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from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 13 December 2006

to: Mr Javier SOLANA, Secretary-General/High Representative

Subject: Communication from the Commission to the European Parliament, pursuant to the second subparagraph of Article 251 (2) of the EC Treaty, concerning the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council on common rules in the field of civil aviation security

Delegations will find attached Commission document COM(2006) 810 final.

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.12.2006
COM(2006) 810 final

2005/0191 (COD)

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251 (2) of the EC Treaty

concerning the

**common position of the Council on the adoption of a Regulation of the European
Parliament and of the Council on common rules in the field of civil aviation security**

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TO THE EUROPEAN PARLIAMENT**

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common position of the Council on the adoption of a Regulation of the European Parliament and of the Council on common rules in the field of civil aviation security

1. BACKGROUND

Date of transmission of the proposal to the EP and the Council (document COM(2005) 429 final – 2005/0191 COD): 22.09.2005

Date of the opinion of the European Economic and Social Committee: 20.04.2006

Date of the opinion of the European Parliament, first reading: 15.06.2006

Date of adoption of the common position: 11.12.2006

2. OBJECTIVE OF THE COMMISSION PROPOSAL

Regulation (EC) No 2320/2002 of the European Parliament and of the Council establishing common rules in the field of civil aviation security has been in force since January 2003. Experience gained on the basis of Commission inspections and the daily application of the Regulation by Member States shows that the swift transformation into legislation of a set of non-binding recommendations developed by the Member States has led, due to the quick drafting and adoption of the Regulation as a response to the events of 11 September 2001, to a number of problems affecting its implementation in a more solid manner.

The Commission has therefore proposed a revision of this Regulation in order to clarify, simplify and harmonise further the legal requirements with the aim of enhancing the overall security in civil aviation. The new framework regulation should solely lay down the basic principles of what has to be done in order to safeguard civil aviation against acts of unlawful interference, whereas implementing acts should lay down the technical and procedural decisions on how this is to be achieved.

3. COMMENTS ON THE COMMON POSITION

Intensive contacts have taken place between the three institutions in order to facilitate an early agreement in second reading on this file. However, this could not be achieved primarily because of the issue of **financing of security** for which the European Parliament had

introduced in first reading several amendments seeking to commit Member States to pay at least some of the costs of aviation security.

The Council's common position adopted by unanimity does not undermine the essential objectives and the underlying approach of the Commission's proposal.

Two specific issues have arisen in the Council which are worth to be mentioned.

The first issue concerns the application of **new comitology rules**. Coherence had to be made with the newly adopted rules laid down in Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC that gives the European Parliament greater powers of scrutiny over autonomous acts adopted by comitology. In the view of the Council, the regulatory procedure with scrutiny laid down in Article 5a of Decision 1999/468/EC should apply to both Article 4(3) setting the criteria to allow Member States to derogate from the common basic standards for small airports / small aircraft and Article 9(2) establishing the specifications for the national quality control programme of Member States. The Commission shares the view of the Council on this.

The second issue concerns **the deletion of the provision on the examination by the Commission of more stringent measures applied by Member States**. In Article 5(2) of the Commission proposal, the Commission proposed that it should be in the position to examine whether more stringent measures applied by a Member State are indeed based on a risk assessment and are relevant, objective, non-discriminatory and proportional to the risk that is being addressed. Where this would not be the case, the Commission after consulting the Committee –and ultimately the Council– should be in the position to decide that the Member State concerned is not allowed to continue to apply these more stringent measures. This provision was deleted by the Council which the Commission resisted through a statement. (see Annex)

Finally, in order for a political agreement on the common position to be reached, the Commission also made statements on how it will interpret Article 6, Article 18 and Chapter 10 as well as on the Commission's intentions as regards Chapter 6. (see Annex)

4. COMMISSION DETAILED COMMENTS

1. EP amendments accepted by the Commission and incorporated in full or in part in the common position

Amendments 2, 4, 11, 15, 17, 23-30, 33, 34, 37, 40, 46-49, 53-56, 58, 65-68, 73, 77-79 and 82 are all related to clarification, better drafting, more precise drafting or consistencies with other provisions in the text. This includes the distinction to be made between cargo and mail as well as setting criteria for small airports / small aircraft.

Amendment 7 states that the goal of "one-stop security" for all flights within the EU should be advanced.

Amendments 8 and 12 relate to Gibraltar Airport, for which a new Ministerial Statement was agreed in Cordoba on 18 September 2006.

Amendment 51 relates to the recognition of Community air carrier security programmes by the Member States other than the one that has validated the programme.

