A European Union certification system for aviation security screening equipment


Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's impact assessment (IA) accompanying the above mentioned proposal (the proposal), submitted on 7 September 2016 and referred to the European Parliament’s Committee on Transport and Tourism.

In its European agenda on security, the Commission contemplates action in the area of airport screening equipment 'to remove barriers to the single market and to enhance the competitiveness of the EU security industry in export markets'.

The IA explains that the aviation screening equipment sector has a turnover of around €4.2 billion in the EU, with a global turnover of €14 billion. It predicts that the market is also set to grow significantly, especially in Asia, where, for example, China is expected to increase its demand for aviation security by 140 % in the next ten years (IA, p. 4). It describes how the international market is dominated by US and EU manufacturers, with a small number of global players and a few small and medium-sized enterprises (SMEs). The market outlook for aviation screening equipment presented in the IA suggests significant increases in sales as the international civil aviation sector as a whole is growing (IA, p. 15), with a predicted average annual growth-rate of 3.8 % between 2014 and 2034.

Currently, existing EU legislation establishes technical specifications and performance requirements for aviation security screening equipment at EU airports but does not include a binding procedure for the EU-wide certification of conformity of screening equipment with that legislation. Member States have so far relied on national certification, and mutual recognition of approval or certification is not mandatory. The proposal seeks...
to introduce a harmonised type-approval certification system, with conformity certificates that are mutually recognised in all Member States.

**Problem definition**

Under the current system, the approval and/or certification of equipment is at the level of individual Member States and, while Member State 'A' is free to recognise the certification issued by Member State 'B', there is no automatic recognition, and Member State A may well decide to require separate testing for its approval and/or certification. This fragmentation is limited to some extent by the operation of the European Civil Aviation Conference (ECAC), of which all the Member States are members, together with 16 other countries. ECAC has established common testing methodologies (CTM) for different categories of aviation security screening equipment and a common evaluation process (CEP) for such equipment. The CTM, however, are not legally binding and Member States may require different or additional tests to issue their national approval and/or certification. It follows that the test results that are issued further to the CEP do not constitute certification. Such test results can be used as the basis upon which national certification is issued, but not necessarily so. A study conducted by the Joint Research Centre (JRC) of the European Commission (the JRC study) shows that Member States have adopted different approaches to the approval of aviation security screening equipment, which can lead to situations where equipment may be certified in one Member State but not in another.

This fragmentation of the certification and approval processes in the EU is identified as the main underlying driver of the problem. The IA identifies the lack of an internal market for aviation security screening equipment as the main problem, and then explores the internal and external dimensions of this problem.

- **Internal dimension:** manufacturers risk having to re-test their product in several Member States with a resultant lack of legal certainty, an increase in the commercialisation costs, and an increase in the time to release products on the market. This is to the detriment of both the industry and end-users, the latter being faced with 'a limited choice of purchasable equipment' (IA, p. 11).

- **External dimension:** the lack of a legally binding common certification system results in a clear disadvantage for European manufacturers of aviation security screening equipment when competing with third country manufacturers. The IA illustrates this by referring to the 'globally renowned and recognised approval by the US Transportation Security Administration (TSA)' (IA, p. 12), which provides a recognisable brand and a consequent marketing advantage to US manufacturers.

In the IA, the problem definition is accompanied by a combined problem and objective tree, which is a helpful graphic representation of the relations between the drivers, the problems with their different dimensions, the consequences of these problems, and the objectives to address the identified problems. The problem definition appears to be supported by sufficient and reliable evidence. Two studies in particular are especially relevant in substantiating the problem definition: (i) the JRC study takes stock of the certification and approval procedures, the performance requirements and the testing methodologies used in Member States, whilst an external study on behalf of the Commission (the SER3CO study) provides a qualitative and quantitative assessment of the baseline (status quo).

**Objectives of the legislative proposal**

The two general objectives of the Commission proposal are to (a) ensure the proper functioning of the EU internal market for aviation screening equipment and (b) to increase the global competitiveness of EU companies operating in this field.

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Corresponding to the first general objective is the specific objective of allowing manufacturers to market conform products throughout the EU internal market, without double testing or unnecessary product modifications, which should in turn speed up the development and availability of high performance equipment to meet EU screening and detection requirements.

