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COVER NOTE

From: House of Commons of the United Kingdom
date of receipt: 1 November 2016
To: General Secretariat of the Council

Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL establishing a Union certification system for aviation
security screening equipment
- Opinion on the application of the Principles of Subsidiarity and
Proportionality¹
Doc. 12090/16 AVIATION 179 MI 565 COSI 150 - COM(2016) 491 final

Delegations will find attached a copy of the above-mentioned opinion.

¹ Translation(s) of the opinion may be available on the Interparliamentary EU Information Exchange website (IPEX) at the following address: <http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20160236/ukcom.do>.



HOUSE OF COMMONS

Donald Tusk
President of the Council of the European Union
Council of the European Union
Rue de la Loi 175
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1 November 2016

Dear President,

EUROPEAN UNION DOCUMENT NO. 12090/16 AND ADDENDA 1, 2 AND 3, A PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A UNION CERTIFICATION SYSTEM FOR AVIATION SECURITY SCREENING EQUIPMENT

On 1 November 2016, the House of Commons of the United Kingdom Parliament resolved as follows:

That this House takes note of European Union Document No. 12090/16 and Addenda 1, 2 and 3, a proposal for a Regulation of the European Parliament and of the Council establishing a Union certification system for aviation security screening equipment; considers that the proposal does not comply with the principle of subsidiarity for the reasons set out in Chapter 1 of the Sixteenth Report of the European Scrutiny Committee (HC 71-xiv) and, in accordance with Article 6 of Protocol No. 2 annexed to EU Treaties on the application of the principles of subsidiarity and proportionality, instructs the Clerk of the House to forward this reasoned opinion to the Presidents of the European Institutions.

I enclose the reasoned opinion, and the relevant European Scrutiny Committee's Report.

Yours sincerely
Handwritten signature of David Natzler in black ink.

David Natzler
Clerk of the House

David Natzler, Clerk of the House of Commons
London SW1A 0AA T: 020 7219 1310

Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

concerning

a Proposed Regulation establishing a Union certification system for aviation security screening equipment("the proposal")¹

- i) The UK House of Commons firstly notes that Protocol No 2 on the application of the principles of subsidiarity and proportionality (the Protocol) applies to the proposal since it is a proposal from the Commission² and a "draft legislative act".³
- ii) The House of Commons considers that the proposal fails to meet the requirements of Article 5(3) TEU⁴ and the Protocol for the following reasons:
 - a) it is not sufficiently clear that Article 4 of the proposal strikes the right balance between action necessary at EU level and action best left to Member States as it does not explicitly refer to the ability of Member States to continue to apply higher security standards for aviation equipment ("More Stringent Measures") permitted by Regulation 300/2008;
 - b) The Commission does not provide adequate substantiation in its Impact Assessment of the necessity of action at EU level, by making too great an inference from a survey limited to eighteen Member States that Member States are unlikely to make improvements to their current cooperation on testing of aviation security equipment;
 - c) The supposed benefit of EU level action in improving the internal market in aviation security equipment will be undermined by increased bureaucracy and costs in complying with the requirements associated with a common certification scheme in each Member State and ensuring that confidentiality concerning specifications for such equipment is maintained as a matter of utmost national security; and
 - d) The balance between EU level action and discretion at national level would be better achieved if the proposal were to take the regulatory form of Directive rather than a Regulation, thus leaving Member States some flexibility as to how to implement the infrastructure needed for a common certification scheme in a cost effective manner.

¹ Council document: 12090/16 + ADDs 1-2, COM (16) 491.

² Article 3.

³ This proposal is based on Article 114 TFEU which specifies an ordinary legislative procedure and does not fall within the exclusive competence of the Union.

⁴ Article 5(3) TEU provides that "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional or local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".



House of Commons
European Scrutiny Committee

Aviation Security

Sixteenth Report of Session 2016–17

Documents considered by the Committee on 26 October 2016,
including the following recommendations for debate:

Aviation security

*Report, together with formal minutes, minutes
of evidence and appendices*

*Ordered by The House of Commons
to be printed 26 October 2016*

HC 71-xiv
Published on 28 October 2016
by authority of the House of Commons

Notes

Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

Numbers in brackets are the Committee's own reference numbers.

Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.

Numbers preceded by the letters COM or SEC or JOIN are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

Abbreviations used in the headnotes and footnotes

AFSJ	Area of Freedom Security and Justice
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
ECA	European Court of Auditors
ECB	European Central Bank
EEAS	European External Action Service
EM	Explanatory Memorandum (submitted by the Government to the Committee)*
EP	European Parliament
EU	European Union
JHA	Justice and Home Affairs
OJ	Official Journal of the European Communities
QMV	Qualified majority voting
SEM	Supplementary Explanatory Memorandum
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

Further Information

Documents recommended by the Committee for debate, together with the times of forthcoming debates (where known), are listed in the European Union Documents list, which is published in the House of Commons Vote Bundle each Monday, and is also available on the parliamentary website. Documents awaiting consideration by the

Committee are listed in "Remaining Business":
www.parliament.uk/escom. The website also contains the Committee's Reports.

*Explanatory Memoranda (EMs) and letters issued by the Ministers can be downloaded from the Cabinet Office website:
<http://europeanmemoranda.cabinetoffice.gov.uk/>.

Staff

The staff of the Committee are Eve Samson (Clerk), David Griffiths, Terry Byrne, Leigh Gibson, Sibel Tanner, Alistair Dillon, Peter Cost (Clerk Advisers), Arnold Ridout (Legal Adviser) (Counsel for European Legislation), Joanne Dee (Assistant Legal Adviser) (Assistant Counsel for European Legislation), Mike Winter (Second Clerk), Julie Evans (Senior Committee Assistant), Jane Bliss, Rob Dinsdale, Beatrice Woods, (Committee Assistants), and Ravi Abhayaratne, Paula Saunderson (Office Support Assistants).

Contacts

All correspondence should be addressed to the Clerk of the European Scrutiny Committee, House of Commons, London SW1P 3JA. The telephone number for general enquiries is (020) 7219 3292/5465. The Committee's email address is escom@parliament.uk.

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1 Aviation security

Committee's assessment	Legally and politically important
<u>Committee's decision</u>	Not cleared from scrutiny; draft Reasoned Opinion for debate in European Committee A before 3 November 2016; drawn to the attention of the Transport Committee and Home Affairs Committee; further information requested
Document details	Proposed Regulation about EU certification of aviation security screening equipment
Legal base	Article 114 TFEU, ordinary legislative procedure, QMV
Department	Transport
Document Number	(38123), 12090/16 + ADDs 1–2, COM(16) 491

Summary and Committee's conclusions

1.1 The technical standards for the equipment used in aviation security screening are controlled by Member States,¹ normally based on technical requirements established at pan-European level by the 44-state European Civil Aviation Conference (ECAC). This provides a high degree of harmonisation across Member States. However, the Commission believes that this is insufficient and proposes that a more formal, and legally binding, certification procedure, based loosely on the existing certification system for road vehicle type-approval and on the ECAC standards, should apply within the EU.

1.2 The Commission presents its proposal as an internal market measure, arguing that the current ECAC system only represents a partial harmonisation, and differing practices by Member States tend to lead to market fragmentation. It asserts that a fully binding, harmonised approach to standard-setting is necessary to boost the competitiveness of EU companies in this manufacturing sector.

1.3 The Government says that it does not accept the Commission's contention that the proposal complies with the Treaty's subsidiarity principle. It tells us it has concerns about:

- a reduction in Member States' ability, under the framework Aviation Security Regulation, to have More Stringent Measures than those required by that Regulation;
- the risk of exposure of confidential information;
- the threat of increased bureaucracy; and
- the possibility of the Commission foreseeing an oversight body alternative to the ECAC.

¹ We understand this control was exercised originally through the delegated legislation "comitology" procedure specified for Regulation (EC) 300/2008 on technical standards for aviation security equipment. Then national experts sat in a Committee which could give a positive or negative opinion to a measure, with the matter ultimately being resolved by the Council (in default of EP opposition) in the case of the latter. Member State control has been maintained through the new Article 291 TFEU implementing legislation procedure.

