INTERNATIONAL AND EU LEGAL FRAMEWORK OF THE AVIATION SECURITY

CONTENTS: 1. THE BIRTH OF AVIATION SECURITY AND THE PREVENTION OF UNLAWFUL ACTS. - 2. THE INTERNATIONAL AVIATION SECURITY AFTER THE 9/11 ATTACKS. - 3. THE EU INITIAL RESPONSE TO THE SEPTEMBER 11TH EVENTS. – 4. THE NEED FOR A STRINGENT SET OF AVSEC REGULATIONS IN EU – 4. INTERNATIONAL AND EU REGULATIONS ON PNRS.

1. *The birth of Aviation security and the prevention of unlawful acts*

Aviation security is a significant matter with regard to safeguarding basic passenger rights. Risks and dangers to a safe flight maybe of different nature and origins. Aviation security addresses all those cases in which the integrity of a flight may be endangered by unlawful acts against civil aviation, whether they be actually committed or merely planned ICAO Annex 17 to the Convention on International Civil Aviation enlists, in its chapter 1, a number of examples of what can be considered as an act of unlawful interference.

In particular, the chapter states that:

> "These are acts or attempted acts such as to jeopardize the safety of civil aviation, including but not limited to: unlawful seizure of aircraft, destruction of an aircraft in service, hostage-taking on board aircraft or on aerodromes, forcible intrusion on board an aircraft, at an airport or on the premises of an aeronautical facility, introduction on board an aircraft or at an airport of a weapon or hazardous device or material intended for criminal purposes, use of an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to property or the environment, communication of false information such as to jeopardize the safety of an aircraft in flight or on the ground, of passengers, crew, ground personnel or the general public, at an airport or on the premises of a civil aviation facility."

In view of the strongly international nature of air transport and travel and that any unlawful act would affect the interests of a number of States, it is fundamental that a common legal framework be prepared at an international level aiming at detecting and preventing such criminal activities (Camarda, 1976, p. 152).

The need for concrete initiatives designed to prevent these acts of unlawful interference is generally dated back to 1960's, when in-flight aircrafts commenced to be hijacked by politically motivated groups or individuals with mental issues. As an example of these hijackings is easy to mention what happened on July 19, 1960, when Trans Australia Airlines Flight 408 was hijacked by a man who threatened to blow out the airplane; The occurrence resulted in no damages to the aircraft and the people on board since he was successfully disarmed by a member of the crew and a passenger.

In response to these events, the International community adopted the first instrument to prevent acts of unlawful interference, the Tokyo Convention of 1963. This Convention is applicable to unlawful activities and acts carried out on board aircraft, provided the latter is registered in one of the signatory States and is flying over a region that is not under the sovereignty of any State or over international waters. This instrument, for the first time, provided for obligations for States in the repression of unlawful acts, although not exhaustively. Jurisdiction on criminal acts committed aboard aircraft is solely that of the State of Registry. A different State may exercise jurisdiction only in the case of a link between the latter and the crime committed. The discretionarily enjoyed by signatory States in defining unlawful conduct entailed several problems in the application of the Convention.

Less than a decade later, a new series of attacks towards civil aviation spotlighted the phenomenon to the international community's attention. On February 21, 1970, Swissair Flight 330 crashed in the woods near Zurich, 9 minutes after take-off, due to the detonation of a bomb on board. In this event, all 47 people on board lost their lives. Little more than a month later, Japan Airlines Flight 351, with 149 people on board, was hijacked by terrorists belonging to the political group 'Japanese Red Army'. Luckily all hostages were released unharmed

The community reacted, in June of the same year, by calling an extraordinary assembly (the 17th Session of the ICAO Assembly, held in Montreal from 16 to 30 June 1970) at the initiative of Switzerland. The Assembly agreed that the adoption of an annex to the Chicago Convention on Security was strongly desirable. This action was required since unlawful acts, at the time in which the Chicago Convention had been signed, was not perceived as a real threat to the safe and secure operations of flights.

Only a few months after this meeting, one of the most spectacular hijacking in the history of world aviation took place, the 'Dawson's Field' hijackings, in which 310 people were taken hostage. On 6 September 1970, armed groups of the 'Popular Front for the Liberation of Palestine' simultaneously hijacked four aircraft: EI Al Israel Airlines Flight 219, TWA Flight 714, Swissair Flight 100 and Pan Am Flight 93. On 9 September, a fifth aircraft, operating BOAC Flight 775, was also hijacked. All five aircraft were made to land at Dawson's Field in Jordan. The terrorist attack came to a conclusion the following fortnight, with the freeing of all the hostages, although the aircraft were destroyed with explosives on 12 September.

