



A European solution for Third Party Liability of the Aviation Security Providers

White Paper by CoESS and ASSA-I

June 2010

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Introduction

This White paper is being submitted on behalf of the European private security industry, represented by **CoESS** (Confederation of European Security Services, representing the whole of the private security industry in Europe) and **ASSA-I** (Aviation Security Services Association International, representing the aviation security services providers).

CoESS was founded in 1989 as a European umbrella organisation for all national private security associations. CoESS is at present representing 30 federations from 28 countries (EU, and non-EU), as well as all branches of industry (such as human guarding, transport of valuables, monitoring centres, airport security and maritime security). CoESS' member federations are in turn representative within their countries and within the branches they represent.

ASSA-I represents all major private security companies which deliver aviation security services related to the European airports and airlines. ASSA-I has currently 7 member companies and represents around 75% of the private (outsourced) aviation security market with a total turnover of around 1.250.500.000 Euro (out of a total aviation security market (public and private) estimated at 3.100.000.000 Euro of which a large part is still covered by the public sector – 45%).

In the aftermath of 11 September 2001, and following the Madrid and London bombings, preventive and operational safety and security have assumed a higher profile than ever before and have been placed at the top of policymakers' agendas.

As far as the responsibility of security providers is concerned, it is a fact that they have only a limited role as one link in the entire security chain, in particular in the light of the existing EU regulations imposing on national Governments large responsibilities related to security. In contradiction with this fact, the reality is that the exposure of security providers to liability in case of a catastrophic terrorist attack is potentially unlimited. The same goes for airports, airlines, air carriers, etc.

The focus of this White paper on aviation security is not arbitrary: the whole sector has been directly and heavily impacted by the 9/11 events, and as a result it is very "experienced" in dealing with the consequences of terrorist attacks.



This CoESS and ASSA-I joint White paper has a threefold aim, more specific:

- to give an overview, focused on the airport security industry, of the current problems raised by third party liability exposure as a result of terrorism or acts of war,
- to show the need for the EU to find an urgent and necessary solution and
- to propose some thoughts on finding answers to this tremendous challenge.

In this document, CoESS, and ASSA-I will present certain critical issues relating to the performance of aviation security services as well as some thoughts to finding a reasonable solution to this problem – a solution covering all the EU member states. In view of its potential magnitude and its pan European implications, the security industry calls for proper consideration of the problem to be given at the EU level as a matter of priority.

CoESS and ASSA-I recognise their responsibilities and are ready to play an active role in trying to find a solution.

Marc Pissens,
President of ASSA-I
President of CoESS



Problem setting

Today various important economic actors such as airports, airlines, air carriers, transport companies, security companies, and many other service providers face real risks of catastrophic losses from acts of war and terrorism.

The EU is fully aware of these risks and has, over the past years, paid increased attention to developing legislation in to reinforce security. The adoption of the new Framework Regulation 300/2008 on common standards in aviation security and the continuously on-going work regarding enhancing aviation security (e.g. use of security scanners, screening of liquids, etc) are examples of the uptake of the EU in dealing with security related initiatives.

CoESS and ASSA-I highly welcome these EU initiatives and the fact that EU wide regulations are being put in place in order to address some fundamental aspects of security and security related issues. It is CoESS' and ASSA-I's view, that this work must be reinforced through the establishment of EU wide binding rules related to selection and recruiting of security staff, training and control and auditing mechanisms which are much more focused on quality.

Because security providers are, on a daily basis, confronted with the increased security needs of their customers, they give full support to defeating terrorism and other threats to security. However, security service providers together with a range of other economic actors remain exposed to potentially unlimited liability in the event of a terrorist attack.

At the same time, developments in relation to available insurance coverage have tremendous implications for the security sector: the insurance industry has raised its premiums but limited available insurance coverage. The resulting problem has potentially dramatic consequences, which are not limited to parties directly concerned.