Corresponding to the second general objective are two specific objectives: (i) avoidance of unnecessary development, production and administrative cost for producers of aviation screening equipment, with a consequent reduction in the time to put new products on the market, and (ii) increasing the competitiveness and market access of EU manufacturers in global aviation security markets.

The IA is not unequivocal in laying out operational objectives. In the ‘Comparing the Options’ section the IA lists seven operational objectives when comparing the policy options in terms of their effectiveness, efficiency and coherence in responding to these operational objectives. The Commission’s better regulation guidelines and tools 8 and 13 of the better regulation ‘toolbox’, however, indicate that operational objectives are option specific and are set after the identification of the preferred option. The seven operational objectives are the following:

i. create a clearer common EU-wide certification system,
ii. improve the choice available to customers (e.g. airport operators),
iii. eliminate the need for multiple testing,
iv. eliminate the need for MS-specific modifications,
v. create a more investment friendly environment for security technologies,
vi. create a label showing compliance with EU regulatory requirements,
vii. create a level playing field with US companies.

These seven operational objectives are also included in the problem and objective tree in the ‘Problem Definition’ section of the IA (IA, p. 10).

Further equivocation is caused by the fact that in a footnote in the ‘Monitoring and Evaluation’ section the list of operational objectives includes three additional operational objectives, which are not listed in the aforementioned instances (IA, p. 34). These additional operational objectives are:

i. promote competition between accredited test centres,
ii. eliminate the need for multiple applications for certification,
iii. increase testing capacity by facilitating the accreditation of new test centres.

Two of these additional operational objectives (i and iii) are rather less easy to place within the logic that follows through the problem definition and the identification of the general and specific objectives, since they concern issues that do not figure in those stages of the IA.

Range of options considered

The IA discusses five policy options, which it divides into three groups: the baseline scenario (status quo) (option 1), a non-regulatory option (option 2), and three regulatory options (options 3.1, 3.2 and 3.3).

Option 1: Baseline scenario (status quo)

According to the baseline scenario, Member States could continue to require national testing of a product and would not have to acknowledge certification from another Member State.

Option 2: Recommendation to the Member States to apply the mutual recognition principle

Under this option, the Commission would issue a recommendation to Member States to mutually accept each other’s national approval systems and/or to rely on a common evaluation process based on the ECAC CEP. This would be complemented by recommendations (i) on establishment of a framework for granting accreditation to testing laboratories, (ii) on granting manufacturers of aviation screening equipment the freedom to select the
accredited laboratory where their products are to be tested, and (iii) for the creation of a distinct EU label for all products successfully certified in an accredited testing facility, in an effort to improve the competitiveness of EU manufacturers in third country markets.

Since the recommendations would not be binding, and Member States may choose not to follow them, one could argue that this option does not differ materially in terms of impacts from the baseline. In such instances, tool 8 of the better regulation toolbox suggests that only one of the options be retained. Given that the baseline should always be considered, this option would therefore be discarded.

**Option 3.1: Legislation - ‘the old approach’ or ‘full harmonisation’**

This regulatory policy option aims at introducing a legally binding type-approval framework based on three pillars: technical requirements, testing methodologies and certification criteria. Two of these three pillars already exist: (i) detailed technical requirements are already provided for under Regulation (EC) 300/2008, and (ii) testing methodologies have already been developed by ECAC (CTM) and used for national approval. In this scenario, EU legislation would be required to provide that, before aviation screening equipment could be sold or put in service in the EU, its compliance with the technical requirements under Regulation (EC) 300/2008 would need to be demonstrated using the CTM developed by ECAC. The legislative measure would establish the framework for this procedure and would provide for compliant equipment to be issued with a certificate of conformity (and a corresponding EU security performance quality label), which would be mutually recognisable in all Member States.

Option 3.1 consolidates and enhances the existing system to achieve a system based on detailed specifications for its three constituent pillars.