Following this incredible event, a new decisive response was required. To this end, two more conventions were ratified: The Hague Convention of 16 December 1970 (which came into force the following year, on 14 October 1971), for the Suppression of Unlawful Seizure of Aircraft, and the Montreal Convention (which was adopted at the International Conference on Air Law, in Montreal, on 23 September 2013 and came into force on 26 January 1973) for the Suppression of Unlawful Acts against the Safety of Civil Aviation. In addition to reaffirm the need to take strong actions aimed at coping with this new emerging threat, these two conventions managed to overcome many of the problems relating to implementation arising from the adoption of the first Convention in 1963. In particular, the Hague Convention widened the possibility of exercising jurisdiction for more signatory states, rendering more uniform the concept of unlawful acts against air navigation safety. The Montreal Convention of 1971 then

further widened this notion, also covering activities that are likely to threaten civil aviation and being an accomplice in said unlawful activities. On 22 March 1974, four years after the "Dawson's Field" event, ICAO adopted, pursuant art. 37 of the Chicago Convention, its 17th Annex, entitled 'Safeguarding International Civil Aviation Act of Unlawful Interference', which came into force on 27 February 1975, which provided for the adoption of security systems aboard and inside aircrafts to ensure an effective safeguard of passengers, crew, ground personnel and the general public in airport areas, to be followed by signatory States. Moreover, as balancing out the Annex, Document 8973 'Security Manual for Safeguarding against Act of Unlawful Interference' was also adopted to provide precise guidelines on the implementation of the Standards and Recommended Practices to the States.

Besides Annex 17 and Document 8973, further provisions concerning Aviation Security, aiming at regulating specific operational aspects and measures to be adopted for a more effective response to and prevention of unlawful acts in air transport are also present in further Annexes to the Chicago Convention (Dobelle, 2008, p. 65).

The adoption of these measures, however, has not been successful to prevent the occurrence of further acts of unlawful interference on passenger planes in the decades that followed.

Amongst the most notorious is the Lockerbie bombing of Pan Am Flight 103 on 21 December 1988 over Lockerbie in southwest Scotland. At around 7 p.m. the airplane flickered off the radar tracking and then fell to the ground, broken in three pieces, about two minutes later, killing all 259 people on board and 11 people living in a part of the town destroyed by the impact of awing section. Later the cause of the disaster was ascertained to be an in-flight explosion, caused by a bomb, brought on board the aircraft inside a piece of luggage in the hold (Schmid, 1993, p. 292 and Aberyratne, 2013, p. 21).

The Lockerbie tragedy, with its 270 victims, coupled with the Air India 812 disaster, happened on 23 June 1985, in which 329 lost their lives due to a bomb explosion occurred in the front cargo hold of the Boeing 747 while it was still on route to London, were the worst air disaster caused by an act of unlawful interference in the history of civil aviation, at least until the beginning of the new century.

2. *The International Aviation Security after the 9/11 attacks*

On 11 September 2001, four flights operated by the two main American airlines, after being hijacked almost immediately after take-off were used as weapons of mass destruction in suicide attacks to strike sensitive United States targets. American Airlines Flight 11 and United Airlines Flight 175 respectively crashed into Tower 1 and Tower 2 of the New York World Trade Centre at 8.46 and 9.03 a.m. local time while American Airline Flight 77 struck the west section of the Pentagon (Arlington, Virginia) at 9.47 a.m. The last of the fourth aircraft, United Flight 93 crashed to the ground near Shanksville in Pennsylvania a few seconds after 10 a.m.: the crash occurred during the revolt of the passengers who, realising the hijackers' intentions, tried in vain to take back control of the aircraft. The most serious terrorist attack in

history, carried out using civil aviation passenger planes, caused the death of 2 974 people.

In the face of the dramatic and at the same time spectacular nature of the 9/11 attacks, the International Community understood the necessity of finding, yet again, new measures to avoid tragedies such as this from ever happening again.

At the 33rd ICAO Assembly, held between 25 September and 5 October 2001, participating States agreed on the need to review the provisions of Annex 17 with a view to making them more stringent in order to tackle this specific new type of threat (Before 11 September 2001 civil aviation planes had never been used as weapons of mass destruction).

With the adoption of Resolution A-33 'Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation', Contracting States stated the necessity of a stronger and closer cooperation (both in financial and human resources) in ensuring the full transposition and implementation of ICAO Security rules within their systems and also asserted the need to call, as soon as possible, a 'high-level ministerial conference on aviation security 'aiming at an update of ICAO Regulations by the adoption of new SARPs, the creation of an audit system to verify their degree of implementation and the provision for suitable measures to fund the new security mechanisms. This conference was held in Montreal, at ICAO headquarters, on 19 and 20 February 2002. The conference highlighted the need to draft an 'Aviation Security Plan of Action' and, as part of this, to design a 'Universal Security Audit Programme - USAP' for the strengthening of Aviation Security at a global level. These documents state the need for States to intensify their implementation of ICAO provisions, introducing additional security measures commensurate with the type of threat that they may possibly be facing as well as economic reasons based on cost-benefit ratio. In this regard, ICAO stressed the necessity for studies to identify new and possible threats (Abeyratne, 2002, p. 406)

Furthermore, many recommendations giving guidelines on the updating of already existing SARPs have been adopted, such as the requirement that the cockpit be suitably locked off to foil any attempted unauthorized intrusion, or the organisation of ground passenger checking instrumentation. Such recommendations were laid down in the abovementioned Annexes 1, 6, 9, 11, 14 and 18.