1.4 This proposed Regulation is of uncertain utility. We consider that it is possible that the proposal may apply to the UK before Brexit, though we note the transitional provisions as drafted would mean that it is unlikely that it would do so to its fullest extent.² We have therefore considered the compliance of the proposal with subsidiarity principle carefully. We have the following concerns:

- a) It is not sufficiently clear that Article 4 of the proposal strikes the right balance between action necessary at EU level and action best left to Member States as it does not explicitly refer to the ability of Member States to continue to apply higher security standards for aviation equipment (the “More Stringent Measures” permitted by Regulation 300/2008);
- b) The Commission does not provide adequate substantiation in its Impact Assessment of the necessity of action at EU level, by making too great an inference from evidence based on a survey of 18 Member States that Member States are unlikely to make improvements to their current cooperation on testing of aviation security equipment; and
- c) The supposed benefit of EU level action in improving the internal market in aviation security equipment will be undermined by increased bureaucracy and costs in complying with the requirements associated with a common certification scheme in each Member State and ensuring that confidentiality concerning specifications for such equipment is maintained as a matter of utmost national security.

1.5 We therefore recommend that the House issue the Reasoned Opinion annexed to this chapter and to be submitted to the EU institutions before 3 November 2016. To facilitate this we ask the Government to arrange the necessary debate as a matter of urgency.

1.6 As for the concerns the Government mentions to us we wish to hear before negotiation of this proposal goes to Coreper how they are being addressed. Meanwhile the document remains under scrutiny.

1.7 We draw both this chapter and the document to the attention of the Transport Committee and Home Affairs Committee.

Full details of the documents

Proposed Regulation establishing a Union certification system for aviation security screening equipment: (38123), [12090/16](#) + ADDs 1–2, COM(16) 491.

Background

1.8 EU requirements for the methods of aviation security screening and the associated detection capabilities are contained in Regulation (EC) No. 300/2008. However, the technical standards for the equipment used are controlled by Member States, normally

² The proposal is to enter into force on the twentieth day following its publication in the Official Journal. It is proposed, provisionally, that it will then apply from one year after entry into force. However, it is until three years after entry into force, Member States may continue to approve equipment under their national rules.

based on technical requirements established at pan-European level by the 44-state European Civil Aviation Conference (ECAC). This provides a high degree of harmonisation across Member States. However, the Commission believes that this is insufficient.

The document

1.9 Accordingly, the Commission proposes that a more formal, and legally binding, certification procedure should apply within the EU, based on the ECAC standards. Its proposed Regulation would introduce an EU-wide system of certification for airport security equipment (such as, for example, baggage X-ray machines, walk-through metal detectors and security scanners). The proposal is accompanied by annexes setting out the proposed standards and certifications, an impact assessment, and a summary of that assessment.

1.10 The Commission presents its proposal as an internal market measure. Its rationale, as set out in the impact assessment, is that the current ECAC system only represents a partial harmonisation, and differing practices by Member States tend to lead to market fragmentation. The Commission asserts that a fully binding, harmonised approach to standard-setting is necessary to boost the competitiveness of EU companies in this manufacturing sector.

1.11 The model certification proposed is based loosely on the existing certification system for road vehicle type-approval:

- each Member State would be required to designate a body with responsibility for approving the compliance of aviation security screening equipment that is used in the delivery of EU security rules by issuing an EU type-approval certificate on the basis of prototype testing;
- once one Member State had granted type-approval to a manufacturer for a particular model of equipment, this would then be valid throughout the EU;
- the manufacturer would then issue a Certificate of Conformity to accompany each piece of equipment that was manufactured in accordance with that EU type-approval certificate; and
- this would be backed up by a ‘conformity of production’ procedure designed to ensure that the manufacturing system was capable of maintaining production to the same standard as the tested prototype.

