



Safety and security: The influence of 9/11 to the EU framework for air carriers and aircraft operators



Sarah Fox*

DMM – School of Management & Law, Buckinghamshire New University, Queen Alexandra Road, High Wycombe, Buckinghamshire HP11 2JZ, UK

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ABSTRACT

Safety and security have always been two key objectives behind policies and innovation within the air transport industry, at international, European and individual government levels. The management of risk is important in aviation and has always been a challenge to the industry. The events of 9/11 revealed that new policy measures and initiatives were needed, both to deal with the short-term market effects and also for the long-term development inline with the European Union Treaty. A key objective behind the establishment of the European Union has always been the objective to create an internal market, where barriers are removed and existing rules simplified, yet the air transport industry in Europe lacked the mechanisms to protect it from exposure to the events and effects of 9/11.

This paper provides a unique view and understanding of the EU framework concerning safety and security in the aftermath of the terrorist attack. The paper considers commercial air operations and the insurance requirements for air carriers and aircraft operators, focusing on the development of the respective aviation liability and compensation framework. It analyses the insurance requirements for air carriers operating in the EU, as a result of Regulation 785/2004. An outline of the International dimension is also undertaken so as to contextualise the position of the European Union and the aspect of EU competence.

The research is based upon a mixed method/interdisciplinary approach, predominately with the focus on a legal qualitative review.

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1. Introduction

Airline services involving the movement of scheduled passengers has become one of the safest modes of transport (Oster, Strong, & Zorn, 2013),¹ but that acknowledged, there is no such thing as “zero risk.” Data from the International Air Transport Association (IATA) reported that in 2012 there were fifteen fatal accidents² and 414 fatalities.³ Preliminary data released by the International Civil

Aviation Organization in January 2014, confirmed that 2013 had seen the number of fatalities reduce from the previous year to 173, a consistent reduction over a period of three years. Using 2010 as a baseline this translates to a fall of 76 per cent.⁴ The 2013 figures show that there were in total nine fatal accidents worldwide and further geographical break down shows that the Americas had five fatal accidents, Europe had two, the Asia/Pacific each had one and the Middle East had none.⁵ Seven of the nine accidents occurred during the go-around or approach of a flight.

Notwithstanding this achievement in airline safety, one incident leading to loss of life, remains one too many.

Security associated with air travel remains a high-profile area, particularly, in the wake of the terrorist attacks on 11 September 2001 in the US (9/11) as aviation continues to be subject to terrorist attacks and hi-jacking/sky-jackings attempts. Civil aviation security

* Tel.: +20 8133 5793.

E-mail address: Sarah.Fox@bucks.ac.uk.

¹ Citing data from the FAA (http://www.faa.gov/data_research/safety) the National Transportation Safety Board (<http://www.nts.gov>) the International Civil Aviation Organization (<http://www.icao.int/safety/Pages/default.aspx>) amongst others. Also see EASA (easa.europa.eu/safety-and-research/safety-analysis-and-research.php).

² See ICAO's definition of an *accident* within Annex 13 – To the Convention on International Civil Aviation, Chicago, 1944.

³ Fatalities include deaths due to injuries sustained in an accident up to 30 days later (ICAO/IATA definition). www.iata.org/pressroom/facts_figures/facts_sheets/Pages/Safety.aspx.

⁴ Data provided from the ICAO press release (January 2014). <http://www.icao.int/Newsroom/NewsDoc2014/COM.1.14.EN.pdf>.

⁵ Based upon ICAO Regional Aviation Safety Group areas.

has been a matter of concern even before Lockerbie⁶ in 1988.⁷ At an international level ICAO has laid down Standards and Recommended Practices and operational procedures in respect to both security and safety practises. However, the events of 9/11 were instrumental in leading to revisions both in terms of preventative measures and related legislation. From a European Union perspective, the events of 9/11 led to the Commission making a legislative proposal to bring aviation security under the EU's regulatory area of competence. This saw a framework Regulation (Regulation EC 2320/2002) being adopted as well as sweeping revisions to the insurance protection and compensation mechanism.