Despite these important measures, which brought significant improvements to the level of security in the aviation sector, new more complex and various attacks towards the civil aviation sector have been committed.

On 9 August 2006, British police arrested 24 people for planning a high-scale terrorist attack with the detonation of liquid explosives carried on board airliners travelling from the United Kingdom to the United States and Canada, disguised as soft drinks. The plot was discovered by British police during an extensive surveillance operation. Yet, on December 25, 2009, in the so called "Christmas Day bombing attempt", Northwest Airlines Flight 253 from Amsterdam Airport Schiphol to Detroit Metropolitan was the target of a failed al-Qaeda bombing attempt in which a passenger, Umar Farouk Abdulmutallab, tried to set off plastic explosives in his underwear but failed to detonate them properly. A Dutch passenger, Jasper Schuringa,

tackled and restrained him and put out the fire with the aid of others. The attack resulted in no fatalities (Abeyratne, 2010, p. 167 and Harrison, 2009, p. 137).

In addition to these events, after 9/11, there were others hijack attempts and successful hijacks around the world, none of these ended with any fatalities until 29 November 2013. On that day, flight TM470 departed from Maputo, Mozambique to Luanda, Angola, and crashed in the Bwabwata National Park. All occupants of the plane (27 passengers and 6 crew member) lost their lives in the accident. The preliminary investigation appeared to show that the aircraft had been hijacked by the captain. Yet, on 7 February 2014, Pegasus Airlines flight PC-751 on route to Instanbul was hijacked by a passenger. The man said he had a bomb on board and asked to be flown to Sochi (Russia). He was led to believe that the flight diverted to Sochi. However, the aircraft was escorted by two Turkish F-16 fighter jets and landed safely, with no injuries or fatalities, at Instanbul Airport. After 10 days, on 17 February 2014, another flight (Ethiopian Airlines flight 702 en route to Rome) was hijacked by the co-pilot. The aircraft and its passengers landed safely at Geneva Airport escorted by the Italian and French air force.

Therefore, ICAO's Member States, well-aware of the changed conditions of risks that can and may condition air transport and the security of air navigation decided, at the close of the 37th ICAO General Assembly, held in Montreal between 28 September and 8 October 8, 2010, to adopt the "Declaration on Aviation Security". The declaration, recognizing the continuing threat to civil aviation, stresses the need to foster international cooperation among the States throughout the enhancement of information collection and sharing systems, including the sharing of sensitive threat information, among Member States and between concerned entities within States. The Declaration serves this purpose by emphasizing the collective responsibility for taking appropriate action to address a worldwide problem. In addition, for the sake of completeness, it is also worth to mention that on September 10, 2010, just two weeks before the ICAO 37th General Assembly, the International Community adopted two new additional instruments for an ampler and more efficient fight against the commission of unlawful acts against and by means of civil aviation. The Beijing Convention and the Beijing Protocol, as of today not yet in force, extend the number of acts criminalised and the judicial competence of states. The provisions in the Convention regulate unlawful behaviour, while the Protocol rules on cases of unlawful seizure of aircraft. It must be noted, finally, that the signing of these two new instruments necessarily entails the adaptation of their national law with the identification of the new crimes and relative sanctions for signatory states (Abeyratne, 2001, p. 243).

On 22 March and 28 June 2016, just few years later the Declaration, a new cornerstone in establishing an effective and pro-active international legal framework on Aviation Security, two bombing-terminal and suicide attacks were conducted at two of the most important airports in Europe, the International Airport of Brussels and the Ataturk International Airport in Istanbul[1]. These two attacks claimed the lives of

[1] On 22 March 2016, three coordinated suicide bombings occurred in Brussels: two at Brussels Airport in Zaventem, and one at Maalbeek metro station in the city center. Thirty-two people and three perpetrators were killed, and more than 300 people were injured.

seventy-seven people, among terminal employees, passengers, well-wishers and visitors. These events coupled with the in-flight disintegration of Metrojet Flight 9268 due to an explosion on board[2], brought the United Nations to firmly react to this new wave of terror by reinforcing the State's commitment embraced in the 2010 ICAO Declaration. With the adoption of Resolution 2309 of 22 September 2016, the UN Security Council, warning that civil aviation remains and attractive target for terrorist, called on all States to work within ICAO to ensure a thorough revision, update, and implementation of the current and new Aviation Security SARPS based on the current risks and future threats. Yet, the Resolution urges States to ensure cooperation among their domestic departments and agencies, underpinning the importance of information-sharing, cooperation in capacity-building and technical assistance.

The recent Resolution A39-18, "Consolidated statements of continuing ICAO Policies related to Aviation Security, adopted by the ICAO Member States, during the 39th ICAO General Assembly, held in Montreal between 27 September and 7 October 2016, has further recognized the need to "consolidate Assembly resolutions on the policies related to safeguarding of international civil aviation acts of unlawful interference". The adoption of this Resolution, mindful of all the above-mentioned measures adopted, has the main objective to facilitate their implementation and application by States, making the texts of these materials more readily available and logically organized. Yet, with Resolution A39-19, the Assembly have called upon States and industry stakeholders to take several measures to address another arising methodology of act of unlawful interference: the cyber-attacks. Specifically, the Assembly, recognizing the multi-faceted and multi-disciplinary nature of cybersecurity, urges States, among the others, to encourage a robust cyber-security culture throughout all national security agencies involved and to identify threats and risks from possible cyber incidents, adopting strategies and best practices, such as a flexible, risk-based approach and a cybersecurity management systems, aimed at protecting critical aviation systems all around the world.