The Government’s view

1.12 In his Explanatory Memorandum of 19 October 2016 the Parliamentary Under-Secretary of State, Department for Transport (Lord Ahmad) first notes that the Commission says, in discussing subsidiarity in its introduction to the proposal, that:

“The objective of this Regulation, namely to establish rules on the administrative and procedural requirements for the EU type-approval of aviation security screening equipment, cannot be sufficiently achieved by the EU Member States. Indeed, if Member States intended to launch such

an initiative on their own, they would have already done it while setting up the ECAC CEP³ system. By reason of its scale and effects, the action of establishing a EU type-approval system entailing mutual recognition of the certification of conformity among Member States can only be done at the EU level.”

1.13 The Minister then comments that:

- the Government agrees that aviation security is, by its very nature, an international concern and it is therefore appropriate that common basic security standards are agreed at EU level;
- the threat situation varies, however, between one Member State and another and it is important the Member States have the flexibility to introduce More Stringent Measures (MSMs) where appropriate to address specific threat concerns;
- that variety is acknowledged in the aviation security framework Regulation (EC) No. 300/2008, Article 6 of which allows for Member States to apply MSMs, subject to a risk assessment and provided those measures are relevant, objective, non-discriminatory and proportionate to the risk;
- the UK has in place a number of MSMs which set out additional security measures or limitations beyond those provided for in the EU baseline;
- the Government disagrees with the Commission’s implication that high security standards can only be delivered through a formal EU type-approval system for security equipment;
- the current ECAC CEP system, which provides a less formal basis for harmonisation of technical standards across the 44 ECAC states, and which is also highly influential in setting global standards, has provided a successful model for promoting, regulating and testing the development of new aviation security equipment while maintaining a degree of flexibility for Member States;
- the Commission proposal appears to lack such flexibility and could potentially impede the UK’s ability to apply any necessary MSMs; and
- the Government remains, therefore, to be convinced that the proposal, as currently drafted, is justified in accordance with the principle of subsidiarity as set out in Article 5 TEU.

1.14 Turning to the policy implications the Minister repeats the familiar incantation that until Brexit the UK remains a full member of the EU, all the rights and obligations of EU membership remain in force and during this period the Government will continue to negotiate, implement and apply EU legislation. He adds that the outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

³ The Common Evaluation Protocol, used for testing (but not certifying) security equipment against ECAC standards.

1.15 The Minister then says that while the concept of a harmonised approval system governing the technical standards of airport screening equipment may on the face of it appear consistent with internal market objectives, the current system of testing new equipment based on ECAC standards has worked well and is not, in the Government's view, in need of modification in order to secure aviation security objectives, nor is it clear that this will benefit the EU manufacturing industry. He continues that the Government is still considering its position on the proposal, but that there are a number of specific potential concerns over the proposed system, as follows:

Reduction in the Member States' ability to introduce MSMs

- while the proposed Regulation would not alter the MSM provision in Regulation (EC) No. 300/2008, this would seem incompatible with the idea of harmonised equipment standards;
- for example, if the UK wished to detect smaller quantities of a particular explosive (or any quantity of a new explosive), but was unable, for single market reasons, to prevent the use of 'EU certified' screening equipment which was unable to meet this higher detection capability, this would impede the UK's ability to apply MSMs, and thus lower the level of security;

Risk of exposure of confidential information

- unlike most manufacturing sectors, where testing standards and methodologies are open to the public, aviation security equipment is required to meet specifications which, for obvious reasons, are strictly confidential;
- in contrast to (for example) car manufacturers, security equipment manufacturers are not given precise information on the standards they are required to meet;
- staff involved in the testing need to have an appropriate level of security clearance;
- opening up the market to increase competition runs the risk of compromising the high degree of data security that exists in the current ECAC system;

Increased bureaucracy

- the system envisaged by the Commission appears to add unnecessary layers of regulation and complexity to the existing ECAC system, including the setting up of competent approval body by each Member State, resulting in no additional security benefit and possibly slowing down the process of introduction of new equipment;
- although some representatives of industry (manufacturers and airports) had initially supported the principle of an EU-wide approval system, due

to previous concerns about the existing ECAC system, these concerns have already been largely addressed, and as a result the Government believes industry support for a separate EU scheme has diminished.

1.16 The Minister says that discussions with the Commission have indicated that it envisages that ECAC would continue to oversee the testing process (including the certification of the testing facilities), but this is not explicitly stated in the text of the proposal, and it is possible that an alternative oversight body is foreseen.