**Option 3.2: Legislation - ‘the new approach’**

Contrary to option 3.1, this option does not envisage detailed specifications laid down in a legal act. Instead, it limits the legal act to the setting of binding essential requirements, set out in general terms to cover the hazards that need to be addressed, which can be fulfilled through different technical solutions. The European standardisation organisations will then set out the technical specifications on the basis of the binding essential requirements laid down in the legal act. These technical specifications would constitute harmonised standards, and compliance with them would create a presumption of conformity with the essential requirements laid down in the legal act. Other technical solutions, which do not fall under the presumption of conformity, could still be demonstrated to be in conformity with the essential requirements. The legal act would also lay down the rules and procedures for conformity assessment which would eventually enable mutual recognition.

Although this option is included in the cost benefit analysis made in the SER3CO study and included amongst the retained options in the IA, it is later discarded and its impacts are not analysed in the IA. The IA explains that this is done because, contrary to the baseline scenario and to the situation under the other options, it would entail the publication of the standards ‘on which the requirements for the certification process would be based’. This would exclude the possibility of restricting access depending on security clearance and on a ‘need to know’ basis. The IA concludes that the removal of such classification is ‘unthinkable’, since such information could ‘be used malevolently to bypass security controls at airports’ (IA, p. 21).

This would suggest that the option goes beyond being incoherent with existing EU policy objectives in the field of security, going as far as effectively undermining these policy objectives. With such an important and obvious impediment to the viability of this option, it is unclear why it was included amongst the retained policy options, only to then be dropped before its impacts are analysed.

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7 For more information on the criteria for screening the viability of options see tool 14 of the European Commission’s better regulation toolbox.
Option 3.3 Legislation – ‘the centralised approach’

This option would involve the centralisation of the certification process. The European Aviation Safety Agency (EASA) would be charged with setting the rules that would apply for the certification of equipment, establishing a certification programme, testing the equipment and verifying its conformity, and issuing certificates of compliance.

The IA also mentions the option (or sub-option) of mutual recognition with the US certification system, which, however, is discarded and not included in the retained options. The preferred policy option is option 3.1.

With regard to the policy options, one passage under section 2.8 ‘EU right to act’ is potentially equivocal: ‘the aim of this action is to incorporate the non-binding ECAC CEP cooperation agreement of the Member States into EU single-market legislation. The options would not seek to abolish this cooperation agreement of the Member States but merely incorporate it into a more transparent and legally binding EU wide system’ (IA, p. 17). Whilst purportedly referring to all the retained options, this passage – early on in the IA – appears to eliminate option 2 (with the reference to incorporation into EU legislation – option 2 is a non-regulatory option) and option 3.3 (with the claim that the aim is to incorporate ECAC CEP cooperation into an EU wide system – under option 3 this would not be the case). With option 3.2 discarded, this would leave just option 3.1 – the preferred option, giving rise to a doubt as to whether option 3.1 was a pre-selected preferred option.

Scope of the impact assessment

The IA focuses on the economic impacts of the options, dealing with their costs and benefits and their possible economic impacts on a range of stakeholders. In this respect, while at face value it might appear from the text of the IA that the analysis of impacts might lack depth in certain instances, the IA appears to draw considerably on the cost benefit analysis undertaken in the SER3CO study, which offers a more solid underpinning to the arguments made in the IA.

In regard to social and environmental impacts, the IA states that these ‘would be relatively limited’. It mentions that one notable social impact could be employment in the aviation screening equipment sector. It maintains however that it is not possible ‘to precisely quantify this impact considering that there are no definite indications on the overall employment figures in the sector’. It also deems that ‘none of the options would lead to measurable environmental impacts’ (IA, p. 31).

One aspect, which seems to be under-considered in the analysis of impacts, is the impact of the options on manufacturers’ capability to offer solutions for better and more efficient aviation security. The reason for this might be that the IA interpreted the stakeholder consultation results as indicating that the certification system for aviation security equipment has little effect on aviation security.8

Subsidiarity/proportionality

The IA assessment specifically discusses subsidiarity and proportionality in section 2.8 ‘EU right to act’, though other parts of the text are also relevant. With regard to subsidiarity, the IA argues that if Member States had intended to launch an initiative on their own, they would have already done so under the current framework. It states that ‘there are no indications that Member States are planning to take any measures to reduce this fragmentation’ (IA, p. 16), noting that the need for EU action is confirmed by the stakeholder consultation.

