http://www.ambafrance-dk.org/IMG/pdf/livre_blanc_english.pdf)

components of a robust security regime. Consequently, French aviation security measures emphasise the importance of ground measures and boarding measures as well as in-flight measures. French security authorities are aware that some third-countries may not meet the basic security standards set out in Annex 17 of the Chicago Convention. Information published by ICAO quantifying third-country “critical element” compliance scores observed that although USAP audits are noted by the authorities they are not considered sufficiently detailed enough to take action as they do not provide a definitive statement of a state's compliance with Annex 17 (not least in respect of the suitability of a state's screening methodologies). Furthermore, authorities are reluctant to request disclosure of ICAO audit reports from third-countries on grounds that reciprocal disclosure would be highly undesirable on a national security level.

- 6.23 France has more than 100 bilateral aviation agreements in place with third-countries, containing clauses (based on the ICAO template) relating to aviation security. These agreements give France, at least in theory, the right to terminate the agreement or request the imposition of additional measures in the event of non-compliance on the part of a third-country.

- 6.24 It is understood that some third-countries cannot meet the Annex 17 standards due to lack of necessary resources, infrastructure and consequently expertise and therefore capacity building is considered a valuable instrument for improving international aviation security. France however does not have a large budget provision for capacity building programmes. As such, French capacity building projects often require beneficiary state financing. Capacity building programmes on their own are not considered to be suitable means for establishing additional audit and inspection rights in a third-country's airports.

- 6.25 Traditionally, France has obtained and shared information relating to security intelligence on an international level using a framework of bilateral relationships, however in recent years it has participated in the multilateral information sharing networks established within NATO, the G8 and through the Joint Situation Centre (“SITCEN”). A French white paper titled “Domestic Security Against Terrorism” comments on the effectiveness of the Situation Centre, stating that *“experience shows that Member States have very different threat perceptions and that their harmonisation is highly useful”*.⁷²

- 6.26 In addition to the security and threat based information gained on a multilateral level, France also places a strong emphasis on the importance of information gained through its various intelligence organisations. However, the highly sensitive nature of such information means that it is not always possible or desirable to share such information with third-countries, whether within the EU or otherwise. There are, in other words, perceived limits to the usefulness of an intra-state information sharing system in respect of international threat and security risks.

⁷² *Ibid.*

United Kingdom

- 6.27 As at the date of submission of this report, the official threat level as published by the United Kingdom Government was "Severe", meaning that a terrorist attack is "highly likely".⁷³ Further, in a report published on 16 March 2010, by the House of Commons Home Affairs Committee, it is stated that "*the threat of terrorist attacks against airports and airplanes... is very real and ongoing*".⁷⁴ It is, therefore, not surprising that the UK invests heavily in national security, and indeed the UK's Department for Transport's Transport Security and Contingencies Directorate (Transec) has a staff of 200 and a budget of £16.8 million and the UK is keen to establish a hard line against terrorism in cooperation with international organisations.⁷⁵ Aviation security is central to the UK's security strategy, and in January 2010 the Prime Minister announced a review of existing security measures at airports, with a view to ensuring that the UK had the "*toughest borders in the world*".
- 6.28 The regulatory landscape in the UK concerning aviation security includes domestic legislation as well as the patchwork of relevant EU Regulations. In particular, relevant UK legislation includes the Aviation Security Act 1982 (which gives effect to the provisions of Hague Convention and Montreal Convention and enables the rules of international agreements for the protection of civil aviation to be applied in the UK), the Civil Aviation Act 1982 (which gives effect to the provisions in the Tokyo Convention) and the Aviation and Maritime Security Act 1990. The effect of such regulation is to ensure that, within the UK, the level of aviation security exceeds the basic requirements set out in Annex 17 of the Chicago Convention.
- 6.29 The UK has bilateral ASAs in place with most third-countries, many of which have been replaced by comprehensive agreements negotiated by the EU. In contrast to the way in which security is managed within the UK's own borders, however, the UK does not mandate the level of security within third-countries that fly to the UK. Although it does in extreme circumstances have the power to prevent direct flights from landing in the UK (as occurred on 19 January 2010 when the British Government suspended direct flights by Yemenia Airways) this right is rarely exercised and instead the UK tends to "*work closely*" with countries where there are specific security concerns in part through the provision of expertise and skills.⁷⁶ In this regard, the UK invests in collaborative capacity building programmes in third-countries designed to enhance the level of aviation security. Recently, the Home Affairs Committee of the House of Commons has criticised the Government for such an approach, claiming that "*rather than merely negotiating a reasonable outcome with the country concerned, the*

⁷³See <http://www.homeoffice.gov.uk/counter-terrorism/current-threat-level>

⁷⁴ House of Commons Home Affairs Committee, 'Counter-Terrorism Measures in British Airports', 16 March 2010

⁷⁵ Transport Committee, UK Transport Security - preliminary report (first report of session 2005-06), HC 637, 30 November 2005, Ev 1 (It is interesting to note, however, that the Government's policy has historically been that the aviation industry should meet the costs of security, to be passed on to the consumer as appropriate -House of Commons Note, "Aviation: Security", SN/BT/1246)

⁷⁶ House of Commons Home Affairs Committee, 'Counter-Terrorism Measures in British Airports', 16 March 2010

Government should be more willing to refuse direct flights, which in turn would create a commercial incentive for all states to improve their security regime".⁷⁷

- 6.30 The UK places a strong emphasis on the regulation of its own national carriers, in particular in respect of flights by those carriers from third-countries where there are specific security concerns. By requiring a UK carrier to implement additional security measures in certain circumstances - or to cease flying from a third-country in very severe cases - the UK is able to limit to some extent the risk imposed by poor security levels in third-countries. In some cases, national carriers are also used as source of information relating observed security standards in third-countries.
- 6.31 Information about the security situation within third-countries is often derived from national security and intelligence gathering agencies, and the UK participates in information sharing networks such as the EU's Joint Situation Centre (SITCEN) and the AVSEC working groups. Ministers within the UK have recently suggested that the EU, the US and other G8 nations should increase the sharing of intelligence about security threats, in order to enhance the ability of all to respond more efficiently to threats.⁷⁸

Summary and Conclusions

- 6.32 The US, Canada, UK and France have established aviation security legislation representing their national approach to the threat of unlawful acts targeting aviation. As ICAO Contracting States they must comply with Annex 17 and both the UK and France also apply EU law and regulations. In each of these national jurisdictions ancillary legislation has traditionally provided for additional measures on top of those prescribed in Annex 17 with the UK and France measures implemented in parallel with EU regulations.
- 6.33 National legislation addresses the challenge of third-country compliance on multiple levels. National air carriers and airport operators are regulated directly by appropriate authorities and can be instructed to apply additional measures on flights departing to or arriving from specific destinations. On the highest level, failure to apply standards can trigger a formal dispute followed by revocation of landing rights and instructing national carriers to suspend operations. In most cases however resolution can be achieved through softer diplomatic channels by raising concerns and entering into negotiations. Legislation also provides the means for capacity building and other expert assistance that can be used to help third-countries improve their standards.

⁷⁷ *Ibid.*

⁷⁸ See http://news.bbc.co.uk/1/hi/uk_politics/8470072.stm

- 6.34 Threat analysis is central to the approach implemented by each of the above States. The appropriate authorities use threat analysis in combination with information on levels of compliance in order to determine the risk posed by substandard implementation of Annex 17 in third-countries. The instruments for risk mitigation vary case by case and generally involve a combination of efforts short of a formal dispute. Where capacity building programs are in place prioritisation of needs, use of national experts, effective quality controls and training standards have all been mentioned as paramount.
- 6.35 The US “legislate and verify” paradigm has established a de-facto right to conduct limited security inspections on foreign soil (see sections 6.4 and 6.5 above) along with a congressional requirement for TSA to inspect and report on foreign air carrier and airports serving US destinations. By enforcing US security programs on foreign carriers the TSA holds air carriers ultimately responsible for their flights to the US and exercises its self-declared right to request additional measures by directive. Although not expressly recognised under international treaties, this process has not been challenged.
- 6.36 Research indicated that the concept of “state responsibility” remains of primary interest (in accordance with Annex 17); however, the possibility of establishing legal precedents for imposing security requirements on third-country air carriers, and performance monitoring of these carriers was considered a positive approach **[see Recommendation 9]**.
- 6.37 Each of these States considers capacity building to be an effective instrument for improving international aviation security standards. They share common concerns relating to coordination of efforts among the donor States. Views were expressed that the Commission as the regional authority for Europe is in an excellent position to coordinate European capacity building efforts among Member States establishing needs and prioritising projects. In addition reservations were raised with respect to coordination of capacity building programs to avoid duplication, the lack feedback and oversight for these programs, and the quality and expertise of the consultants delivering the programmes **[see Recommendations 10,11,12 and 13]**.
- 6.38 Although it was **not** expected that the aviation security standards and operational procedures in third-countries would match the detailed standards for the implementation of common basic standards on Aviation Security as defined by the EU ⁷⁹, the absence of common standards for security equipment in third-countries was mentioned as one reason for the unwillingness of third-countries to invest in equipment that was not certified for use; and/or which could become obsolete with a short timeframe. In addition, the lack of defined security procedures and implementation measures for example for screening of passengers, baggage and cargo, featuring higher levels of detail than provided in Annex 17, was considered an issue impacting

⁷⁹ Commission Regulation (EU) No. 185/2010 of 4 March 2010 laying down detailed measures for the implementation of the common basic standards on aviation security

performance of capacity building programmes, and contributing to inconsistency amongst these programmes [**see Recommendation 14**].

7. The Air Safety Framework

Scope

- 7.1 The legal framework governing aviation safety in the EU has been significantly successful at harmonising and enhancing the safety standards of flights from third-countries. This section of the report presents the existing framework and discusses the evolution of the ICAO Universal Safety Oversight Audit Program and the importance of its international dimension.
- 7.2 The objective of this review is to examine parallels in the aviation safety field that provide EU appropriate authorities with inspection, enforcement and oversight instruments regarding compliance of third-country air carriers with ICAO safety standards. Recommendations will be drawn from conclusions regarding applicable elements that could be adopted or implemented in future security legislation.