ASSA-I and CoESS believe that all other stakeholders must be convinced of the importance of an EU wide approach and solution for the issue. Therefore, ASSA-I and CoESS express their growing concern about the dangerous tendency, inspired by cost-cutting argumentation, of considering security services as a pure commodity. The recent events have clearly shown that high quality security in general, and efficient private security in particular, must depend on well-screened, highly trained and permanently supervised staff.



1. Liability exposure post - 9/11

Before September 11, 2001, the worst case scenario contemplated within the aviation industry was an accident estimated to cost around USD 300 million (EUR 247 million). The nature of the 9/11 attacks made the industry realise that losses incurred in an aviation incident were no longer limited to the value of the aircraft and its passengers but that there is a real probability of material (potentially unlimited) third party losses on the ground if an attack were to succeed. Recent estimates of the costs of another incident similar to 9/11 indicates that the risk could be around USD 100 billion (EUR 82,5 billion) per case or higher.¹

CoESS and ASSA-I also want to draw attention to all the other potentially devastating consequences a similar incident in an EU country could cause in terms of: impact on the national economy of the country concerned, on its internal political scene, on its relations with other EU Member states.

2. Aviation industry - a likely target for terrorist attacks

Private security companies are very often in the frontline of possible terrorist attacks. Companies, individuals and, in an increasing way, parts of public bodies are asking private security companies to protect their assets, valuables and lives. Especially for the protection of high-risk targets, such as airports, the security industry works closely with governments.

Considering that the aviation industry is likely to remain a target for terrorists in the future, it is clear that this industry has a material potential liability exposure with respect to a wide variety of losses, injuries and damages suffered by the contracting parties as well as by third parties.

3. Current state of play – responsibility of the national governments

Given that today, the responsibility for private security is still nearly completely held by the national level, the issue of Third Party Liability is essentially also a responsibility of national governments.

At EU level, there is a low level of knowledge about the problem of Third Party Liability in security services in general and in private security services specifically.

¹ Speech held by Dan Ingbar, Chairman of Homeland Security Research Association Corporation (HSAC) at the NATO- Forum on Business and Securities, Berlin February, 2004.



To address the issue of Third Party Liability, CoESS and ASSA-I are of the opinion that a very wide range of aviation stakeholders must be involved (Member States, the European Commission, the European Parliament, the insurance sector, airports, airlines, beneficiaries of private security services, media).

Also CoESS and ASSA-I believe that the national authorities have a responsibility to raise the issue of Third Party Liability toward the European Commission.

Under EU Regulation 300/2008 the European Commission has the responsibility to perform EU inspections at the airports located in the EU Member States. ASSA-I and CoESS believe that the inspections should have a wider scope and should include the aviation security providers. If the EU inspections would include the security providers, it would increase the pressure on national authorities and airports to concentrate on and to give higher importance to the quality aspects of the security procedures such as recruitment procedures, training of personnel (including training records), working conditions, contingency planning, etc.

Also when the European Commission performs the EU inspections at the European airports it will be the Member States that, in case of a deficiency, will need to make all the necessary adjustments / corrections and will bear the end responsibility for the security delivered at the airports located in their country. Which results in full responsibility when a terrorist attack occurs because of a failure in the security procedures performed at their airports. Therefore the national authorities should raise this issue of Third Party Liability as they would also benefit from a European solution.

4. Third Party Liability – no insurance solution available

The atrocities of September 11, 2001 and the events thereafter had, and still have, an enormous impact on the insurance market. In a post 9/11 environment a financially weakened insurance industry provides less capacity for a higher premium on less favourable terms. The insurance market is facing problems of insolvency and unavailability of re-insurance.

As far as the responsibility of security providers is concerned, it is a fact that they have only a limited role as one link in the entire security chain, in particular in light of the existing EU Regulations imposing on national governments large responsibilities related to security. In contradiction with this fact, the reality is that the exposure of security providers to liability in case of a catastrophic terrorist attack is potentially unlimited. The same goes for airports, airlines, air carriers, etc.

The private aviation security providers are not able to sign contracts with liabilities that go far beyond a possible insurance coverage. Our security companies are not able to face possible third parties' claims for astronomical sums.