3. *The EU initial response to the September 11th events.*

The European Union too, after the tragic attacks of 11 September 2001, understood the importance and the need to adopt a uniform system of Regulations for the prevention of unlawful acts in civil aviation. Before this date, in fact, each

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Another bomb was found during a search of the airport. Three months later, on 28 June 2016, a group of terrorist equipped with automatic weapons and explosive belts stroke the Instanbul Ataturk Aiprort with a simultaneous attack at the international terminal of Terminal 2. Forty-five people were killed, in addition to the three attackers, and more than 230 people were injured.

[2] On 31 October 2015, Metrojet flight 9268, a scheduled flight from Sharm el Sheikh to Saint Petersbrug, was destroyed in an accident central Sinai, Egypt. All 224 on board were killed. Investigators reported that they believed the aircraft broke up in the air. The Russian Federal Security Service stated on November 16 that the crash was caused by a terrorist attack. Traces of explosives were found in the wreckage of the plane.

Member State was individually responsible for security legislation relating to air transport.

On 10 October 2001, a month after the tragic events of New York and Washington, the Commission, on initiative of the European Parliament, proposed the adoption of a common Regulation in the field of security. This proposal resulted in the adoption of Regulation No (EC) 2320/2002 of 16 December 2002, which was implemented at European Union airports from 19 January 2003. This Regulation, no longer in force today, is of fundamental importance since it made, for the first time, the control procedures on passengers and their baggage in airport access areas uniform under common aviation security rules. The first Recital of the preamble to the Regulation, which states' that terrorism is one of the greatest threats to the ideals of democracy and freedom and the values of peace', is significant. Since the latter principles constitute the very essence of the European Union, the importance of this provision is quite clear.

Regulation (EC) No 2320/2002 was then integrated by Commission Regulation (EC) No 622/2003 of 4 April 2003 laying down specific measures for the implementation of the common basic standards on aviation security.[3]

[3] On the basis of Article 8 of Regulation (EC) No 2320/2002, Article 3 of Regulation (EC) No 622/2003 states that the measures set out in its Annex, which must be inserted in the programmes for civil aviation security, are secret, and thus cannot be published, and are to be made available only to persons authorised by a Member State or the Commission. The matter of the confidentiality of information in the Annex to Regulation (EC) No 622/2003, already the subject of disagreement between EU institutions, was submitted to the attention of the Court of Justice during a reference for a preliminary ruling by the Unabhängiger Verwaltungssenatim Land Niederösterreich (the independent administrative regional court for Lower Austria) in Case C-345/06. The issues raised by the Austrian court arise from a somewhat curious event. On 25 September 2005, Mr Heinrich was not permitted to pass through the security control at Vienna-Schwechat airport. It appears that he nevertheless boarded the aircraft with tennis racquets in his cabin baggage, despite their being 'allegedly'[3] forbidden by Regulation (EC) No 622/2003 as being suitable to be used as weapons.[3] Security staff subsequently ordered him to leave the aircraft. Two questions were referred to the Court for its interpretation: do Regulations fall under the category of documents whose public access may be the object of specific limitations, considering that being published in the Official Journal of the European Union is a specific requirement for their applicability or, if this is not the case, are such Regulations binding despite being contrary to Article254(2) TEC (now Article 280 TFEU). In essence, the referring court wondered whether a provision such as Article 8 of Regulation (EC) No 622/2003 constitutes a legal basis for the non-publication of documents for which TEC (now TFEU) expressly prescribes the obligation and if such documents are furthermore valid. The Court, in its judgment in Case C-345/06, after recalling that if a Regulation is to have any effect on individuals it must be published in the Official Journal of the European Union, went on to state that the principle of legal certainly requires that individuals must be given the possibility of ascertaining unequivocally what their rights and obligations are in order to adjust their behaviour in the light of their knowledge. It follows that an act adopted by a Community institution cannot be enforced against natural and legal persons in a Member State before its publication in the Official Journal of the European Union. The Court then added, in regard to this last aspect, that when EU Regulations impose obligations on individuals, national implementing measures must also be published since it is not possible to require that individuals comply with them if they have had no way of knowing them. Regulation (EC) No 622/2003 was subsequently repealed and replaced by Commission Regulation (EC) No 820/2008 laying down measures for the implementation of the common basic standards on aviation security (in OJEC L 221 of 19 August 2008, p. 8). Regulation

Regulation (EC) No 2320/2003 soon proved to be inadequate as a result of the complexity of its procedures and the fact that some of the technical requirements it provided for had a very limited impact on levels of security while, on the other hand, they made it particularly difficult for air carriers to carry out routine procedures, especially at small airports. The Commission also attributed this inadequacy to the speed with which, in the wake of the events of 11 September 2001, a number of non-binding recommendations, drawn up by the Member States, took the shape of a piece of legislation which was extremely complex from the point of view of its implementation.