Background

- 7.3 The EU's air safety Regulations and "last-resort" criteria for community-wide air carrier operating bans are based on the Chicago Convention and its Annexes. Under the Chicago Convention, Contracting States are responsible for ensuring that aircraft engaged in international air transport registered in their territories are operated in accordance with, and adhere to safety standards at least as stringent as those laid down by the Chicago Convention. These standards and recommended practices (SARPs) are contained within Annexes 1, 6, 8, 11, 13 and 14 to the Chicago Convention and deal with matters such as airworthiness, maintenance, equipment, flight operations, and licensing and training of personnel. Certificates issued pursuant to standards which meet or exceed those laid down by the Chicago Convention must be recognized as valid by other contracting States.⁸⁰
- 7.4 With regard to the enforcement of Chicago Convention air safety standards, and third-country aircraft flying into the EU, the most powerful instrument at the EU's disposal is Regulation (EC) No. 2111/2005 which establishes a Community list of air carriers which, for safety reasons, are subject to an operating ban in the EU, more commonly referred to as the 'blacklist'.⁸¹

⁸⁰ The Convention on International Civil Aviation, Article 33

⁸¹ The Community List of Air Carriers subject to an operating ban was established under Commission Regulation (EC) No. 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban

Summary of the Existing Air Safety Legal Framework

- 7.5 In January 2006 the Commission became authorized to compile the blacklist and the first version of the list was published in March 2006⁸². The blacklist can be applied to all or some of an air carrier's flights/aircraft, or to some or all of the air carriers licensed within an entire State. Sometimes, inclusion on the blacklist is preceded by a warning which, if acted upon appropriately, may prevent or limit such inclusion in practice. Member States are required to enforce the blacklist within their territory. Regulation (EC) No. 2111/2005 establishes that the decision to blacklist an air carrier is based upon the merits of each case taking into consideration whether the carrier meets the relevant safety standards set out in the Annex to that regulation, these include international safety standards.
- 7.6 Carriers and civil aviation authorities may make representations prior to a ban being imposed. There is also an appeal process following imposition of a ban although, contrary to some media reports, no air carrier has yet overturned a ban. The blacklist is compiled by the Safety Unit of DG-MOVE, in consultation with the Air Safety Committee ("ASC") (comprised of experts from each Member State) and is updated at regular intervals by means of amending Regulations.
- 7.7 In compiling the blacklist, DG-MOVE and the ASC rely on several different sources of information. The primary source is information received from Member States via the ASC. This data is collected during ramp inspections carried out by the safety authorities in each Member State and forwarded to EASA. A ramp inspection comprises a physical inspection of an aircraft according to a checklist undertaken during the course of its normal operations between time of arrival at a particular EU airport and subsequent departure.⁸³ A second source of information is the Universal Safety Audit Oversight Programme ("USOAP") audits performed by ICAO. USOAP audits assist assessment of the oversight capabilities and activities of its Contracting States, and provide an indication of whether those bodies within a State responsible for regulatory oversight of air carriers licensed in its territory are able to, and actively undertake, their Chicago Convention oversight responsibilities.
- 7.8 EASA is the EU agency charged with air safety analysis and research, monitoring and implementation, inspections, and technological standardisation. It has also signed Working Arrangements with an additional 16 non-EU States⁸⁴. In addition to the inspection coordination

within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC (Text with EEA relevance), Official Journal of the European Union, L344, 27 Dec. 2005.

⁸² Regulation (EC) No. 474/2006 of 22 March 2006 laying down implementing rules for the Community list of air carriers which are subject to an operating ban within the Community referred to in Chapter II of Regulation (EC) No. 2111/2005 of the European Parliament and of the Council (Text with EEA relevance), Official Journal of the European Union, L84, 23 Mar. 2006.

⁸³ See SAFA ramp inspection selection criteria, <<http://www.iaa.ie/index.jsp?p=147&n=225>>.

⁸⁴ These states are Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Iceland, the Former Yugoslav Republic of Macedonia, Moldova, Monaco, Montenegro, Norway, Serbia, Switzerland, Turkey and Ukraine.

and standardisation roles, EASA is responsible for the ramp inspection Safety Assessment of Foreign Aircraft ("SAFA") programme database.

- 7.9 Under Commission control and EASA management, the SAFA programme is becoming increasingly standardised and for all intents and purposes, less voluntary and more centrally regulated than was the case under ECAC (which first introduced SAFA in 1996). Member States are legally bound by SAFA and EU accession States see the number and quality of their inspections rise through the application of the EASA training programme. It is envisaged that larger EU members which currently conduct relatively few SAFA inspections will increase their inspection rate under the new points system. Most importantly, it is envisaged that SAFA will continue to increase its focus on third-country air carriers outside the European Common Aviation Area. SAFA ramp inspections will be conducted on aircraft that have not landed at airports in the EU, and at least in theory, aircraft landing or transiting any airport in the Caucasus or Eastern Europe are now liable for a SAFA ramp inspection by state inspectors.
- 7.10 The current safety approach can be defined as ex-ante. It is focused on ex-post regulation including ramp checks, incident reports, standardisation visits at EU operators confirming that they are acting on directives, accident investigations and air worthiness history.
- 7.11 The weakest link in the ex-ante approach is that there are no implementing rules for third country air carriers flying into the EU. By April 8 2012 there will be an authorisation process including implementing rules under article 9 of Regulation (EC) No; 216/2008⁸⁵ governing foreign carriers. Article 9 relates to "*Aircraft used by a third-country operator into, within or out of the Community*".
- 7.12 Article 9 stipulates in paragraph 1 and 2 that: 1. Aircraft referred to in Article 4(1) (d), as well as their crew and their operations, shall comply with applicable ICAO Standards. To the extent that there are no such standards, these aircraft and their operations shall comply with the requirements laid down in Annexes I, III and IV, provided these requirements are not in conflict with the rights of third-countries under international conventions; and 2. Operators engaged in commercial operations using aircraft referred to in paragraph 1 shall demonstrate their capability and means of complying with the requirements specified in paragraph 1.

⁸⁵ 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

ICAO Universal Safety Audit Oversight Programme

- 7.13 Initially, the results of USOAP audits were strictly confidential, however, over time these have become more transparent. The original aim of increased transparency and disclosure was to identify areas for States to work on together on addressing aviation safety issues. Proactive action was intended to achieve safer skies, as reaffirmed by the Assembly's insistence that the information derived from audits should be restricted to safety related usages. Achieving transparency of audit findings has been an on-going process within ICAO. In 2001 the principle of transparency and disclosure was first established with the proposal "*ICAO [should] publish a non-confidential audit summary report of each completed audit. The summary report [should] contain sufficient information to enable States to form an opinion as to the safety oversight status of the audited State*". It was also proposed that the report should indicate improvements made post-CAP (Corrective Audit Procedure) implementation.⁸⁶ During the 165th Session of the ICAO Council, it was decided to share non-confidential information to enhance aviation safety. A webpage was recommended to share audits, follow-up summary reports, and successful resolution of safety deficiencies. In 2002, a webpage dedicated to USOAP became fully operational and provided links to all audit and follow-up summary reports published. Access is limited to States and the ICAO Secretariat.
- 7.14 The 35th Assembly directed the Secretary General to make the final safety oversight audit reports available to States, and to provide access to all relevant information derived from the Audit Findings and Differences Database ("AFDD"). The Assembly also directed the Council to develop a procedure to inform all States of any State which posed a significant safety compliance concern.
- 7.15 The initial generic mandate to increase transparency opened the door to the identification of non-compliant States. However, ICAO has a specific target in mind: States with severe and persistent safety oversight shortfalls. As of 31 October 2004, all audit summary reports were published and distributed to States in addition to relevant information from the AFDD. To deal with the development of a procedure to inform all States about a State with significant safety compliance shortcomings, the Secretariat developed a Procedure of Transparency and Disclosure⁸⁷ to analyse relevant data, and if significant compliance shortfalls persisted the matter would then be brought to the ICAO Council's attention for a recommendation to be made. If the State fails to carry out such recommendation all States should be informed. The procedure was approved unanimously by the ICAO Council.
- 7.16 In March 2006, ICAO held a Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety (DGCA/06). The Secretariat proposed that final audit reports

⁸⁶ Currently, States are able to post their improvements on the ICAO website; however, the information posted by the State after the audit is not verified by ICAO.

⁸⁷ See ICAO Council, Procedure of Transparency and Disclosure, 174th Session, Agenda Item No. 14.5: *Safety Oversight*, ICAO Doc. CWP/12497 (2005) [C-WP/12497].

derived from the initial and current audit cycles should be made publicly available through the ICAO website.⁸⁸

- 7.17 On 29 November 2006, the ICAO Council approved the following mechanism to deal with significant safety concerns.⁸⁹ A “significant safety concern” occurs *“when a holder of an authorisation or approval does not meet the minimum requirements established by the State and by the Standards set forth in the Annexes to the Chicago Convention are not met, resulting in an imminent safety risk to international civil aviation”*.⁹⁰
- 7.18 Many States still do not benefit from ICAO initiatives to improve SARPs implementation on safety because of the lack of technical, financial, or human resources. For this reason ICAO has developed different sources to assist States in resolving safety-related shortcomings, such as: the ICAO Technical Co-operation Bureau; the Implementation Support and Development Branch; the International Financial Facility for Aviation Safety; and a partnership system to analyse causes and develop and implement solutions.
- 7.19 Currently, ICAO, States, other international organisations, air navigation service providers and financial institutions are promoting global, regional and national programmes to encourage cooperation and assistance to resolve safety-related deficiencies identified by the USOAP. Today, it is difficult to argue that a State cannot improve its level of compliance with the SARPs or cannot implement its CAP. The ingredients required in this formula are transparency, sharing of information and political will to fulfil the obligations prescribed by the Chicago Convention and its Annexes.