With respect to proportionality, the IA argues that none of the options go beyond what is necessary to achieve the objectives. Furthermore, proportionality also appears to be important in the final selection of the preferred

8 For example, the IA highlights that more than 50 % of respondents answered that they do not see that a lack of a harmonised certification system has any effect on passenger and staff security, against the 29.73 % who see this as having a negative effect.
option between option 3.1 and option 3.3. Option 3.3 would generate administrative costs and burdens that, considering the investment already made by Member States in ECAC and its CEP and CTM, would be considered as disproportionate by Member States. Also relevant to the matter of proportionality is the part of section 6 ‘Comparing the options’ dealing with the choice of legislative instrument, where the IA concludes that a regulation is a more appropriate instrument than a directive in view of the aims, the context and the content of the proposal.

The legal basis of the proposal is Article 114 of the Treaty on the Functioning of the European Union. The deadline for the submission of reasoned opinions by national parliaments on whether the proposal complies with the principle of subsidiarity was 3 November 2011. Before that date, the French National Assembly and the United Kingdom (UK) House of Commons issued reasoned opinions stating why they do not consider that the proposal complies with the principle of subsidiarity. In both cases, the main concern is the Member States’ inability, under the proposal, to apply higher security standards for aviation security than those laid down in European legislation. The UK House of Commons also questions the evidential basis of the claim made in the IA that Member States are unlikely to make improvements to their current cooperation if no EU action is taken.

**Budgetary or public finance implications**

Budgetary and public finance implications are discussed in the analysis of the impacts of the options and play an important part in the choice of option 3.1 over option 3.3. The IA states that political feasibility is a ‘determining factor’ in the choice of the preferred option. It then argues that option 3.3 would entail an increase in costs, hampering its political feasibility, especially considering that Member States have ‘already invested in the creation, running and maintenance’ of the CTM and the ECP of the ECAC (IA, p. 32). Option 3.1, on the other hand, would continue to build on this investment. The explanatory memorandum states that ‘the proposal has no implications for the Union budget’.

**SME test/competitiveness**

In its problem definition the IA singles out SMEs as being particularly vulnerable to the problems identified. Given their limited resources, consequences such as increased costs, delays in releasing products on the market and other competitive disadvantages are less easily absorbed by SMEs. This increased vulnerability is taken into consideration in the assessment of the impacts. SMEs’ views were also considered in the stakeholders’ consultation, although their views do not appear to have been significantly different from those of the rest of the industry.

EU industry competitiveness in the sector of aviation security screening equipment is central to the IA. The competitive disadvantages of EU industry vis-à-vis third country competitors is identified as one of the major consequences of the problem, and consequently, one of the two general objectives of the proposed EU action is to increase its competitiveness. The IA dedicates an annex to an overview of the impacts of the different options on the competitiveness of EU businesses.

**Simplification and other regulatory implications**

Simplification and the reduction of regulatory and administrative burdens is a focal point of the discussion in the IA. The heavy regulatory and administrative, monetary, and temporal costs that have to be borne by EU industry is identified as an important aspect of the problem, and the reduction of such costs is one of the specific objectives singled out by the IA. In the choice of the preferred option, therefore, preference is given to the option that would allow the integration and streamlining of existing certification processes without reinventing a completely new regulatory framework. This serves not only to keep implementation costs down, but also helps to maintain policy and legal coherence.

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9 Explanatory memorandum, p. 7.
Relations with third countries
EU industry competitiveness vis-à-vis third country industry is one of the major issues discussed in the IA. One aspect, which is not explored in the IA however, is the impact of the options on the relationship of the EU and the Member States with the remaining ECAC member states. The possibility of mutual recognition with the US verification system of the TSA, which would have involved substantial examination of impacts with third countries, is discarded by the IA.

Quality of data, research and analysis
In terms of research and data, the IA appears to rely significantly on the JRC study and on the SER3CO study, offering little by way of evidence in the main body of the IA and in its annexes to back up its assertions, especially in regard to cost implications.