4. *The need for a stringent set of AVSEC Regulations in EU*

In 2005, the Commission proposed a new Regulation to replace Regulation (EC) No 2320/2002, which aimed at strengthening while at the same time simplifying and harmonising the procedures provided for in the original provision (Giemulla, 2001, p. 357). This was prompted, *inter alia*, by the fact that in the over 40 un announced inspections carried out in Member States' airports as from February 2004, serious shortcomings in security systems were discovered. Three years after this proposal was presented, Regulation (EC) No 300/2008 was adopted. The new Regulation underwent a rather tortuous legislative procedure because of the widely diverging positions among the EU institutions so much so that it required a decision by the Conciliation Committee under the codecision procedure under Article 251 TEC (now Article 294 TFEU), which delivered its decision on11 January 2008. This was followed by the Council's decision at third reading on 4 March 2008 and of the European Parliament on 11 March 2008.

Regulation (EC) No 300/2008 achieved its full effectiveness from 29 April 2010, with the exception of Article 4 (Procedure for the common basic standards not foreseen at the entry into force of the Regulation and the amendment non-essential elements of the common basic standards), Paragraphs 2, 3 and 4, Article 8 (Cooperation with the International Civil Aviation Organisation), Article 11 (procedure for the modification of National quality control programmes), Paragraph 2, Article 15 (Commission inspections), Paragraph 1, second subparagraph, Article 17 (Stakeholders' Advisory Group), Article 19 (Committee procedure) and Article 22 (Commission report on financing), which were implemented with effect from the publication of the Regulation.

In general terms, while Regulation (EC) No 300/2008 restricts itself to determining only general rules to which are subject all interventions aiming at preventing unlawful acts, without specifying the technical and procedural details relative to their concrete execution, leaving technical and procedural methods to implementation measures, it nonetheless corrected a few operational problems which had arisen in the application of the preceding Regulation. Thus, Regulation (EC) No

(EC) No 820/2008 was subsequently repealed and substituted by Commission Regulation (EU) No 185/2010 of 4 March 2010 (in OJEU L 55 of 5.3.2010, p.1). This latter regulation, after being amended several times, was finally repealed and substituted by Commission Regulation (EU) No 2015/1998 (in OJEU L 299 of 14 November 2015, p. 1).

300/2008 takes account of and provides for the need to ensure greater flexibility in the adoption of security measures and procedures so as to take into account changes in the assessment of risks and enable the introduction of new technologies in a timely fashion.

In other words, the declared aim of the Regulation is, then, to clarify, simplify and bring further into line legislative provisions to reinforce civil aviation security as a whole.

What Regulation (EC) No 300/2008 does, as for that matter Regulation(EC) No 2320/2002 did, is to provide, in the Annex referred to by Article 4(1) or its subsequent amendments, the basic common rules for the protection of civil aviation from acts of unlawful interference that endanger its safety. However, it leaves to the Commission the task of establishing both the means of incorporating and applying common rules and the criteria that allow Member States to derogate from those rules and adopt alternative security measures to ensure an adequate level of protection on the basis of local risk assessment, which it may do by modifying the Regulation with a decision adopted according to the regulatory procedure under Article 5 of the Council Decision of 28 June 1999.

In this latter regard, the Commission, under Article 4(4) of Regulation (EC) No 300/2008, may lay down, by a decision adopted according to the procedure under Article 19(3), the criteria allowing Member States to derogate from common basic standards and adopt alternative security measures that provide an adequate level of protection on the basis of a specific risk assessment, provided such alternative measures are justified by reasons relating to the size of the aircraft, or by reasons relating to the nature, scale or frequency of operations or of other relevant activities. This allows, especially in small airports where the number of flights is limited, the application of less stringent measures than those prescribed by the Regulation, provided an adequate level of security is ensured. Regarding this aspect, it also necessary to remember that small airports intended for general aviation mean those with an annual average of not more than two daily commercial flights with a commercial activity limited to aircraft with an MTOW (Maximum Take Off Weight) of less than 10 tonnes, or seating less than 20. This derogation should, however, be applicable to commercial airports, although of large dimensions, having separate facilities for small aircraft, as above described. In other terms, areas of large airports, destined to traffic limited by the number and size of aircraft are, to all intents and purposes, equated with small, independent airports.

This amendment, which takes account of the objective difficulties encountered by some airports in complying with stringent security measures, includes some aspects set out in the preamble to Regulation (EC) No 2320/2002, in particular Recital 14 which, as already mentioned, is informed by the principle of proportionality, and at the same time removes some of the ambiguity of Article 4(3) of that Regulation, the implementation of which has given rise to many interpretative doubts. Article 4(3) entrusted the competent national authorities with the adoption of national security measures for the provision of an adequate level of protection at airports on the basis of local risk assessment, and 'where the application of the security measures specified

in the Annex to this Regulation may be disproportionate, or where they cannot be implemented for objective practical reasons' (Barros, 2012, p. 53)

Although the measures allowing derogation from the basic common standards are established by the new Regulation at EU level, Member States may nevertheless adopt more stringent measures, provided they are relevant, objective, and non-discriminatory and proportionate to the local risk. In this case, Member States have an obligation to inform the Commission even when the measures adopted are limited to one specific flight on a particular day.