Summary and Conclusions

- 7.20 The development of EU air safety regulations, the sharing of safety audit information, the existence of the Community list of air carriers subject to an operating ban (the “black-list”) and the authorisation process under article 9 of Regulation (EC) No. 216/2008⁹¹ governing foreign carriers, are measures that are viewed as having benefited and enhanced the safety of third-country air carriers operating to the EU. This study considered the applicability of such a model to security of flights from third-countries.

⁸⁸ See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety - Transparency and Sharing of Safety Information, Theme 2: Improving aviation safety, ICAO Doc. DGCA/06-WP/5 Revised (2006) § 2.13.

⁸⁹ See Session of the ICAO Council. Review of the Memorandum of Understanding (MOU) relating to the conduct of safety oversight audits under the comprehensive systems approach, 179th Session., 12th Mtg., Subject No. 14.5: Safety Oversight, ICAO Doc. C-WP/12774 (2006) § 2.2 and 2.3.

⁹⁰ *Ibid.*, ICAO Doc. C-MIN 179/12 (2006) § 49

⁹¹ Regulation (EC) No. 216/2008 of 20 February 2008 on common rules in the field of civil aviation and establishing a European Safety Agency, and repealing Council Directive 91/670/ECC Regulation (EC) No. 1192/2002 and Directive 2004/361EC

- 7.21 The ICAO safety model is viewed as having been successful in many ways, and specifically in reducing the rate of safety related accidents involving passenger fatalities in scheduled air transport operations worldwide. For the period 1994-1999 this was 1.3; it declined to 0.8 for the period 2000-2004, a 61.5% reduction.⁹²
- 7.22 The recognition by ICAO of EASA as a “responsible authority” that requires access to ICAO information in order to act on behalf of Member States that are contracting parties to the Chicago Convention provides unofficial direct access to ICAO safety information. Attempts to enhance the relationship of the EU with ICAO (see sections 4.65 to 4.71) **[see Recommendation 2]**.
- 7.23 Much of the information relating to safety violations comes as a result of planned or random ramp inspections, which are performed after an aircraft lands at an airport within the EU. Using this type of approach to non-safety issues such as security seems less appropriate because evidence of violation will often no longer be apparent on landing. Nonetheless, it may still have value as a possible means of checking adherence to Chicago Convention security SARPS in the State of origin of third-country flights to the EU. For example, random physical checks of passengers and baggage aboard such aircraft could be used to test if they had passed through Chicago Convention compliant security procedures before their departure. Likewise, passengers aboard third-country aircraft could be randomly interviewed (on a volunteer basis) to record their security experiences before departure against a checklist. Additionally, third-country carriers could be subjected to a checklist based security scrutiny upon the arrival of one of their aircraft in the EU **[see Recommendation 5]**. The effectiveness of these types of steps could be enhanced by being combined with introduction of a requirement on Community air carriers operating to/from third-countries to supply information about third-country security and compliance oversight through a confidential mandatory reporting system of the type which already applies to occurrence reporting⁹³ **[see Recommendations 3 and 4]**.
- 7.24 The “name and shame” policy adopted by the safety authorities through the Community blacklist has proven to be effective and powerful means of exercising a degree of safety regulation over third-country air carriers over whom no authority in the EU has any regulatory oversight rights under the Chicago Convention and, notwithstanding its apparent intrusion into the authority of regulatory oversight bodies within third-countries, has not been successfully challenged and has well stood the test of time. Security certification of third-country air carriers (and airports) is not within the remit of any Member State, EASA or the EU. However, the success of the Community safety blacklist indicates that an approach to security standards which has parallels with the safety blacklist seems unlikely to be controversial outside the EU. Such an approach could be in many different forms, for example, a “white

⁹² See Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety; *Worldwide and Regional Trends in Aviation Safety*, 6th Session., Theme 1: The status of aviation safety, ICAO Doc. DGCA/06-WP/2 (2006) § A-3.

⁹³ See Directive 2003/42/EC of the European Parliament and of the Council of 13 June 2003 on occurrence reporting in civil aviation

list" of approved third-country air carriers and/or airports could be used in place of the more conventional blacklist, which may be particularly appropriate in relation to third-country airports [see **Recommendations 8 and 9**].

- 7.25 It is possible that third-countries and their airlines may react to a security based operating ban or restrictions on the grounds that it would represent an infringement of the customary international law principle of sovereignty over airspace (as reaffirmed in the Chicago Convention). However, as the blacklist would not be an extraterritorial act, it would have no impact whatsoever on the sovereignty of third-country States, who would remain free to impose their own security rules and regulations. It is assumed that these considerations were analysed at the time of the introduction of the safety based operating ban blacklist in 2006 and, more recently, the extensions of the EU Emissions Trading Scheme to aviation from 1 January 2012.
- 7.26 Were a third-country air carrier banned from operating (wholly or partially) to the EU on security grounds, a tension may arise between such a ban and the terms of the applicable bilateral or multilateral ASAs between Members States and the third-country concerned. The extent to which this is the case will, of course, depend on the terms of the applicable agreement in each instance. Such a tension has arisen in practice in relation to the safety based blacklist since its introduction in 2006 without any apparent major problems, even though a least one major flag third-country flag carrier has found itself subject to a ban since then. As has already been noted, States have traditionally been reluctant to seek to enforce ASAs through the mechanisms included therein. In any event the risk of a dispute escalating as a result of a ban could be mitigated as follows:
- the prohibition of flights could itself be considered a legitimate "countermeasure", that was necessitated by the States failure to adhere to the requirements of Annex 17 of the Chicago Convention (although it may, in practice, be hard to demonstrate that such action was proportionate, particularly in cases of minor infraction - see section 4.61);
 - wording could be included in the relevant ASA (or, in theory, by way a horizontal agreement on behalf of all Member States) that expressly permits such action to be taken in certain events, including where there are legitimate security concerns arising out of non-compliance with Annex 17 [see **Recommendation 7**];
- 7.27 With regard to possible use of "white lists", it is relevant to note that it could have the potential to lead to liability issues in practice if, for example, a third-country carrier not included in a "white list" causes loss or damage to its passengers in circumstances caused directly by non-adherence to Chicago Convention security SARPS. In such a situation, there may be a risk of litigation by affected passengers against the EU.

8. Information Sharing Networks

Scope

- 8.1 Back in 2004 the Madrid train bombings prompted a revision of the EU action plan that contained 150 initiatives constructed around objectives set out in the Declaration on Combating Terrorism⁹⁴, adopted by the European Council following the attacks. The declaration called upon Member States to “Ensure that law enforcement agencies (security services, police, customs etc.) cooperate with each other and exchange all information relevant to combating terrorism as extensively as possible”. Later, in November the same year the EU adopted the Hague Program on strengthening freedom, security, and justice in the EU enhancing information sharing among counterterrorist agencies as a critical element of the cross border counter terror effort.
- 8.2 EU cooperation on justice and home affairs dates back to the Maastricht treaty that designated justice and home affairs as the third pillar of European integration. In terms of information sharing, one of the many concrete results on the treaty⁹⁵ was the full activation of Europol in 1999 as a consecutive body for sharing information and analysis among Member States’ law enforcement agencies.
- 8.3 This section of the report will summarise existing information-sharing instruments that have been set up primarily to provide added value to Member States by strengthening national capabilities, facilitating cooperation and developing collective capabilities. The conclusions section examines to what extent the existing instrument principles could be used to facilitate an exchange of information on third-country aviation security standards between Member States and the EU. Specifically, whether or not they are suitable for exchanging information on third-country areas of non-compliance with Annex 17 requirements and identify possible enhancements and improvements.

Joint Situation Centre

- 8.4 The Joint Situation Centre (“JSC” or “SITCEN”) is the intelligence body of the EU under the authority of the High Representative of the Union for Foreign Affairs and Security Policy. The role of SITCEN is “to provide the Council with high quality information” on matters of public

⁹⁴ See Declaration on Combating terrorism, 25 March 2004 (<http://www.consilium.europa.eu/uedocs/cmsUpload/DECL-25.3.pdf>)

⁹⁵ See EU Focus Newsletter, May 2005 (<http://www.eurunion.org/News/EUNewsletters/EUFocus/2005/EUFocus-Terror.pdf>)

security, in the form of early warnings, assessment, services in case of emergency, and by constituting a contact between the High Representative and the intelligence community of the countries of the EU. In 2002, the Situation Centre started to be a forum for exchange of sensitive information between the services of France, Germany, Italy, the Netherlands, Spain, Sweden and the United Kingdom. While its initial mission focused on assessment of situations abroad, in June 2004, its domain of interest was expanded to terrorist threats within the EU.

8.5 On 27 July 2010, the agency was integrated into the European External Action Service (EEAS)⁹⁶. As of 2010, the Situation Centre is divided into three units:

- the Civilian intelligence Cell ("CIC"), comprising civilian intelligence analysts working on political and counter-terrorism assessment;
- the General Operations Unit ("GOU"), providing 24-hour operational support, research and non-intelligence analysis; and
- the Communications Unit, handling communications security issues and running the council's communications centre ("ComCen").

8.6 SITCEN has one hundred staff, based in Brussels. It cooperates with EU Military Staff and the Council to operate the European Union Satellite Centre, which provides satellite imagery and analysis.

FRONTEX

8.7 The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ("FRONTEX") was created as a specialised and independent body tasked to coordinate the operational cooperation between Member States in the field of border security. The activities of FRONTEX are intelligence driven. FRONTEX complements and provides particular added value to the national border management systems of the Member States.

8.8 As an intelligence-driven agency whose core activity is operations it conducts risk analysis as a basis for operations. The agency operates a situation centre that gathers and collates information from partner countries, within and beyond the EU's borders, as well as from open sources such as academic publications and the press, to create as clear a picture as possible of the ongoing situation at Europe's frontiers. This information is then analysed using FRONTEX's own system, CIRAM ("Common Integrated Risk Analysis Model"), which has been developed over the course of the agency's activities in close cooperation with its

⁹⁶ See Europa Press Release 12589/10, 26 July 2010 - Council Establishes the European External Action Service

partners. The result of this is a comprehensive model of the strengths, weaknesses, opportunities and threats at the external borders enabling FRONTEX to balance resources and risk with a view to neither under nor over-protecting the border.