ASSA-I and CoESS would like to stress the fact that the aviation security providers are too often subject to contracts exceeding available insurance coverage. Exposure to such liabilities jeopardises the long-term viability of the aviation security industry.

As previously indicated, airports and airlines are facing the same problem as the private security industry, i.e. the insurance market does not offer a solution that would be sufficient to meet the potentially unlimited exposure that could follow from a new terrorist attack.

5. Terrorism and war– a firsthand responsibility for the community

It is clear that national, European and international authorities have an overall and first hand responsibility to make the necessary risk analyses and to set the appropriate national and international legal structure to deal with risks related to war and terrorism.

Terrorist attacks are of course in general directed towards states rather than towards private companies or individuals and their impact is both national and international. It would therefore seem reasonable that this picture also be reflected in the overall and ultimate allocation of liability and responsibility following a terrorist attack.

6. Some existing partial solutions and coverage's

a. US Safety Act:

In the USA, in response to the prospect of taking on those risks, the anti-terrorist security providers gained the protection of the SAFETY Act², passed in 2002. However, the SAFETY Act only applies within the USA and its territories.

The SAFETY Act uses a system that, on the application of the technology or service supplier, examines the qualities of the technology or service and, depending on the category of relief applied for and approved, the supplier is permitted relief of liability ranging from a fixed limit of liability with an obligation to insure, to an entire relief from liability.

b. Regimes of Liability Limitation:

² USA SAFETY Act (2002): <https://www.safetyact.gov>.



There are other industries and services that enjoy limitation of liability regimes, one being the civil nuclear industry which is covered by the Vienna Convention on Civil Liability for Nuclear Damage 1963 (the Vienna Convention)³.

The Vienna Convention operates by identifying an entity, the operator, who will be responsible for all the events that may take place at the nuclear installation, and then requires that the entity insure for losses up to a given limit (currently around £400 million).

The Vienna Convention model works most efficiently when applied to large facilities such as airports, major sporting and entertainment facilities and out-of-town shopping malls. All facilities of this nature will probably be owned or operated by a single entity who can be appointed to take the lead risk and with that the benefit of the overall cap on liability.

c. Directive 2004/35/EC⁴ of the European Parliament and of the Council of 21 April 2004 on environmental liability

Directive 2004/35/EC⁵ of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD) establishes a framework based on the 'polluter pays' principle, according to which the polluter pays when environmental damage occurs. This principle is already set out in the Treaty establishing the European Community (Article 174(2) TEC). As the ELD deals with the 'pure ecological damage', it is based on the powers and duties of public authorities ('administrative approach') as distinct from a civil liability system which is more appropriate for 'traditional damage' (damage to property, economic loss, personal injury).

The Directive's main objective is to prevent and remedy 'environmental damage'. Environmental damage is defined as damage to protected species and habitats (nature), damage to water and damage to soil. The liable party is in principle the 'operator', i.e. the one (natural or legal person) who carries out an occupational activity.

The operator, who carries out certain dangerous activities as listed in the Directive, is strictly liable (without fault) for the environmental damage he caused. He might though benefit from certain

³ Vienna Convention on Civil Liability for Nuclear Damage 1963: <http://www.iaea.org/Publications/Documents/Infcircs/1996/inf500.shtml>.

⁴ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:143:0056:0075:EN:PDF>.

⁵ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:143:0056:0075:EN:PDF>.



exceptions and defences allowed by the ELD (for example force majeure, armed conflict, third party intervention) or by transposing legislation of the Member States (for example regulatory compliance defence, state of the art defence).

All operators carrying out occupational activities are liable for fault-based damage they cause to nature as defined by the ELD. An operator should not be required to bear the costs of preventive or remedial actions taken pursuant to this Directive in situations where the damage in question or imminent threat thereof is the result of certain events beyond the operator's control.

Member States may allow that operators who are not at fault or negligent shall not bear the cost of remedial measures, in situations where the damage in question is the result of emissions or events explicitly authorised or where the potential for damage could not have been known when the event or emission took place.

d. The Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed in Rome on 7 October 1952⁶ (Rome Convention of 1952).