One of the most important innovations in Regulation (EC) No 300/2008 is to be found in Article 7, which concerns the controversial issue of security measures in third countries compared to those in the EU.

In that respect, Regulation (EC) No 2320/2002 merely laid down a procedure to be followed, according to which the Commission, assisted by the Committee for Security, should take into consideration, together with the International Civil Aviation Organisation (ICAO) and the European Civil Aviation Conference (ECAC), the possibility of developing a mechanism to evaluate the meeting of security requirements of flights coming from third country airports.

The new Regulation introduces a procedure where each Member State must notify the commission of the measures prescribed by a third country whenever they differ from the common basic rules with regard to flights departing from an airport in a Member State to, or over, said third country. The Commission, subsequently, must 'draw up an appropriate response to the third country concerned'. The Commission's involvement is not necessary when the Member States have adopted more stringent measures than the common basic standards, or the requirement of the third country is limited to a given flight on a specific date. The Commission, moreover, has the power to conclude agreements recognising that the security standards applied in a third country are equivalent to Community standards in order to advance the goal of 'one-stop security' for passengers, luggage and cargo on all flights in transit at European Union airports.

Other provisions in Regulation (EC) No 300/2008 are just as interesting. As well as the national programme for civil aviation safety, a rule on national programmes for quality control is also provided for (Article 11), the aim of which is to enable Member States to check the level of security of civil aviation and identifying and swiftly correcting any deficiencies. In the context of national quality control programmes all airports, operators and entities responsible for the implementation of aviation security standards that are located in the territory of the Member State concerned are tobe regularly monitored.

A specific airport security programme (Article 12) and an air carrier security programme (Article 13) are introduced, setting out the methods and procedures that are to be followed by the airport operator and the air carrier in order to comply with security requirements.

Article 14 of Regulation (EC) No 300/2008 makes it an obligation for any other entity required to apply aviation security standards to draw up, apply and keep an updated security programme.

In reference to the Commission's powers of inspection, there are no particular innovations to be recorded in Regulation (EC) No 300/2008. According to the new legal approach chosen by the legislature, the modalities for the carrying out of the Commission's inspections should have been adopted afterwards according to the regulatory procedure under Article 19(2).

This was the case with Commission Regulation (EU) No 72/2010, under which the inspections verifying the application of Regulation (EC) No 300/2008 must be conducted in a transparent, effective, harmonised and consistent manner, in cooperation with the competent authorities of Member States, designated under Article 9 of Regulation (EC) No 300/2008, and must cover selected airports, operators and entities responsible for applying aviation security standards. As regards the relevant procedures, the Commission must give due notice (at least two months) to the appropriate authorities of the territory. Commission officials must conduct inspections which meet the criteria of effectiveness and efficiency. On completion of the inspection, a report is to be sent to the competent authority of the relevant State. The latter must submit a reply in writing based on the results and recommendations received and the same authority is also to provide an action plan, specifying actions and deadlines, to remedy any deficiencies identified.

Furthermore, still on the subject of inspections and for the sake of completeness, it must be pointed out that some of the amendments to the proposal for the adoption of Regulation (EC) No 300/2008 presented by the European Parliament were not included in the common position. Amongst these was an amendment to require the Commission to ensure that every airport should be inspected at least once every four years, following the Regulation's entry into force.

Finally, mention should be made of another important innovation, introduced by Article 4 of Regulation (EC) No 300/2008, providing for the only additional responsibility attributed to the Commission. The Commission must introduce detailed in-flight security measures, regulating aspects such as access to the flight deck, the treatment of potentially disruptive passengers, and flight security officers. The latter, by express provision, may be armed. This is undoubtedly an important legislative innovation that will need to be applied with a great deal of caution.

The new Regulation has also updated the previous provisions concerning air transport security, based on ECAC recommendations (Article 4(1)) already in the Annex to Regulation (EC) No 2320/2002).

5. *International and EU regulations on PNRs.*

As previously stated, the threat of possible unlawful interferences in the air transport system did not decline, even after the events of 11 September 2001, nor has it lost any of its urgency. For this reason, especially today, the necessity of sharpening preventive measures in order to avoid the repetition of such events is keenly felt.

In this context, the use by the authorities of every State of personal data provided by passengers during when travelling is a useful preventive instrument. These identifying data (Passenger Name Records – PNR. In the beginning, the use of PNRs

was conceived to allow air carriers to exchange information on personal data acquired upon booking from those passengers who might have had to use flights from different Airlines to reach their final destination) contain much information on the individual passenger including name, address and email, phone numbers, terms of payment, booking dates, seat number and information on previous non-appearances at boarding. Such data are collected by air carriers (and in some cases by tour operators and travel agencies) and are mainly used for commercial aims and purposes. But these are not the only purposes the data are put to. Since the 1950s, this information has been used by customs offices in various States as an instrument in the fight against terrorism and organised crime, and consequently for purposes of security and safeguard of national interests.