- 8.9 Since 2007 FRONTEX has been connected to ICONet, for the purpose of exchanging information with Member States regarding risk analysis, preparation of joint operations and return. The ICONet was established by Council Decision 2005/267/EC4 and has been operational since 2006. It is a secure web-based network for information exchange between the migration management services on irregular immigration, illegal entry and immigration and return of illegal residents.
- 8.10 FRONTEX participates in the meetings of the CIREFI, the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration which meets regularly in the EU Council. CIREFI assists Member States in exchanging information on legal immigration, in preventing illegal immigration and unlawful residence, on combating smuggling of human beings, improving the detection of false or falsified travel documents and on ways of improving return practices.

European Police Office

- 8.11 Originally based on a Convention signed by Member States in 1995, the European Police Office ("EUROPOL") has been in operation since 1999. The Council Decision 2009/317/JHA confers upon EUROPOL the status of EU agency as from 1 January 2010.
- 8.12 EUROPOL's purpose is to assist Member State police forces in order to improve their cooperation in the prevention and fight against the most serious forms of international crime, such as terrorism, drug trafficking and people smuggling.
- 8.13 Europol officers have no direct powers of arrest, they support Member State law enforcement by gathering, analysing and disseminating information and coordinating operations. Europol partners use the input to prevent, detect and investigate offences, and to track down and prosecute those who commit them. Europol experts and analysts take part in Joint Investigation Teams which help solve criminal cases on the spot in EU countries.
- 8.14 Some 130 Europol Liaison Officers are based at Europol headquarters in The Hague, Netherlands. These ELOs are seconded to Europol by the Member States and non-EU partners. They guarantee fast and effective cooperation based on personal contact and mutual trust.

- 8.15 Europol produces regular assessments which offer comprehensive and forward-looking analyses of crime and terrorism in the EU. The European Organised Crime Threat Assessment ("OCTA") identifies and assesses emerging threats. The OCTA describes the structure of organised crime groups and the way they operate, and the main types of crime affecting the European Union. The EU Terrorism Situation and Trend Report ("TE-SAT"), published annually, gives a detailed account of the state of terrorism in the EU.

- 8.16 In order to support its operations and deliver operational and strategic services to Member States, Europol maintains and develops a technically-advanced, reliable, efficient and secure telecommunication infrastructure. The backbone of the infrastructure is a network, connecting all Member States and a growing number of non-EU States and third parties with which Europol has established cooperation agreements.

- 8.17 The primary purpose of the Europol Information System is the detection of matches among data contributed by different Member States and third parties (via Europol).

- 8.18 The Secure Information Exchange Network Application ("SIENA") is a new (2009) communication tool designed to enable the swift, secure and user-friendly exchange of operational and strategic crime-related information and intelligence between Member States, Europol and third parties. Significant design emphasis was put on data protection and confidentiality and implementation of best practices in law enforcement information exchange.

General European Rapid Alert System

- 8.19 There are also mature networks in the EU established to support coordinated actions in which DG-MOVE is a participant and plays a coordinating role. The general European rapid alert system ("ARGUS") is an example. ARGUS has the capability to link all specialized systems for emergencies and a central crisis centre ("CCC") which brings together all relevant EU services during an emergency. ARGUS is tasked with assuring a coordinated and effective management of major multi-sectoral crisis that require a reaction at the European Community level. ARGUS allows each Directorate General to inform other Directorates General and services of the beginning of, or risk of, a multi-sectoral crisis via an alert mechanism, and provides coordination processes that can be activated in case of crisis where there is a cross-border or multi-sector dimension and the EU provides added value. Where a health crisis is involved ARGUS will coordinate actions with DG-SANCO (Health and Consumers) and the ECDC (European Centre for Disease Prevention and Control), and ECDC can itself mobilize ARGUS, and DG-HOME. ARGUS performed crises management exercises annually, with different scenarios being played out each year.

Monitoring and Information Centre

- 8.20 In addition, where there is an element of crisis management, Member States can ask for assistance from the Monitoring and Information Centre ("MIC"). It is available on a 24/7 basis and is staffed by duty officers working on a shift basis. It gives countries access to the community civil protection platform. Any country affected by a major disaster, inside or outside the EU, can launch a request for assistance through the MIC.
- 8.21 MIC is activated during emergencies when it acts as a focal point for the exchange of requests and offers of assistance. It disseminates information on civil preparedness and response to participating States and to non EU States, and disseminates early warning alerts on natural disasters. It facilitates the provision of European assistance at HQ level by matching needs to offers, identifying gaps in aid also appoints UK experts to assist at the field level.
- 8.22 In 2009 the Commission established a policy package on chemical, biological, radiological and nuclear ("CBRN") security. The Commission CBRN action plan is based on prevention, detection and preparedness and response, and it has been implemented predominantly by already existing national, EU and international structures.⁹⁷
- 8.23 One other EU Directorate General is involved in security, DG Human Resources and Security. The security function of the Directorate General is defined as *"providing a single contact point outside office hours and monitoring the security situation in collaboration with the national authorities in preventing or responding to emergencies; raising awareness amongst staff of security issues; investigating all illegal acts committed on Commission premises; and, devising and implementing data security and secure communications measures to facilitate the secure exchange of confidential information both within and outside the Commission."*⁹⁸

Summary and Conclusions

- 8.24 This research has shown that the EU has in place multiple instruments that facilitate and support information sharing among Member State law enforcement and emergency response agencies. These systems have been designed to support the specific information sharing needs of the responsible agencies while providing the technical infrastructure to address security and confidentiality concerns.

⁹⁷ Europa Press Release IP/09/992, June 2009 - The Commission proposes a new policy to enhance chemical, biological, radiological and nuclear security in the EU.

⁹⁸ See DG Human Resources and Security web site (http://ec.europa.eu/dgs/human_resources/index_en.htm)

- 8.25 The nature of information on aviation security standards in third-countries is such that the subject matter is wide and dispersed. Geographically speaking, many of the individual airports from which flights depart to the EU would have to be considered to some extent. This research has found that some Member States and other concerned nations perform similar threat and risk assessments regarding destinations serving their own airports. However, as the regional body, the EU would need to consider a wider span of destinations than any single Member States calling for a systemic competence to collate, analyse and disseminate the information.
- 8.26 It was suggested, at the outset of this study, that a formal relationship for sharing of information between the Commission and Member State intelligence agencies is being utilised by DG-HOME for the exchange of information on explosives. This research has found that these activities are performed primarily in an informal voluntary capacity on behalf of the Member State agencies through the joint working groups.⁹⁹
- 8.27 Member State experts that provided information to this study emphasized the importance of threat analysis in any evaluation of the aviation security measures they expect to see on the ground. As the Commission does not generally collect or analyse intelligence information it would have to base any risk analysis activity on information from other sources. Possible sources of information include capacity building visits and activities, ICAO audits, the travelling public and air carrier crew and staff **[see Recommendations 3 and 4]**.
- 8.28 Agencies such as FRONTEX and EUROPOL perform data collection and analysis activities in the EU, a similar approach may also be applicable for aviation security. By forming a dedicated body tasked with the gathering, collating and analysis of information available from the sources above the EU could provide added value to Member State analysis. Development of a risk assessment methodology independent of intelligence information could provide necessary data for entering into consultations with third-countries and the prioritization of capacity building and other measures in order to improve the situation on the ground **[see Recommendation 1]**.

⁹⁹ Due to the public nature of this report it is possible that additional frameworks for confidential information sharing were not shared with this research

9. Recommendations

Scope

- 9.1 The final section of this study includes a number of recommendations that could be adopted to improve and monitor the application of aviation security standards for flights from third-countries to the EU more effectively. which when combined could constitute a proposal for possible action that could enhance the systematic exchange of information between Member States on third-country threat levels and security risks.
- 9.2 The structure of the recommendations, and a summary of how the individual recommendations could form part of a single coherent solution, is set out below.

Overview

- 9.3 In order to establish an effective solution to concerns regarding civil aviation security standards in third-countries, the EU needs to secure the ability to **obtain useful information** in respect of third-country compliance with security standards, and subsequently to **take coordinated and effective remedial action** in response to such information. Indeed, 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 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. The recommendations are therefore set out in the following three broad categories:
- recommendations that relate to the ability of the EU to **obtain useful information** in respect of third-country compliance with security standards (see Recommendations 1 to 5);
 - recommendations that relate to the ability of the EU to **take coordinated and effective remedial action** in response to such information at the "macro level" (see Recommendations 6 to 7); and
 - recommendations that relate to the ability of the EU to **take coordinated and effective remedial action** in response to such information at the "micro level" (see Recommendations 8 to 14).

- 9.4 With regard to obtaining reliable and current information, some of the recommendations relate to establishing new mechanisms for obtaining information, such as obtaining information from passengers and air carriers (see Recommendations 3 and 4), through *ex-post* security checks (see Recommendation 5), or through enhanced engagement with ICAO (see Recommendation 2), whereas other recommendations relate to ways in which better use could be made of existing sources of information. In particular, it is recommended that the EU establishes a dedicated aviation security information agency (see 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.
- 9.5 With regard to how the EU could seek to take coordinated and effective remedial action, the recommendations fall into two further sub-categories categories:
- enforcement at the government or State level through the principles of international law and the enforcement of treaties or international agreements (i.e. enforcement at the "**macro level**")
 - enforcement through alternative means that do not seek to enforce rights directly against a sovereign State (i.e. enforcement at the "**micro level**").
- 9.6 At the macro level, the EU may have, or may be able to establish, certain rights to enforce compliance with Annex 17 by taking lawful action against the offending third-country at a State level. Even though not a signatory to the Chicago Convention, the EU could contractualise the Annex 17 requirements by way of inclusion in international agreements between States, thereby ensuring that a third-country owes the EU an enforceable legal duty to comply. An agreement could also be used to legitimise other enforcement action that the EU may take, by effectively ratifying at a State level the EU's right to take enforcement at the micro level.
- 9.7 Action that the EU may take in the event that obligations under such an international agreement are breached may include following the dispute resolution procedure contained in that agreement, or otherwise potentially seeking to make use of legitimate and proportionate retorsions and, in extreme cases, countermeasures. It is therefore recommended that the EU should continue establishing a robust framework of suitable agreements with relevant third-countries, incorporating, as far as possible, provisions based on the model aviation security clause that is set out below (see Recommendation 6) . Also at the macro level, the EU may seek to further steps to enhance its engagement with ICAO, thereby enabling it to influence Contracting State's obligations in respect of civil aviation security (see Recommendation 2).