2. EP amendments rejected by the Commission and not incorporated in full or in part in the common position

Amendments 3, 35, 43 and 44 on the financing of security are rejected by the Council. The Commission shares the view of the Council, namely that it is not appropriate for a technical regulation to contain requirements or obligations pertaining to the financing of security.

Amendments 6 and part of 57 require the European Aviation Safety Agency (EASA) to conduct inspections in the field of aviation security. However, there is a clear distinction between safety and security that should be kept – safety is concerned with the construction and use of aircraft, whereas security is concerned with preventing acts of unlawful interference. As security is clearly outside the remit of EASA, it is not appropriate in this Regulation to change the scope of EASA.

Amendments 19, 36 and 85 relate to background checks on personnel. In the Commission's view these amendments go beyond the scope of this Regulation, as the work of national intelligence services would be involved. In accordance with the principle of subsidiarity, the Community should not act in setting harmonised rules on background checks. As regards obliging background checks for pilots, the Commission can support the aim, but pilot licensing goes beyond the scope of this Regulation.

Part of amendments 20 and 21 change the definition of both transfer- and transit passengers, baggage, cargo and mail in an unacceptable manner. Only the change of aircraft, and not the change of flight number, changes the security status of passengers, baggage, cargo and mail. If these amendments would be accepted, it would imply that passengers, baggage, cargo and mail on transit stops have to disembark or off-loaded, respectively, in order to be rescreened simply because the flight number changes at the transit point. This is neither necessary nor desirable.

Amendment 22 broadening the definition of potentially disruptive passengers is considered to be unnecessary and unenforceable. An air carrier always has the right to refuse badly behaved passengers from boarding for safety reasons. Furthermore, it is ambiguous how to judge in advance that a person's behaviour will threaten the safety of a flight – how does one identify a potential hijacker in the airport?

Amendment 32 adds a definition of 'continuous random check'. However, as the term does not appear in the Regulation, there is no need to define it.

Amendment 38 requires a risk- and impact assessment to be performed for each of the detailed implementing measures and procedures to be adopted, including the estimated costs. While the overall policy on aviation security will be subject to a risk- and impact assessment, it would not be appropriate to do this for the individual measures and procedures. The creation of a Stakeholders' Advisory Group (see amendment 61) will provide a forum for the detailed assessment of the implementing measures and procedures.

Amendments 41 and 42 require that Member States shall notify and consult the Committee before applying more stringent measures. From an institutional point of view, it is not for the Member States to notify or consult a Regulatory Committee for measures that they want to take; it is a Committee assisting the Commission in its regulatory task.

Amendment 45 on drawing up a response to a third country that requires security measures in respect of flights from an EU airport is incorporated in part. However, the requirement to consult the third country concerned prior to the response is considered to be inappropriate for incorporation into a Community Regulation.

Amendment 50 changes the responsibility for air carrier security programmes from the air carrier to the Member State and limits the obligations of this programme to the national civil aviation security programme. However, air carriers should meet the obligations of both this Regulation and the national civil aviation security programme, not just the latter. Also, the Commission proposal gives air carriers, airports and other entities similar obligations which would change with this amendment.

Amendment 52 is not consistent with amendment 53 which was incorporated in the common position of the Council. The Commission agrees with the Council that the title of Article 12 should be 'entity security programme'.

Amendment 59 requires the Commission to ensure that every European airport is inspected at least once within four years of the entry into force of this Regulation. This would not be realistic, as it would either mean that the Commission undertakes 200 inspections a year (compared to around 30 inspections in 2005) or, conversely, that the Commission compels Member States to a 4-year cycle for inspecting its airports which is not frequent enough for inspections by the national authorities.

Amendment 63 seeks more aviation agreements with third countries. Not only has Article 17 been deleted by the Council as it is considered to be superfluous given the reference to Article 300 of the Treaty, but also the conclusion of mutual recognition agreements should not be linked necessarily to the conclusion of air services agreements.

Amendments 69, 70, 71, 75, 76 and 83 go into a degree of detail that should be left to implementing legislation, although the Commission has supported the aim behind these amendments.

Amendment 74 ensures that air carriers do not have to be regulated agents. However, if an air carrier ensures security controls for another air carrier, the former must always be a regulated agent. The reference to air carrier is therefore also explicitly incorporated in the definition of 'regulated agent' - definition (24).

Amendment 80 seeks to extend the scope beyond Community air carriers. Contrary to the principles of international law, in-flight security rules are determined by the State of registration of the aircraft, not according to the place of business of the carrier.