PNRs are, then, a group of data that enable the tracing of each passenger for commercial uses, but the handling of PNRs, especially for security reasons (after the 9/11 attacks many States started to require transmission of this information from carriers) has, however, impinged on the users-passengers' right to privacy. For this reason, it is essential that processing of these data be carried out in ways and forms ensuring the respect of the fundamental rights of persons. These data are not to be confused with API (Advance Passenger Information), obtained by optically reading passports. API data are also distinguishable from PNR data for the purposes of their collection and use. The former is, in fact, mainly used as identity control tools, in the monitoring of and processing accesses to frontiers. The latter are used for the prevention of terrorist acts and other serious crimes. Because of the great number of elements present in the latter, the use they may be put to varies according to necessity. PNR may thus be used both for investigations and in criminal proceedings (reactively), and the prevention of crimes (by their use in real time), and for the study and analysis of trends, to create general movement and behaviour models of subjects (from a pro-active point of view).

On an International prospect the issue of the collection of PNR data by Member States has been raised for the first time during the twelfth session of the Facilitation Division International Civil Aviation Organization (ICAO), held in Cairo between 22 March and 1 April 2004, with the adoption of recommendation B/5 by which it invited the same ICAO to develop guidelines addressed to Contracting States who had decided to use PNR data as an additional identification instrument to the data API – Advance Passenger information (Mendes De Leon, 2006, p. 320 and Pauvert, 2005, p. 81).

The Recommendation B/5[4] was followed by the adoption of the Recommended Practice *3:48* by the ICAO Council which was inserted in Annex 9 (Facilitation).

> The Recommended Practice states that: «Contracting States requiring Passenger Name Record (PNR) access should conform their data

[4] According to *Recommendation* B/5, «It is recommended that ICAO develop guidance material for those States that may require access to Passenger Name Record (PNR) data to supplement identification data received through an API system, including guidelines for distribution, use and storage of data and a composite list of data elements which may be transferred between the operator and the receiving State».

requirements and their handling of such data to guidelines developed by ICAO».

At this regulatory intervention, ICAO, a year later, has responded by launching, in its corollary, the guidelines for the adoption of uniform measures for transmission and conservation by the Member of such data (Circular 309). Finally, some years later, following a recommendation of the Facilitation Panel (FALP) in 2008, the ICAO issued, during a FALP meeting held between 10 and 14 May 2010 in Paris, the doc. 9944 (Guidelines on Passenger Name Record Date) with the specific purpose of updating the guidelines contained in Circular 309, setting more stringent criteria to be followed by Contracting States in the creation of transmission, storage and data protection systems of PNR.

> The new paragraphs states that: «[c]ontracting States requiring PNR data should consider the data privacy impact of PNR data collection and electronic transfer, within their own national systems and also in other States. Where necessary, Contracting States requiring PNR data and those States restricting such data exchange should engage in early cooperation to align legal requirements».

Appendix 1 of Doc. 9944 expressly establishes that the transmission of data should only refer to those elements strictly relevant and necessary and that passengers cannot be required to provide sensitive information both to airlines and States. Another profile on which the ICAO guidelines dwell, and that will have wide importance in the European debate leading to the adoption of Directive 2016/681/EU, is related to the method of transmission of PNR data. At an international level, it has been widely discussed the choice between the 'push' method, under which air carriers shall provide information only following the express request of the State, and the 'pull' methodology which allows the State to have a direct access to the database in which PNR data are kept. Supporting the first system, the ICAO, with its guidelines, has also intervened on the timing and frequency of data transmission in order, also, to avoid excessive costs for airlines, by requiring, on the contrary, to these latter, carrying when they are required to send data, to pay special attention to compliance with provisions on protection of personal data in force in the two States between which the exchange of data occurs.

In 2014, the discipline of PNR was merged into two new Recommended Practices, the 3:49 and 3.49.2, both included in Annex 9. Finally, during a meeting in Montreal from 4 to 7 April 2016, the Facilitation Panel, noting the recent growth of PNR national programs and the fact that in many cases the procedures followed were neither perfectly aligned with the Recommended Practices contained in Annex 9 nor with the requirements contained in doc. 9944 ICAO and related guidelines, suggested, supporting the WP/13 International Air Transport Association (IATA), to move the two Recommended Practices from Chapter 3 (par. 3:49 and 3.49.2) to subsection D of Chapter 9 and to raise these provisions to Standards (through the inclusion of two new paragraphs, the 9.26 and 9.26.1, with minimal changes to the text of the previous

Recommended Practices). In addition, the Facilitation Panel proposed to introduce a new Recommended Practice (9.27) concerning the specific issue of privacy.

