



JOINT CoESS AND EASA POSITION PAPER

Third Party Liability and the European Aviation Security Industry

Executive Summary

- This position paper has a **twofold aim**:
 - 1) 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, and**
 - 2) to propose some thoughts on finding answers to this tremendous challenge.**
- The paper is being submitted on behalf of the European private security industry, represented by CoESS and EASA. **CoESS**, or the Confederation of European Security Services was founded in 1989 as a European umbrella organisation for all national private security associations. CoESS is at present representing 27 federations from 23 European 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. CoESS represents the interests of approximately 25.000 companies located in Europe (with around 1.100.000 employees). **EASA**, or the European Aviation Security Association, represents all major private security companies which are delivering services related to aviation and airport security in Europe. EASA has currently 9 members and represents a total turnover of around EUR 650 million (out of a total market estimated at EUR 1,3 billion, of which a large part is still covered by the public sector).
- The private security industry plays an important role in the further development of Europe's welfare society. Indeed, the necessary economic activities can only prosper in a stable and 'secure' environment. This is particularly true in the transport and aviation sector where the confidence of travellers is key.
- In the aftermath of 11 September 2001, preventive and operational safety and security have assumed a higher profile than ever before and have been placed at the top of policymakers' agendas.¹ Confronted with the increased security needs of their customers, security service providers give full support to defeating terrorism and other threats to security .
- However, security service providers together with a range of other economic actors remain

¹ As was mentioned, a.o. in the opinion of the European Economic and Social Committee on the Security of Transport of 24 October 2002.

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

1. Introduction

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

It is a fact that security providers have only a limited role as one link in the entire security chain, in particular in the light of recent EU regulations imposing on national Governments large responsibilities related to security. It is also a fact that the liability exposure of security providers in case of a catastrophic terrorist attack is potentially unlimited. The same goes for airports, ports, air carriers, production sites, etc.

The reality is that the present insurance solutions available to security companies (as well as to any other party involved in this sector, except for government) are not sufficient to meet the potential exposure. This means that a catastrophic loss could threaten the existence of any provider of security and/or any other commercial party. In 2003, the private security market in the EU employed some 1,1 million employees and had a total turnover of ca EUR 12 billion.

In this document, CoESS (Confederation of European Security Services, representing the whole of the private security industry in Europe), and EASA (European Aviation Security Association, representing the airport security providers) 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 2003, the aviation security market in the EU had a total turnover of ca EUR 1.300 billion and employed some 40.000 employees.

The focus on aviation security is not arbitrary: the whole sector has been directly and heavily impacted by 9/11, and as a result it is very “experienced” in dealing with the consequences of terrorist attacks. However, it has become clear that other sectors in the economy are also susceptible to becoming targets of terrorist attacks (e.g. production sites, airports, ports, ships). These sectors together with companies that are in any way connected with potential “targets” (catering companies, cleaning companies,...) are confronted with the same risks. Therefore the issues presented and the solutions put forward in the following pages are mutatis mutandis also applicable to them.

2. 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.² CoESS and EASA 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, Moreover, the whole of the European private security industry (representing over 1 million jobs) would seriously face the risk of disappearing.

3. Aviation Industry - a Likely Target for Terrorist Attacks

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. It should be noted however that maritime and other modes of transport, and industrial sites could also all be the target of such an attack at exponential risk.

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.

Currently the situation is such that the costs of one incident similar to 9/11 are estimated at EUR 82,5 billion whilst the security industry (who last year had a turn-over of ca EUR 12 billion) had to pay an insurance premium of approximate EUR 180 million 1,5 % of total turn-over) for a coverage that generally does not exceed EUR 365 million per year (some major companies have an aggregate cover of EUR 700 million per year).

As previously indicated, airports and airlines face 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.

Needless to say, the same issues relating to unlimited liability exposure from a terrorist attack are also of concern to other sectors of our society, e.g. seaports.

² Speech held by Dan Ingbar, Chairman of Homeland Security Research Association Corporation (HSAC) at the NATO-Forum on Business and Securities, Berlin February, 2004.

5. Terrorism and War– a First Hand 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. 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 airport 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 security tasks in accordance with instructions from the authorities and clients, can not reasonably assume the full risks of all the perils and calamities generated from or affecting the airport 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 airport 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 EASA 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. 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 some form of clear legal framework within the EU is

required for the different sectors concerned. This is a prerequisite if the European Commission aims to achieve what it highlighted in its *White Paper on Services of General interest*³: “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”.

CoESS and EASA 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

CoESS and EASA believe that this is a matter of critical importance and that serious consideration should be given to this issue now.

Brussels, 26 May 2004

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³ COM(2004) 374.

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