- 9.8 It is, however, important to note that dealing with compliance at such a State level is an inevitably slow and cumbersome process, and in any event, is unlikely to be a suitable and sustainable method of dealing with non-compliance with Annex 17 in all but the most extreme of cases, and consequently the EU should also ensure that it has the means to take coordinated and effective remedial action in response to such information at the micro level.
- 9.9 Indeed, measures taken to promote aviation security standards at the micro level may provide for a significantly more responsive and adaptive approach to compliance than is afforded on the macro level, and may serve to facilitate the monitoring of actual compliance on a more regular basis. As such, recommendations include monitoring and regulating third-country air carriers (see Recommendation 9), establishing a mechanism for preventing flights from entering the EU from certain third-country airports (see Recommendation 8) and undertaking targeted and coordinated capacity building programmes (see Recommendation 10).
- 9.10 It is envisaged that the adoption of the recommendations in their entirety would provide the EU with the best prospect of ensuring third-country compliance with Annex 17 based measures, as those measures which relate to compliance at a macro level would be enhanced by, and would themselves enhance, those measures which relate to compliance at a micro level. It is, of course, also recognised that many of the recommended measures are not without their disadvantages and/or impracticalities, whether economic, political or administrative, and may not in themselves be guaranteed to be entirely effective means. As such, for each recommendation the advantages and disadvantages have been set out.
- 9.11 Figure 1 provides a schematic overview of an EU Aviation Security Information Agency that could be established to coordinate and implement the above recommendations.

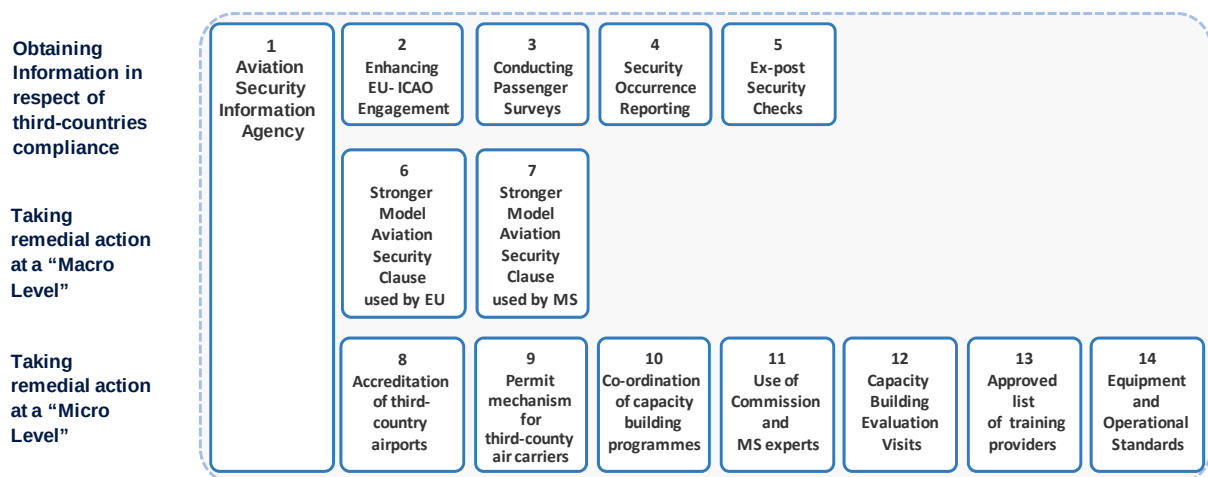


Figure 1 - Study Recommendations

- 9.12 To the extent that the EU (or, in certain cases, the Commission) does not currently have the exclusive competence or authority to implement the recommendations, not least as the EU

does not have exclusive competence in transport policies given that transport is included in the specified shared competencies set out in article 42 (g) of the Treaty on the Functioning of the European Union ("TFUE"), the following would apply:

- i. Based on articles 100 (2) and 294 of the TFUE, the Commission (in consultation, with the relevant committees) would need to draft a proposal for legislative action, which would require scrutiny and approval of the EU Parliament and Council. Given that Article 4(2) of the Treaty on European Union states that "*national security remains the sole responsibility of each Member State*", there is a risk that such action may be seen as being outside of the EU's competence, however it could legitimately be argued that this is a question of security of persons and property as opposed to "national security", and as such may fall within Article 3(5) of the Treaty on European Union, which States that "*in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace [and] security...*".
- ii. Indeed, the purpose of such action would be almost identical to the purpose behind equivalent measures that are already adopted in the field of aviation safety, and as such the principles advocated in the preamble to Regulation (EC) No 2111/2005 could apply equally to the field of aviation security: "*Action by the Community in the field of air transport should aim, as a priority, at ensuring a high level of protection for passengers from safety risks. Moreover, full account should be taken of the requirements of **consumer protection in general**,*" (emphasis added) save that security goes beyond passengers and includes other persons (e.g. persons on the ground) as well as property.¹⁰⁰
- iii. Applying the provisions of the subsidiarity principle as set out in Article 5 (3) of the Treaty of the European Union, it could be argued that the implementation of a particular recommendation through action at the European level will better achieve the objectives of the proposal for one of a number of reasons. Firstly, the EU has long established competence in respect of aviation transport, and aviation security generally. Indeed, it has established a genuine single aviation market with common rules safeguarding civil aviation (such as Regulation (EC) No. 300/2008). The EU also demonstrated competence in this area through various activities, including the implementation of horizontal agreements used to modify Member States' bilateral ASAs with third-countries (although this was for the specific purpose of ensuring that such bilateral ASAs did not infringe EU law), and the establishment of comprehensive aviation agreements with third countries. Certainly, the adoption of an EU common set of basic rules (including, by way of example, the adoption of a process which has the effect of requiring third-country air carriers or airports to acquire some form of EU approval based on solely on security criteria) will ensure fair play between the aviation partners
- iv. Secondly, it could also be argued that due to the scale or effects of the proposed action and the need for uniformity, the implementation of a particular recommendation cannot be

¹⁰⁰ Regulation (EC) No 2111/2005 Of The European Parliament And Of The Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC

sufficiently undertaken by Member States, either at central level or at regional and local level, and therefore would be better achieved at the EU level in accordance with the above mentioned principle of subsidiarity. Certainly, it seems very unlikely that a harmonized, effective solution could be achieved at a Member State level (see, by way of example, sections 4.51 to 4.54), and as such would comply with the subsidiarity principle.

- v. It may also need to be argued that the implementation of a particular recommendation would be a proportionate response in all the circumstances that does not exceed what is necessary to achieve the above mentioned objectives, complying therefore with the proportionality principle as set out in article 5 (4) of the Treaty of the European Union.

Recommendations that relate to the ability of the EU to obtain useful information in respect of third-country compliance with security standards

Recommendation 1: Establishing an EU aviation security information agency

- 9.13 To enhance information sharing between Member States about security risks and vulnerabilities, the EU should consider establishing an EU Aviation Security Information Agency, which would serve as centralized body to obtain, receive and analyse information relating to third-country aviation security standards and their enforcement locally. The agency would liaise with Member State authorities and EU agencies as appropriate, for example through providing risk assessment recommendations to the AVSEC committee (regarding airport evaluation and air carrier certification). The new agency could be in addition to, but not in substitution for, Member States national aviation security responsibilities.¹⁰¹
- 9.14 It envisaged that an EU Aviation Security Information Agency would be in a position to implement the various recommendations contained in this report that relate to establishing additional sources of information (such as Recommendations 3 and 4). In so doing, 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.
- 9.15 An EU Aviation Security Information Agency may also be ideally positioned to undertake, or be responsible for, a number of the other recommendations contained herein relating to the EU taking effective and coordinated remedial action in the event that it has sufficient information about a particular third-country's non-compliance with the requirements of Annex 17 of the Chicago Convention. By way of example, the agency could coordinate capacity building measures relating to security (see Recommendation 10), and could manage the operation of an airport "white list" or "black list" (see Recommendation 8).

¹⁰¹ The notion of the European Security Agency was raised during the Austrian EU presidency in 2006.

Pros	- Creates a process for systematic exchange of information between Member State appropriate authorities on threat levels and security risks. - Centralising Annex 17 compliance information gathering and dissemination, irrespective of the source of this information. - Operate any EU mechanisms and or permit/accreditation programmes adopted to monitor compliance of third-country airports and/or air carriers with the terms of obligations between the EU and third-countries (comprehensive agreements and other treaties). - Coordination of actions taken at the EU level to provide capacity building and other security assistance to third-countries to avoid the necessity to take actions of “last-resort” against States which cannot meet ICAO Annex 17 compliance standards.
Cons	- Additional resources (budgets, manpower, facilities, etc) required to establish and operate a new agency. - Challenge of establishing this agency as a “recognized authority” with other aviation security agencies. - Individual Member States may be reluctant to share all information necessary for Agency to discharge its functions. - The procedure described at section 9.12 would need to be followed, which could be a lengthy process.
Legislative Considerations	- Depending on the nature and remit of the agency, new legislation may be required to establish and to grant it the required powers to effect the recommendations. - Legislation may also be required if the EU wanted to mandate Member States to pass certain information on to the agency. - It could be the case that the remit of an existing EU organisation (such as, by way of example, EASA), may be sufficiently wide to enable to it to assume such responsibility, such that no new legislative authority would be required

Recommendation 2: Enhancing ICAO – EU Engagement

- 9.16 The EU could seek to strengthen its engagement with ICAO, as a means of potentially providing increased access to information, as well as potentially allowing the EU to influence the ongoing evolution of common standards. In 2002, the Commission recommended that the Council authorise the Commission to open and conduct negotiations with ICAO on the conditions and arrangements for accession by the EU, on the basis that accession to ICAO

was considered desirable and "necessary".¹⁰² Despite the 2002 recommendation, accession has not occurred and it is not clear whether this would still be the Commission's preferred course of action to achieve its objectives, or indeed whether instead such objectives could be better achieved through enhancing the EU's engagement with ICAO through other means (for example through seeking to formalise its regional role within ICAO).