During the thirty-ninth General Assembly of ICAO, held in Montreal from September 27 to October 7, 2016, the Executive Committee expressed its full support for the priorities, identified during FAL Programme works for the 2017-2019 triennium, in order to strength the provisions contained in Annex 9 - Facilitation; among these there are the recommendations, on the subject of PNR, made by the FALP during the aforementioned meeting held last April. During the same meeting, the Executive Committee also expressed its support to the WP/203, presented by Indonesia, to request the ICAO Council to consider the complete implementation of PNRGOV standards (a standard electronic message endorsed jointly by WCO/ICAO/IATA, with specific data elements provided accordingly on the specific aircraft operator's Reservation and Departure Control Systems) so as to provide a quick and accurate instrument to face possible new threats to security in the context of air travel, arising from the continuing growth in traffic volumes in this area. The Committee, noting that these standards for application of PNR data are developed together with the World Custom Organization (WCO) and the International Air Transport Association (IATA), asked these three organizations to review the same message PNRGOV, so as to allow, in considerations of the different systems, easier access to such information by operators and by States.

Well, we may find many of these indications in the international agreements that have been signed by the European Union with third countries.

To date the European Union has signed bilateral agreements on PNR (Boehm, 2011, p.171; Cotura, 2011, p. 277 and Dirrig, 2006, p. 698) with three countries: the United States, Australia and Canada, although with regard to this latter country the relevant agreement has already ceased its effects and therefore needs to be replaced (Rossi Dal Pozzo, 2015, p. 99). The new agreement, signed on 25 June 2014, however, has never been approved by the European Parliament which, considering it incompatible with the Treaties (Art. 16 TFEU) and the Charter of Fundamental Rights (arts. 7, 8 and 52 par. 1) referred questions to the Court of Justice. To date the Court has not yet issued its Opinion (numbered 1/15) but Advocate General Mengozzi did and it is strongly contrary to the agreement in its current form, starting from the reliefs on the correct legal basis of the agreement that, according to Advocate General Mengozzi, should be both Art. 16 and Ar. 87 TFEU. This Agreement latter, like, moreover, all other agreements of the same kind signed by the EU with third countries, pursues, in fact, two inseparable objectives, with equal importance: the fight against terrorism and serious cross-border crimes, which is covered by Art. 87 TFEU, and, secondly, the protection of personal data, which is covered by Art. 16 TFEU.

In addition, on the 14th of July 2015 the negotiations for the conclusion of an agreement with Mexico were initiated. Besides, even in the absence of such international agreements, other Countries (Russia, Mexico, United Arab Emirates, South Korea, Brazil, Japan and Saudi Arabia), have begun to ask the European Union to transfer PNR data.

At EU level, it had been lacking a common approach, at least until the approval of Directive 2016/681/EU to be transposed by Member States by 25 May 2018.

This directive whose legal basis are Articles 82 par. 1 letter. *d*, 87 par. 2 letter *a* and 16 TFEU has two main objectives: on the one hand to guarantee the security, protect the lives and safety of people, and on the other to create a regulatory framework to protect other fundamental rights of the person that are relevant in case personal data are collected and processed by a public authority.

Conclusion

Aviation Security is defined by ICAO as a combination of measures (human and material resources) aimed at safeguarding civil aviation against acts of unlawful interference. Despite the wide international legal framework which governs the matter nowadays, it is worth to mention that at the time ICAO was created, threats to civil aviation were practically unheard of.

During the 60s and 70s, the civil aviation sector started to be targeted by terrorists and criminals for its inherent value and high profile. The vital role which is played by the industry in facilitating movement of people and trade has made itself an attractive target for those who want to perpetrate crimes which would create a deep impact on social life and public opinion.

In the last five decades, aviation has suffered numerous attacks, varying from hijacks to attacks on airport, which prompted the International Community to closely address the issue.

Unfortunately, due to the unpredictably and creativity of perpetrators, whom have been capable to keep developing new threats, the aviation industry has been capable to respond to these attacks in a mostly reactive manner.

As a matter of fact, none of the four Conventions, signed between 1963 and 1988, together with the issuance of ICAO Annex 17, were effective in preventing the use of aircrafts as weapons of mass destruction on that Sept. 11th, a day which would have changed both the course of history and the aviation industry. Neither the strong and decisive response of the International Community to that episode, specifically prompting, *inter alia*, the US, the European Union and its Member States to set new standards and legal measures relating the prevention of act of unlawful interference, was successful to stop new attacks towards the aviation industry from happening again.

The bombing of Brussel and Istanbul airport's terminal area, along with the mid-air explosion of the Metrojet flight over the Sinai Peninsula, represented the latest chilling wake-call for the aviation industry, calling for a renovated and closer cooperation between all the stakeholders involved, aiming at preventing new terrorist attacks.

The commitment shown by the International Community during the ICAO General Assembly last year may represent a good starting point in tackling the arise of new threats to aviation industry, but it is crucial for the regulatory activity, both at international and national level, to be accompanied by a continuous evolution of aviation security measures which will reduce re-activity and enhance pro-activity.

In doing so, it is paramount that the development of up-to-date and effective legal instruments will always pursue to find a fair balance between the need to make air transport as secure as possible, and the safeguard of individual's fundamental rights and freedoms.

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