1.17 In relation to consultation and the Commission's assessment of the impact of the proposal the Minister says that:

- the Commission conducted a public consultation between March and June 2013 and received 37 responses with, it suggests, general support then for a legislative approach; and
- the Commission's impact assessment is a comprehensive document, but was based on 2013 data and does not reflect fully the more recent improvements in the ECAC CEP regime

1.18 The Minister says that it is not anticipated that the proposal would have any significant financial impact on industry in comparison with the current ECAC regime and that there are unlikely to be significant financial implications for the EU or the Government.

Previous Committee Reports

None.

Annex: Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

concerning

a Proposed Regulation establishing a Union certification system for aviation security screening equipment ("the proposal")⁴

- i) The UK House of Commons firstly notes that Protocol No 2 on the application of the principles of subsidiarity and proportionality (the Protocol) applies to the proposal since it is a proposal from the Commission⁵ and a "draft legislative act".⁶

⁴ Council document: 12090/16 + ADDs 1–2, COM (16) 491.

⁵ Article 3.

⁶ This proposal is based on Article 114 TFEU which specifies an ordinary legislative procedure and does not fall within the exclusive competence of the Union.

- ii) The House of Commons considers that the proposal fails to meet the requirements of Article 5(3) TEU⁷ and the Protocol for the following reasons:
- a) it is not sufficiently clear that Article 4 of the proposal strikes the right balance between action necessary at EU level and action best left to Member States as it does not explicitly refer to the ability of Member States to continue to apply higher security standards for aviation equipment (“More Stringent Measures”) permitted by Regulation 300/2008;
 - b) The Commission does not provide adequate substantiation in its Impact Assessment of the necessity of action at EU level, by making too great an inference from a survey limited to eighteen Member States that Member States are unlikely to make improvements to their current cooperation on testing of aviation security equipment;
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⁷ Article 5(3) TEU provides that “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional or local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

Formal minutes

Wednesday 26 October 2016

Members present:

Sir William Cash, in the Chair

Geraint Davies	Mr Jacob Rees-Mogg
Richard Drax	Kelly Tolhurst
Peter Grant	Mr Andrew Turner
Kate Hoey	

Draft Report, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.18 read and agreed to.

Resolved, That the Report be the Sixteenth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

[Adjourned till Wednesday 2 November at 1.45pm.]

Standing Order and membership

The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

- a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;
- b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and
- c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression "European Union document" covers —

- i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;
- ii) any document which is published for submission to the European Council, the Council or the European Central Bank;
- iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;
- iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
- v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;
- vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee's powers are set out in Standing Order No. 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House's Standing Orders, which are available at www.parliament.uk.

Current membership

[Sir William Cash MP](#) (*Conservative, Stone*) (Chair)

[Geraint Davies MP](#) (*Labour/Cooperative, Swansea West*)

[Richard Drax MP](#) (*Conservative, South Dorset*)

[Peter Grant MP](#) (*Scottish National Party, Glenrothes*)

[Damian Green MP](#) (*Conservative, Ashford*)

[Kate Green MP](#) (*Labour, Stretford and Urmston*)

[Kate Hoey MP](#) (*Labour, Vauxhall*)

[Calum Kerr MP](#) (*Scottish National Party, Berwickshire, Roxburgh and Selkirk*)

[Stephen Kinnock MP](#) (*Labour, Aberavon*)

[Craig Mackinlay MP](#) (*Conservative, South Thanet*)

[Mr Jacob Rees-Mogg MP](#) (*Conservative, North East Somerset*)

[Alec Shelbrooke MP](#) (*Conservative, Elmet and Rothwell*)

[Graham Stringer MP](#) (*Labour, Blackley and Broughton*)

[Kelly Tolhurst MP](#) (*Conservative, Rochester and Strood*)

[Mr Andrew Turner MP](#) (*Conservative, Isle of Wight*)

[Heather Wheeler MP](#) (*Conservative, South Derbyshire*)

The following members were also members of the committee during the parliament:

Nia Griffith MP (Labour, Llanelli) and Kelvin Hopkins MP (Labour, Luton North)