However, the two studies mentioned do seem to provide a reliable source of data, research and economic analysis. The JRC study is based on a questionnaire distributed to all EU and EFTA states and takes stock of the certification and approval procedures, the performance requirements and the testing methodologies used in the Member States. Responses to the questionnaire were received from 24 EU Member States and three EFTA member states. The study provides the data for the analysis of the baseline and the identification of the problems. The SER3CO study provides a comparative overview of the industry and performs a cost-benefit analysis of the options formulated by the European Commission.

Stakeholder consultation
The IA identifies the stakeholders affected by the problem and by the proposed solutions, and their views were gathered through the following initiatives:

- A 12 week online open public consultation was held between March and June 2013. The consultation yielded 37 responses from different stakeholders (e.g. national administrations, enterprises of different sizes, airport operators, business associations and test facilities), which the IA considers to be representative of all stakeholders concerned by the harmonisation of the certification process (IA, p. 43). Respondents were from 16 European countries: 12 Member States and four non-EU countries. The questionnaire included questions intended to gather stakeholders’ views on (i) the problems related to the current system; (ii) the policy options formulated by the European Commission; (iii) technical issues in the certification procedures; and (iv) the role of ECAC. According to the IA, the results of the consultation show that stakeholders’ preferred policy option is option 3.3, as they attribute the most positive impact to that option (IA, p. 65). The Commission, however, considered this option as not politically feasible, and chose as its preferred option, option 3.1, which was a close second in stakeholder preferences.

- A follow-up workshop, involving all the stakeholder groups concerned, was held on 25 September 2013, during which the outcomes of the JRC study and the SER3CO study were discussed.

The IA acknowledges that these consultation initiatives are somewhat dated. An observation that is relevant not only in terms of the lapse of time between the stakeholder consultation and the publication of the proposal, but also in terms of changes in the level and nature of security threats in the intervening period. The IA, however, remarks that the findings from the stakeholder consultation ‘remain valid on the central issue’ of the IA, namely the lack of common legally binding procedures for the certification of aviation security screening equipment in the EU (IA, Annex 4, p. 45). The explanatory memorandum explains that this ‘has been confirmed in contacts with all relevant stakeholders over the course of 2015.’

Annex 4 of the IA gives a general overview of the stakeholder consultation that served to feed into the IA.

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10 Explanatory memorandum, p. 5.
Monitoring and evaluation

The IA identifies the following five indicators for monitoring and assessing the implementation of the regulation:

- reduction of research and development costs,
- reduction of commercialisation costs,
- recognition of EU certification in third countries,
- reduction of time to release equipment on the market,
- improving competition with non-EU suppliers.

This list of indicators is reproduced in the proposal’s explanatory memorandum, except that there it consists of only four elements – the indicator regarding the recognition of EU certification in third countries is omitted.

The IA, the explanatory memorandum and the proposal envisage publication of a report by the European Commission on the implementation of the proposed regulation. However, whilst the IA and the explanatory memorandum indicate that this report should be published every five years, the proposal only lays down the requirement for the Commission to publish a first report, five years after the entry into force of the proposed regulation.

European Commission Regulatory Scrutiny Board

The Commission’s Regulatory Scrutiny Board (RSB) issued a positive opinion on the IA on 6 July 2015, but also made a number of recommendations for improvement. It would appear that not all of the points in these recommendations were fully addressed, notably the following: distinguishing between issues related to standards and those purely related to certification; substantiating the cost implications of EU market fragmentation; explaining why the Commission is not seeking a more global approach with the involvement of international partners; describing how cooperation within ECAC between EU and non-EU members would continue; substantiating the quantified impact on business costs.

Coherence between the European Commission’s legislative proposal and IA

Except for the inconsistencies pointed out above with regard to monitoring and evaluation, the proposal appears to correspond to the recommendations in the IA.

Conclusions

The IA appears to present a good argument on the need to address fragmentation of the EU market in aviation security screening equipment. In this respect, the JRC study and the SER3CO study seem to provide a solid underpinning on the need for action. There appears to be some lack of clarity in regard to the setting of operational objectives, while it might appear that the range of viable alternative options is somewhat limited.

This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament’s Committee on Transport and Tourism (TRAN), analyses whether the principal criteria laid down in the Commission’s own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

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11 See Monitoring and Evaluation section.