The events of 9/11 gave additional impetus to the ongoing ICAO work on the revision of the Rome Convention. Those events significantly revamped the statistics of accidents affecting victims on the ground, but, even more importantly, they confronted the international community with both a moral dilemma as well as an economic challenge.

On the moral front, the question arose on how to organise, in a fair way, compensation to third party victims (and how liability should be attributed) for highly disturbing events caused by terrorist attacks, for which the air transport industry is not responsible and which are different in nature from accidents caused by factors such as pilot error or negligent aircraft maintenance.

From an economic perspective, the withdrawal of the insurance market from providing coverage in respect of war and terrorism risks put States before the unattractive choice between either grounding their fleets or providing state guarantees. In the longer term, the question arose on how to provide insurance coverage, and thus proper protection, for both the potential victims as well as the airlines, in case of risks that cannot be reasonably assessed and whereby the consequences could deliberately be oriented towards causing the maximum economic damage possible.

Two new conventions have been adopted: the Convention on Compensation for Damage Caused by Aircraft to Third Parties in case of Unlawful Interference ('Unlawful Interference Compensation

⁶ Convention on damage caused by foreign aircraft to third parties on the surface (7 October 1952): http://www.assa-int.org/_Uploads/dbsAttachedFiles/RomeConvention1952.pdf.



Convention⁷ - UIC), and the Convention on Compensation for Damage Caused by Aircraft to Third Parties ('General Risks Convention' - GRC).

The 'Unlawful Interference Compensation Convention'⁷: The main objective of the Convention is on the one hand to ensure effective, expeditious and fair compensation for third party victims of aviation accidents resulting from acts of unlawful interference, and, on the other hand, to limit, to a just extent, the financial exposure of the air transport industry that could result from such occurrences. These objectives are pursued by balancing the interests of the main actors involved, notably the (families of the) aviation victims on the ground, the airlines as well all other entities involved in air transport.

The Convention was signed on May 2, 2009. In accordance with its Article 40, the Convention shall enter into force 180 days after the deposit of the 35th instrument of ratification.

7. Fair distribution of liability

Clearly a professional security provider must take responsibility for the quality of the services it provides under a service contract. There must however be a fair and acceptable distribution of responsibilities and risks between the authorities and other parties responsible for aviation security on the one hand, and the private security company to which security services have been outsourced, on the other.

A subcontractor responsible for carrying out certain specified aviation security tasks in accordance with instructions from the authorities and clients cannot reasonably assume the full risks of all the perils and calamities generated from or affecting the aviation industry. Private security companies execute the standards that have been set by governments and airport authorities.

It is clear that the catastrophic loss potential related to aviation security is high. No single security provider is capable of handling the consequences of a catastrophic aviation security incident, nor is the aviation security industry as a whole. This is particularly true in the case of third party losses where the liability exposure would certainly be astronomic and where even the highest insurance coverage available on the market would not be sufficient and could make the continuation of the private security industry within the aviation sector unviable. It is also evident that the risk connected to such a catastrophic loss could never be reflected in the value of the aviation security contracts.

Whilst CoESS and ASSA-I fully expect and accept the responsibilities of their members with regard to providing adequate levels of insurance, there is obviously a limit to the insurance coverage available and the insurance a company is able to obtain.

⁷ Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft (2 May 2009): http://www.icao.int/icao/en/leb/Admin_pkg/UICC_en.pdf.



8. Liability limitation when delivering high quality services.

One of the key priorities of ASSA-I and CoESS is to continuously invest in and promote high-quality security services as well as guaranteeing the enduring professionalism and quality of the service providers' delivering security services at the European airports and to airlines.

In 2008, ASSA-I and CoESS (Confederation of European Security Services) initiated a project in order to create a European wide standard for aviation security services.

The CEN/PC 384 draft standard contains quality criteria for the delivery of civil aviation security services and requirements for private security companies and their independent branches and establishments related to:

- its organisation,
- operations,
- personnel management (recruitment, training).

At the beginning of 2011 this project for a standard on aviation security services should be final and ready for publication. This standard for aviation security services will be a European standard with voluntary application and could subsequently evolve towards a more binding set of standards. This is in any case the ultimate goal of CoESS and ASSA-I.