3. EP amendments acceptable to the Commission but not incorporated in full or in part in the common position

Amendments 1, 10, 13, 16, 31 and 33 seek to emphasise why rules on aviation security are needed. They do not negatively affect the content of the Regulation, although the wording is not in line with the internationally accepted terminology – security is a means of preventing acts of unlawful interference with civil aircraft and thus safeguards civil aviation.

Part of amendment 5 replaces 'quality' with 'level'. A quality control programme can check both the quality and level of security. For consistency reasons in relation to amendments 49 and 56, it has thus been recommended to keep the word 'quality' as well.

Amendment 9 expresses the wish to have a terrorist-incident solidarity mechanism. The Commission acknowledges the importance of this issue while recognising that the consequences go beyond the transport sector.

Amendment 14 adds a definition of an airport. The Commission could accept this amendment, although it is not strictly necessary to define an airport in this Regulation.

Amendment 18 modifies the definition of a demarcated area. This modification could be accepted, although it is not necessary since all airside areas of airports are not accessible to the general public.

Amendment 39 on the indication of security costs on the ticket or otherwise could be accepted by the Commission, although it is not strictly relevant to this Regulation.

Amendments 60 and 62 require the Commission to write an annual report. The Commission had preferred amendment 62 as it is very similar to the wording of Article 11 of existing Regulation 2320/2002.

Amendment 61 establishes a Stakeholders' Advisory Group, in the same way as Article 6 of Regulation (EC) No 549/2004 laying down the framework for the creation of the single European sky. It formalises the current situation, where a Stakeholder Advisory Group unofficially already exists.

Amendment 64 on the date of application (one year from the date of entry into force) was acceptable to the Commission, depending on when this Regulation is adopted by the European Parliament and the Council.

Amendment 72 requires unaccompanied hold baggage to have 'adequate' instead of 'additional' security controls. The Commission accepts this wording, since it would still leave it to implementing legislation to determine the security requirements.

Amendment 81 requires responsibilities for taking action in the event of an act of unlawful interference to be clearly defined. This new mandate to the Commission could be accepted.

Amendment 84 requiring security equipment to meet approved specifications was acceptable to the Commission, if the word 'approved' was replaced with 'defined' since no Community wide approval system for equipment is yet in place.

5. CONCLUSION

The Commission considers that the common position of the Council adopted on 11 December 2006 by unanimity does not contradict the essential objectives and the underlying approach of its proposal, and can therefore support it.

ANNEX

Statements of the Commission for inclusion in the minutes of the Council

Article 5(2) and (3) (changed), 'More stringent measures applied by Member States'

'The Commission does not consider it appropriate to amend its proposal until the European Parliament has delivered its opinion on the change of Article 5(2) and (3) in the common position when compared to the Commission's original proposal, particularly as regards the provisions on implementation of the committee procedure as regards the examination of and authorisation for the application of stricter measures by the Member States.'

Article 6, 'Security measures required by third countries'

'In deciding whether or not to act on its own initiative under Article 6(2), the Commission will take into account whether the request concerns specifically the notifying Member State or has been or is likely to be addressed also to other Member States.'

Article 18, 'Entry into force'

'During the period running from the date of entry into force of this Regulation until the date of application of Article 11, the Commission will interpret and construe Article 5(4) of Regulation (EC) No 2320/2002 in the light of Article 11 of this Regulation.'

Annex – Chapter 6, 'Cargo and mail'

'The Commission recognises that mail is a specific form of cargo and, therefore, should have specific security controls. Such controls should be proportionate to the degree of risk and should also seek not to adversely prejudice both the commercial and public service obligations in the mail sector.

The precise requirements for security controls for mail will be laid down in implementing legislation, but the Commission recognises the wish of the postal sector for stable rules. Consequently, the Commission intends that the implementing legislation will be based on the existing EC security requirements for mail and will, in particular, initially maintain the specific rules for mail which is to be carried on all-mail flights.

Furthermore, the Commission intends that the draft implementing rules for mail will be brought forward prior to the repealing of Regulation (EC) No 2320/2002 and its implementing acts, with the aim of ensuring that there is continuity by having the repealed acts immediately replaced.'

Annex – Chapter 10, 'In flight security measures'

'In relation to paragraphs 3 and 4 of Chapter 10 as contained in the common position, the Commission wishes to clarify that it neither seeks to oblige Member States to accept the carriage of weapons on flights, nor seeks to prohibit them. The Commission recognises that the decision as to when weapons will be carried on board aircraft for potential use by State officials is a matter for each Member State to decide upon.'