Pros	- The information held by ICAO (particularly that derived from the USAP audits) constitutes a potentially invaluable source of information for the EU relating to third-country compliance with Annex 17. - ICAO has recognised the need for a degree of information sharing amongst Contracting States, and is increasingly making information available (in particular high-level information relating to a State's security oversight capabilities and unresolved 'significant security concerns'). - The EU may be able to influence ICAO's activities in the common interest on behalf of all Member States and in support of sustainable development. - The EU has already developed a degree of engagement with ICAO on a number of levels, and it is understood that ICAO is keen to encourage regional civil aviation bodies to enter into formal arrangements with ICAO.¹⁰³ - There is precedent for the EU being a member of a UN agency.¹⁰⁴
Cons	- Becoming a member of ICAO would necessitate amendment of the Chicago Convention, which is not straightforward and may take a considerable amount of time to achieve (if achievable at all) and is therefore considered to a potential long-term solution. - In addition, becoming a member would be unlikely to give the EU better rights than those which already accrue to Member States, as contracting States (which do not include unrestricted access to all ICAO USAP audits) - Depending on what action was to be taken, the procedure described at section 9.12 may need to be followed, which could be a lengthy process.
Legislative Considerations	- None, provided that such activity remains within the scope of the EU's competence and authority. - Accession would require a mandate from the European Council and the European Parliament for the Commission to open and conduct negotiations with ICAO.

¹⁰² Recommendation from the Commission to the Council in order to authorize the Commission to open and conduct negotiations with the ICAO on the conditions and arrangements for accession by the European Community / *SEC / 2002 / 0381 final*

¹⁰³ ICAO 37th Session, Document A37-WP/28

¹⁰⁴ We are aware, for example, that the EU is a full member of one other UN specialised agency, the Food and Agricultural Organisation and so there is some precedent for this internationally.

Recommendation 3: Conducting passenger security interviews and surveys

9.17 The EU could establish a method for information gathering from passengers on arrival into the EU. Passengers and air crew members could be selected randomly for interview. Elements in the survey could include:

- was the passenger permitted to board the aircraft with in excess of 100 ml of liquids?
- were the passenger and the passenger's cabin baggage screened?
- if the passenger was transferred onto this flight from another airport, was he or she and his/her cabin baggage subject to screening at the airport of departure and again at the transfer airport?

Pros	- Information is obtained in “real-time” and can be disseminated rapidly. - Information obtained from the surveys could provide input into measuring and monitoring the performance of third-countries and their air carriers, which would serve as another source of information to assist the EU in building up a picture of third-country compliance with Annex 17 without necessarily conducting an inspection within that third-country, and could constitute an important component within a wider information gathering programme.
Cons	- Information will be subjective and limited. Surveys would require additional manpower at the Member State level. - On its own, such information is unlikely to be sufficiently detailed or accurate to provide the EU with a clear view of compliance with Annex 17 in a third-country, and would therefore inevitably need to constitute a component within a wider information gathering programme.
Legislative Considerations	- If the EU were to require Member States to conduct such passenger surveys, it would need to establish such an obligation in legislation. This could, potentially, be done through amending Regulation (EC) No. 300/2008.

Recommendation 4: Community air carrier security occurrence reporting, and passenger security concerns/comments reporting system

- 9.18 The EU could launch and promote a program requiring Community air carriers operating to/from third-countries, to confidentially report certain types of *occurrences* which come to their attention in the exercise of their functions to a national or central EU body (such as the recommended EU Aviation Security Information Agency) regarding the application of security standards in third-countries within a prescribed time frame. Such a system could also embrace voluntary reporting by passengers of security concerns at third-country airports or about third-country air carriers. The latter could be done, for example, through the creation of a secure web-site. In the case of Community air carriers operating to third-countries, a confidential mandatory reporting system could be established in relation to security incidents using the current system which applies to air safety issues as a starting model.

Pros	- Taps into knowledge and experience of those who come into regular contact with security procedures in third-countries - Frequent travellers and air carrier personnel are likely to notice sub standard security practices. - Collection of the information using a secure web site could permit aggregation of the data, which would serve as another source of information to assist the EU in building up a picture of third-country compliance with Annex 17 without necessarily conducting an inspection within that third-country, and could constitute an important component within a wider information gathering programme. - Analogous to a security incident reporting system, but collecting data from passengers. - Analogous to mandatory occurrence reporting by air carriers in respect of aviation safety issues. - The role of the EU in promoting aviation security would be illustrated in a positive light to EU citizens encouraged to report security concerns in third-countries (especially relevant in view of recent aviation security incidents).
-------------	--

Cons	- The information collected will need to be stored, protected and analysed. - On its own, such information is unlikely to be sufficiently detailed or accurate to provide the EU with a clear view of compliance with Annex 17 in a third-country, and would therefore inevitably need to constitute a component within a wider information gathering programme. - Citizens reporting concerns may expect a response from the EU.
Legislative Considerations	- No legislation required for passenger security concerns data collection. - If the EU were to require Member States to create obligations in respect of air carrier personnel, it would need to establish such an obligation in legislation. This could, potentially, be done through amending Directive 2003/42 of 13 June 2003 on occurrence reporting in civil aviation

Recommendation 5: Undertake *ex-post* security checks in respect of flights from third-countries

- 9.19 The EU could establish a mechanism whereby it is able to conduct *ex-post* security checks in respect of flights from third-countries on arrival in the EU, which would (conceptually) be similar to the ramp checks undertaken in respect of aviation safety. By conducting random *ex-post* screening of passengers and baggage, for example, the EU may be able to ascertain whether it is likely that proper screening was undertaken within the third-country from which the flight departed, as the presence of prohibited or restricted items may indicate non-compliance with Annex 17 security standards.
- 9.20 *Ex-post* checks will not, in themselves, provide a complete picture of third-country compliance with Annex 17. However, such checks may serve as useful source of information that, when combined with other sources of information and intelligence processed by a centralised body (such as the Aviation Security Information Agency referred to in Recommendation 1) could facilitate a targeted programme of action. Furthermore, random *ex-post* security checks could themselves be targeted, and only invoked when the EU has particular concerns about flights from a specific third-country.

Pros	- Checks would serve as another source of information to assist the EU in building up a picture of third-country compliance with Annex 17 without necessarily conducting an inspection within that third-country, and could constitute an important component within a wider information gathering programme. - The EU could target random <i>ex-post</i> checks on the basis of existing information, conducting checks on flights from third-countries of particular concern. - There is precedent for conducting <i>ex-post</i> checks, albeit in respect of aviation safety rather than aviation security.
-------------	--

Cons	- The information gained from such checks would, in itself, be inevitably limited, and could never provide a complete picture of third-country compliance with Annex 17. - Undertaking such checks would require additional resource, either at the EU or Member State level. - The introduction of an additional level of security checks may not be popular with passengers or air carriers. - To be effective, such checks would require centralised EU coordination.
Legislative Considerations	- If the EU were to require Member States to conduct such checks, it would need to establish such an obligation in legislation. This could, potentially, be done through amending Regulation (EC) No. 300/2008, or, perhaps more appropriately, introduction of a new Regulation modelled on Directive 2004/36/EC on safety of third-country aircraft using Community airports and implementing Regulation 768/2006 regarding collection and exchange of information on the safety of aircraft using Community airports and the management of the information system.

Recommendations that relate to the ability of the EU to take coordinated and effective remedial action in response to such information at the "macro level"

Recommendation 6: Stronger model ASA aviation security clause to be used by the EU

- 9.21 The EU should continue active adoption of model ASA aviation security clause(s) based (as a minimum) on the ICAO model security clause,¹⁰⁵ and wherever possible should seek to further enhance such provisions to add express, unilateral information sharing obligations and inspection rights and to contractualise Annex 17 (particularly those elements which are merely "Recommendations").
- 9.22 The EU should, therefore, seek to include in these clauses as far as possible the following obligations on the third-country (expressed conceptually):
- explicit recognition of and commitment to compliance with all international obligations including Annex 17 to the Chicago Convention, including, where required, an express obligation on the State to comply with Annex 17 recommended practices (re-statement and enhancement of provision from existing model clause);
 - obligation to provide direct notification of deviations/departures from Annex 17 standards and required practices;
 - obligation to give positive consideration to requests for special measures to meet any specific threats to aviation security (based on existing model clause);
 - obligation to allow EU designated inspectors to visit third-country airports to conduct their own assessment of security measures;
 - participate in a 'Joint Committee' of both parties to address interpretation and dispute issues, to foster cooperation and to discuss proposals on the development of coordinated positions vis-à-vis third parties;
 - implement a formal dispute resolution process which may/may not include an initial informal 'consultation' mechanism with a view to early settlement and a more formal mechanism such as arbitration process (re-statement of provision from existing model clause);

¹⁰⁵ This clause is Article 15 in the Comprehensive Agreements reviewed

- ability for the EU to suspend, revoke, limit any rights under the agreement (e.g. access to airspace) in the event of non-compliance and/or in the event of an identified threat (this improves upon the existing rights to suspend for non-compliance which exist only after the expiry of a period of time);
- the on-going provision of ICAO audit reports to the EU together with any SSeCs identified by ICAO; and
- agreement on a mechanism whereby the third-country allows the EU, when necessary, to impose additional security measures on air carriers conducting flights between the third-country and the EU.