It is CoESS and ASSA-I view that if aviation security providers choose to continuously invest in and promote high quality services, on this a voluntary basis, they should receive a the necessary protection and limitation on their liability in case of war and/or a terrorist attack.

One of the major problems the aviation security providers are confronted with, especially during these difficult economic times and equally challenging security risks, is that the customers (airports, airlines, governments) are overly focused on the price/cost factor of the security services, the fluidity of the passenger flow (passenger services) and, as a consequence, neglect the importance of quality of the services the security providers deliver.

However CoESS and ASSA-I believe that increasing the quality of the security services will benefit all the players in the civil aviation industry as it makes an important contribution to the creation of a more secure air transport environment. Therefore the customer should be aware of the important role the security providers play in the security chain, but also the problems, as unlimited liability that they are facing on a daily basis. CoESS and ASSA-I believe that if the customers keep choosing for a lower price instead of high quality services that this will have severe consequences at the moment a terrorist attack occurs.



Conclusion/Proposal

Considering the important role of the aviation industry in today's society, it must be in the interest of society as a whole to find appropriate solutions that limit liabilities incurred by all commercial parties in this industry to levels that are reasonable and/or that provide alternative funding sources for liabilities. This kind of solution already exists for certain other industries.

It is also obvious that in order to find a long-term solution for the critical liability issues that arise in connection with terrorist attacks or war only **a clear and binding EU legal framework** will be able to efficiently address the issue for all different sectors concerned.

CoESS and ASSA-I believe that it should be a prerequisite for the European Union in its overall strategy and for the European Commission when looking into concrete measures to achieve "*the physical safety of consumers and users, of all persons involved in the production and provision of these services, and of the general public must be guaranteed, including the protection against possible threats such as terrorist attacks and environmental catastrophes*".

The overall objective must be to work towards such an EU legislative proposal aimed at:

- Stating the **shared** responsibilities when private security is concerned
- Determining the **specific** responsibility of each stakeholder involved in security
- **Limiting** the responsibility/liability of private security providers
- Establishing a mechanism for **handling** third party claims
- Thus **eliminating** the risk for private security providers of unlimited third party liability

While working towards such a solution, all aviation stakeholders must be involved. However, CoESS and ASSA-I believe that the most exposed stakeholders should play a primary role in designing the strategy moving forward.

A substantial increase in the total package of security measures (be it in airports, amongst security providers, auditing or control mechanisms) as well as finding a solution to the exposure of private service providers to unlimited liability – will undoubtedly represent a high cost. It is ASSA's and CoESS view that such costs must be shared between all stakeholders involved. It is a fact that modern terrorism is aimed at the State, its policies, peoples or institutions and not at service providers. In this context, it is ultimately the State who has a duty to ensure compensation for its citizens and companies affected by acts of war and terrorism.



With this in mind, CoESS and ASSA-I believe that a solution can be found applying the following principles:

- a strict liability;
- that is capped;
- and exclusively channelled towards one actor;
- whose viability remains protected by a three tier liability regime, respectively covered by an insurance, a fund financed by all interested parties, a state intervention

As previously mentioned, CoESS and ASSA-I believe that if aviation security providers choose to continuously invest in and promote high quality services, on this a voluntary basis, they should receive a the necessary protection and limitation on their liability in case of war and/or a terrorist attack.

Therefore both our associations believe that this is a matter of critical importance and that serious consideration should be given to this issue now.

NOTE:

Private security today is a huge, complex and highly segmented industry. The main components of this industry can be roughly listed as follows: providers of technologies and equipment (including related managed services), providers of security services (in essence manned guarding services, in combination or not with handling of equipment and technologies), the conglomerate of end-users, operators, customers and the corporate security world.

Each of these segments is represented by recognised, representative and mandated organisations. Although these speak and act on behalf of a specific segment, their overall goals is to work towards joint proposals and positions if and when possible where joint interests exist and where complementary positions reinforce a global defence of the private sector as a whole.



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