Pros	- The onus on provision of compliance information will be on the third-country; and the third-country will give the EU the right to suspend certain flights in the event of non-compliance with Annex 17 elements deemed as critical by the EU. - An express clause may allow the EU to legally (i.e. contractually) enforce the provisions of Annex 17 of the Chicago Convention even though the EU is not itself a Contracting State.
Cons	- In practice this may be difficult to negotiate where existing agreements with third-countries are already in place and are not due for renewal or replacement. - The process of concluding agreements with third-countries is known to be slow, and whilst such a clause provides "paper based" compliance (contractually), seeking to enforce an international agreement is an inevitably slow and cumbersome process, and in any event, is unlikely to be a suitable and sustainable method of dealing with non-compliance with Annex 17 in all but the most extreme of cases. - Due to the onerous nature of the recommended provisions, it is expected that third-countries will resist agreement to these clauses (for example a clause which allows an express right for the EU to inspect airports in its sovereign territory) because they go beyond the current typical clause wording (whereby the current clauses provide for "agreements to agree" and obligations of reasonableness).
Legislative Considerations	- None, provided that such activity remains within the scope of the EU's competence and authority.

Recommendation 7: Stronger model ASA aviation security clause to be used by Member States

- 9.23 As an alternative to including such provisions in ASAs between the EU and a third-country, the EU may instead seek to oblige all Member States to include (or at least attempt to include) such provisions in their bilateral ASAs with third-countries, and to enforce such provisions when so required.

Pros	- As above (although at the Member State rather than EU level). - As all Member States are Contracting States of the Chicago Convention, and could therefore invoke the dispute resolution procedure contained therein.
Cons	- As above (although at the Member State rather than EU level). - Furthermore, given that each bilateral ASA will have been concluded on its own terms (and many - particularly those concluded before 2001 - may not contain the relevant security provisions), seeking to invoke each Member State's bilateral ASA with a particular third-country is unlikely result in a coherent, uniform approach across Europe. Indeed, such an approach could well result in the situation where the offending third-country is being sanctioned by certain Member States but not others. - The level of information available to individual Member States may not be as complete as the information that may available to the EU as whole (see recommendations relating to information gathering). - The ability of Member States to include such provisions (whether in new bilateral ASAs or as an amendment to existing bilateral ASAs) will be entirely dependant on the agreement of the third-country.
Legislative Considerations	- If the EU wanted to oblige Member States to include and enforce certain provisions in bilateral ASAs, new legislation would be required. It may be possible that this could be achieved through amendment of Regulation (EC) No. 300/2008, for example by including a provision to either (i) "encourage" Member States to include and enforce such provisions, (ii) require Member States to use a certain level of "effort" to include such provisions, or (iii) mandate that all bilateral ASAs must include such provisions. - Mandating inclusion is unlikely to be workable given that this will always remain dependant on the agreement of the third-country.

Recommendations that relate to the ability of the EU to take coordinated and effective remedial action in response to such information at the "micro level"

Recommendation 8: Accreditation of third-country airports

- 9.24 The EU could establish a mechanism whereby airports in third-countries are specifically accredited for the purposes of being a permitted airport of departure for flights into the EU. Such a mechanism would serve to accredit those airports which meet the required criteria (based on Annex 17 of the Chicago Convention).
- 9.25 Such accreditation could be done in one of two ways. Firstly, it could be done through the operation, in effect, of a "white list", whereby only those airports that have been monitored and approved by the EU would be accredited. Such a "white list" would of course need to be maintained. Such an approach would inevitably require a lengthy, resource intensive process, and the initial creation of the "white list" would require active accreditation of each third-country airport from which flights depart into the EU.
- 9.26 As an alternative approach, accreditation could be effected through the operation of a "black list" of airports, whereby airports in third-counties would retain existing rights to fly into the EU until such time as that right is revoked through inclusion on the "black list". This would be similar in operation to the "black list" currently used by the EU in the field of aviation safety. Although the outcome may be similar to that achieved through the "white list" referred to above, it would not require the same degree of initial activity.
- 9.27 Indeed, it is envisaged that banning flights from specified third-country airports, whether through the operation of either a "black list" or a "white list", would inevitably constitute an action of last resort, and that the real benefit of such a mechanism would be that 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.
- 9.28 There may be concern that preventing flights from entering the EU from certain airports could constitute an infringement of the international rules of the World Trade Organisation ("WTO"). However, from a WTO perspective, air transport services are governed by a specific annex of

the General Agreement on Trade in Services (GATS), which excludes from the agreement the largest part of air transport services including traffic rights and services directly related to traffic. So far, this only applies to aircraft repair and maintenance services, the selling and marketing of air transport services and computer reservation system (CRS) services. Indeed, Article 2 of the Annex on Air Transport Services provides that "*The Agreement, including its dispute settlement procedures, shall not apply to measures affecting: (a) traffic rights, however granted; or (b) services directly related to the exercise of traffic rights.*" Moreover, GATS also provides for a "general exceptions" clause allowing Members to deviate, under certain conditions, from their obligations and commitments under the GATS specifically when adopting measures to protect "public order" (which include security concerns as concluded in the US-Gambling Panel). Therefore, an EU mechanism for prohibiting certain flights on the grounds of security concerns would not constitute a breach of WTO obligations.

- 9.29 The process for accreditation could be based on the principles which are established by the EU aviation security regulatory committee and which could be periodically revised based on threat and technology developments, and carried out according to an effective methodology.

Pros	- In response to information, intelligence or EU/other inspections, that an airport (or country) has a security problem, then the EU can threaten to remove them from the approved list (to "withhold, revoke or limit" their operating authorisation).¹⁰⁶ - The EU (supported by Member States) would be able to act in the event of identified security vulnerabilities. - This new mechanism could coordinate information related to Annex 17 compliance in third-countries. - The 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
-------------	---

¹⁰⁶ e.g. EUROMED aviation agreement between the EU and Morocco, see Art 15

Cons	- Further consideration would be required to establish the criteria for the white list. At the least, the criteria would be based on Annex 17, but that is still an issue with receiving Annex 17 ICAO audit information (i.e. the EU does not have access to that information). As such this recommendation can only work in conjunction with other recommendations for additional information set out above. In addition, the ICAO audit information is based on a multi-year cycle and so may not be up to date at any one time. As such, this recommendation also needs to be seen in conjunction with recommendations for additional, more current, sources of information. - Potential infringement of rules of customary international law regarding sovereignty and exercise of sovereign rights, and potential infringement of a permission available pursuant to one or more bilateral or multilateral ASAs to which Member States are party. However, the potential for infringement may be reduced / eliminated where an express permission is set out in the relevant agreement such as on the basis of the model clause recommended above, or through the application of the principles of international law where such action is a legitimate and proportionate countermeasure (see sections 7.25 to 7.27). - Blacklisting of third-country airports would impact on Community air carrier commercial operations to/from such airports in circumstances which may be unfair because such carriers have taken (or will take) additional security steps of their own to address shortcomings in the subject airport(s) - Consideration would need to be given to EU exposure to possible liability to third party passengers suffering loss as a result of using non-white list airports. - Additional resources would be required to establish a new mechanism (costs of operation may not be recoverable from any fees charged). - The procedure described at section 9.12 would need to be followed, which could be a lengthy process.
-------------	---

Legislative Considerations	- New legislation would be required to establish and enforce this recommendation, which could at least in part be based on Regulation (EC) No. 2111/2005 . In particular, this may include: - Process as in 9.12 to establish competency - Threat of a "black list", or the establishment of a accreditation system. - The establishment of the criteria for accreditation and a mechanism for updating criteria over time - Obligation on Member States to enforce within territory (or instruct carriers to implement additional measures prescribed by Commission) - Ability to suspend or threaten to suspend accreditation pending receipt of sufficient evidence to justify continued operations into EU.
-----------------------------------	--

Recommendation 9: Establish a security permit mechanism for third-country air carriers

- 9.30 The EU could establishes a "security approval" system allowing the EU to revoke approval (thereby suspending access rights into the EU) in the event that the third-country air carrier's operations do not meet the required criteria (regardless of whether within the carrier's control or not). This would allow the EU to impose additional responsibility for making the required improvements to security upon third-countries through their designated air carriers.
- 9.31 Annex 17 compliance of air carriers flying from third-countries into the EU should be monitored and assessed using methodology and standard EU instruments.
- 9.32 As an alternative approach, permission to fly into the EU could be revoked through the operation of a "black list" of air carriers, whereby air carriers would retain existing rights to fly into the EU until such time as that right is revoked through inclusion of that air carrier on the "black list". This would be similar in operation to the "black list" currently used by the EU in the field of aviation safety. Although the outcome may be similar to that achieved through the "white list" referred to above, it would not require the same degree of initial activity.
- 9.33 As with accreditation of airports, it is envisaged that revoking a security permit necessary for operations to the EU or including an air carrier on a "black list" would inevitably constitute an action of last resort, and that the very threat of losing permission to operate to the EU (i.e. in effect, being subject to a ban) may provide sufficient incentive for air-carriers to seek to work with the EU to resolve security concerns, perhaps agreeing to participate in capacity building exercises or permitting the EU to require additional plane-side security measures.

- 9.34 As with accreditation of airports, an EU mechanism for prohibiting certain flights on the grounds of security concerns would not constitute a breach of WTO obligations.

Pros	- Allows the EU to address security concerns on specific route(s) or in respect of specific air carrier(s) by suspending operations where a security concern exists. - Precedent, analogous rules applicable to third-country air carriers such as the EU Emissions Trading Scheme¹⁰⁷ ("ETS") which will come into force in 2012 and which will regulate emissions from the point at which any aircraft starts its flight, even in a third-country and operated by a third-country air carrier. - Precedent, analogous air carrier black list exists in safety, which has teeth and is used to stop flights until safety concerns have been resolved.
Cons	- Tension with rules of customary international law regarding sovereignty and exercise of sovereign rights, and potential infringement of a permission available pursuant to one or more bilateral or multilateral ASAs to which Member States are party. However, the potential for infringement may be reduced / eliminated where an express permission is set out in the relevant agreement such as on the basis of the model clause recommended above, or through the application of the principles of international law where such action is a legitimate and proportionate countermeasure (see sections 7.25 to 7.27). - Increased cost of compliance (regulatory burden) upon the third-country air carriers. - Requires pro-active management of permit system with attendant costs of administration, therefore a more expensive option than use of banning list for carriers assessed as non-compliant. - The procedure described at section 9.12 would need to be followed, which could be a lengthy process.

¹⁰⁷ Established by Directive 2003/87/EC, as amended by Directive 2004/101/EC, as amended by Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Brussels, 10 October 2007

Legislative Considerations	- The EU may consider amending Regulation (EC) No. 2111/2005 to extend its scope to cover security issues; or - New legislation may be established, which could be based on Regulation (EC) No. 2111/2005 that would include: - requirement for third-country air carriers to secure a security permit to be permitted to conduct flight operations from prescribed third-country airports to the EU - Threat of a "black list", or the establishment of a permit mechanism⁹⁴ - Notification and period to rectify - Obligation on Member States to enforce within territory (no restriction on Member States requiring higher standards) - Ability of carriers and civil aviation authorities to make representation prior to a ban being imposed - Appeals process - Provision to deal with <i>ex-post</i> and <i>ex-ante</i> provisions
-----------------------------------	---

Recommendation 10: Coordination of capacity building programmes

- 9.35 The EU could seek to establish a framework for cooperation between the Commission, relevant Member State national authorities, ECAC, and any other relevant bodies, which would serve to promote the sharing of information and coordination of activities pertaining to capacity building. This could, for example, be undertaken through a dedicated "working group", which would use the products of Member States' and ECAC risk analysis and all parties' capacity building expertise to evaluate the needs for the activities in third-countries. Taking into consideration both current and past activities the group could propose a prioritised plan of action addressing States or locations where serious shortcomings have been identified. The resulting risk-based assessment could be cross-checked with ICAO and other international organisations or States involved in civil aviation security capacity building exercises, and capacity building activity could be coordinated accordingly at a global level.¹⁰⁸

⁹⁴ As defined Commission Regulation (EC) No. 474/2006 of 22 March 2006 laying down implementing rules for the Community list of air carriers which are subject to an operating ban within the Community referred to in Chapter II of Regulation (EC) No. 2111/2005 of the European Parliament and of the Council (Text with EEA relevance), Official Journal of the European Union, L84, 23 Mar. 2006.

¹⁰⁸ This is consistent with the ICAO working paper A37 - WP / 100, presented by Belgium on behalf of the EU

Pros	- Activities can be based on risk analysis and information sharing between parties with multiple sources of information on third-country compliance. - A working group based primarily on the relatively small number of Member States providing capacity building programs can focus on the European agenda and as a relatively small body facilitate the sharing of sensitive information in an efficient way. - Prospects of avoiding wasteful duplication of efforts and repetition at short intervals of activities for the benefit of the same beneficiary State.
Cons	- An accurate picture of the needs would be highly dependent on available information on compliance standards or lack thereof. - Prioritisation at a European level may not be optimal without taking into account capacity building activities provided by countries like the US, Canada, Australia, South Africa and Singapore or updating the proposal once the scope of activities reported at ICAO has been evaluated.
Legislative Considerations	- None, provided that such activity remains within the scope of the EU's competence and authority, and provided that existing capacity building frameworks can be used for aviation security capacity building in specific third-countries.

Recommendation 11: Delivery of security assistance by Commission and Member State aviation security experts

- 9.36 The security components within technical assistance programs for aviation in third-countries should be delivered on site by the Commission's and Member States' aviation security experts. Coordination of such supportive activities could be achieved in line with existing programmes established by the Commission.

Pros	- On-site presence and a first-hand evaluation of compliance standards will feed the overall risk analysis activities. - Content and quality of assistance provided would be the best the EU and Member States have to offer. - Alignment with Commission objectives and priorities for improving security of flights from the recipient third-country. - The EU will have a single focal point and consolidated picture of all aviation security aid and assistance activities worldwide.
Cons	- Limited EU inspection resources.

Legislative Considerations	- None, provided that such activity remains within the scope of the EU's competence and authority, and provided that existing capacity building frameworks can be used for aviation security capacity building in specific third-countries.
-----------------------------------	---

Recommendation 12: Undertaking effective evaluation visits within third-countries who received capacity building

- 9.37 The negotiated terms of reference for the delivery of capacity building assistance should include evaluation visits before, throughout and after the assistance has been provided. Initial assessments could include an obligation on behalf of the recipient State to share audit reports and provide access to airports in order to confirm and validate the need for assistance. Once the project is complete, follow up visits should be used to confirm that standards and benefits are upheld and assess any additional needs for assistance. Evaluation visits should facilitate objectives to ensure that the capacity building efforts are carried out effectively and in line with established goals.

Pros	- Evaluation visits by qualified experts will provide valuable information on levels of compliance feeding the risk assessment. - Evaluation visits will significantly contribute to effective management of capacity building and support programmes offered to third-countries. - Using the goodwill of the parties involved to provide lawful access to audit reports without having to secure grounds for reciprocity and without considerations of international law or conclusion of agreement terms.
Cons	- Limited additional overheads involved in the processing and analysis of reports and identifying standards of compliance (or lack thereof). - Vague definition of "Evaluation visits" as a form of inspection (meaning that it will not be entirely clear what is, and is not inspected and so may not be sufficient to assess full compliance with Annex 17 of the Chicago Convention).
Legislative Considerations	- None, provided that such activity remains within the scope of the EU's competence and authority, and provided that existing capacity building frameworks can be used for aviation security capacity building in specific third-countries. - The EU may wish to effect new legislation to ensure that such visits are an integral and mandatory component within the relevant agreement between the EU and the recipient State.

Recommendation 13: Creating an approved list of aviation security training providers

- 9.38 Establishing an approved list of aviation security training providers, certified by the EU, for the provision of training assistance in third-countries

Pros	- Consistent and harmonised training standards. - Facilitates feedback from training sessions held on site back to the Commission.
Cons	- Would require the establishment and budget for a new certification process and associated administration.
Legislative Considerations	- None, provided that such activity remains within the scope of the EU's competence and authority.

Recommendation 14: Establishing recommended EU aviation security equipment performance standards and operational procedures

- 9.39 Establishing an approved list of equipment standards (for example X-ray, walk through metal detectors, security screening, etc), and operational security procedures, appropriate for implementation in third-countries, to support Annex 17 compliance possibly building on existing processes promulgated by ECAC.

Pros	- Provides guidance for both third-countries and donor States considering capacity building investment in screening and other security equipment and training in operational procedures. - Provides additional guidance to assist the third-country in the implementation of the standards defined in Annex 17 of the Chicago Convention. - Addresses claims from third-countries that they are being required to meet a “moving target” with respect to equipment and procedures.
Cons	- Additional competence required for approval of equipment and/or technology and operational procedures by the EU. - Could be misconceived as an attempt by the EU to impose “one-stop” security on third-countries.
Legislative Considerations	- None, provided that such activity remains within the scope of the EU's competence and authority.

Summary of Future EU Legislation or Negotiation Mandates

9.40 The table below sets out, in summary, which of the above recommendations may or may not require the Commission to seek to create new, or amend existing, legislation. This information is intended to provide a high-level overview of a proposal for possible action, and it is envisaged that further analysis will need to be done in respect of the scope of existing authority and competence, as well as in respect of the detail of a relevant proposal for legislative change.

Table 1 - Future EU Legislation or Negotiation Mandates

#	Recommendation	May not require new/amended legislation	May require new/amended legislation
1	EU aviation security information agency		X It is likely new legislation would be needed to establish the agency and any powers it may have.
2	Enhancing ICAO – EU Engagement	X Provided the scope of such activity remains within the scope of the EU's competence and authority.	X Accession would require a mandate from the European Council and the European Parliament for the Commission to open and conduct negotiations with ICAO.
3	Conducting passenger security interviews and surveys		X New legislation would be required to oblige Member States to conduct passenger surveys. This could, potentially, be done through amending Regulation (EC) No. 300/2008.

#	Recommendation	May not require new/amended legislation	May require new/amended legislation
4	Community air carrier security occurrence reporting, and passenger security concerns/comments reporting system	X No legislation to allow passengers to report concerns.	X New legislation would be required to establish Community air carrier security occurrence reporting. This could, potentially, be done through amending Directive 2003/42.
5	<i>Ex-post</i> security checks		X New legislation would be required to oblige Member States to conduct <i>ex-post</i> checks. This could, potentially, be done through amending Regulation (EC) No. 300/2008 or through creating new legislation modeled on Directive 2004/36/EC.
6	Stronger Model Aviation Security Clause (EU)	X The EU may simply seek to incorporate a version of the model clause into current and future agreements with third-countries.	
7	Stronger Model Aviation Security Clause (MS)		X If the EU were to require Member States to use such a clause, it would need to establish such an obligation in legislation. This could, potentially, be done through amending Regulation (EC) No. 300/2008.

#	Recommendation	May not require new/amended legislation	May require new/amended legislation
8	Accreditation of third-country airports		X Legislation may be needed to set out criteria for accreditation, obligations on Member States to enforce accreditation and ability to suspend flights.
9	Permit mechanism for third-country air carriers for flights into EU		X Legislation may be needed to impose obligations on air carriers - could use safety legislation as a model.
10	Coordination of capacity building programmes, security assistance and evaluation visits	X It is likely this could be achieved by using existing EU frameworks.	
11	Commission and EU Experts support for capacity building	X It is likely this could be achieved by using existing EU frameworks.	
12	Capacity building evaluation visits	X It is likely this could be achieved by using existing EU frameworks.	
13	Approved list of aviation security training providers	X It is likely this could be achieved by using existing EU frameworks.	
14	Recommended Aviation Security Equipment performance standards and security procedures	X It is likely this could be achieved by using existing EU frameworks	