This paper provides a unique view and understanding of the EU framework concerning aviation insurance. The paper considers commercial air operations and the insurance requirements for air carriers and aircraft operators, focusing on the development of the respective aviation liability and compensation framework within the European Union (EU). It analyses the insurance requirements for air carriers operating in the EU, as a result of Regulation 785/2004. The Regulation having established minimum insurance requirements in respect of passengers, baggage, cargo as well as third party liability in the aftermath of 9/11.

The research is based upon a mixed method/interdisciplinary approach, predominately with the focus on a legal qualitative review, which presents the factual, chronological background, prior to explaining the present compensatory framework in Europe. An outline of the International dimension is undertaken so as to contextualise the position of the European Union; and, the very principles of the European Union regarding market integration are also considered.

2. Safety and security

Safety and security remain a constant challenge to the airline industry in what is an ever evolving and developing globalised environment.

2.1. Safety

Research into aviation safety has been all encompassing, and has included investigating the technological development, training of personnel, accident investigation and analysis, maintenance etc.

Research carried out to determine whether there is a direct correlation between airline safety and profitability has produced mixed results. In 1986 Golbe reported no significant link between the two, whilst four year later, Rose (1990) contradicted this by showing a significant linkage between the two in particular in relation to small and medium airlines. Noronha and Singal (2004) questioned whether the financial situation of airlines impacted upon the respective safety record. The research being, to determine whether investment in safety is reduced to increase profitability. In 2008, the then Executive Chairman of Southwest Airlines, Herb Kelleher answered critics from an industry perspective when he reported to the US House Committee on Transportation and Infrastructure⁸ that “[b]eing unsafe would be the worst business strategy any airline could have.” In the same year Southwest Airlines were fined to the tune of \$10.2 million for safety violations having flown

numerous flights without performing the required maintenance inspections (Madsen, 2013).

From a common-sense perspective safety in transport, whatever the mode, remains of paramount importance, and from an industry perspective, “*safety is good business*” (Osborn & Jackson, 1988). The same is equally true in respect to prevention of security breaches.

2.2. Security

Attacks on aviation, both aircraft and airports have occurred for over 80 years, and regardless of the definition applied to acts of ‘terrorism,’ it is by no means new phenomena (Sinclair, 2003). A review of criminal and terrorist acts show the origins clearly traceable to the 1930s (Gero, 1997). There are however, distinct periods that show the advancement and sophistication of criminals and terrorists from the 1930s to the present time, which have subsequently led to parallel responsive and preventative policies and practices.

Price and Forrest (2013) reflecting on research carried out before 2000, make reference to the hard-hitting comments of Wilkinson (1999) which considered analysis undertaken by the University of Tel Aviv (Merari) that determined that a hijacker had an 81% chance of seizing control as compared to the success of bombing an aircraft which remained at 76%. This research also levied criticism at the intelligence service and aviation administration for failing to liaise in an effective way to prevent attacks. It should be recalled that this was also to be one of the findings of the 9/11 Commission.

However, the tragedy of 9/11 was to highlight the full implications of an organised terrorist attack, not only in terms of the loss of life, but the catastrophic consequences which saw the grounding of aircraft in the United States for a period of three days, the plummeting of airline stock values and the release of government emergency funding to cope with the devastating aftermath.

Gladwell (2001) commented that this evolution of both attacks and defences had led to the situation whereby “[a]irport-security measures have simply chased out the amateurs and left the clever and the audacious.” Even with increased investment into improving air safety and security and with continuous research into making the industry safer for travellers, the question remains whether it will ever be possible to achieve zero accidents and incidents despite the continued concerted efforts to achieve this. Reflecting on the statement of Kelleher (above) it is perhaps not a question of being ‘unsafe’ but it a question of being the safest it is possible to be and recognising, whether through regulation or otherwise, when this is not achievable (or until such a time when it is) mechanisms need to be in place to compensate for losses associated with air travel.

3. Assessing and accepting risk

Risk remains part of our everyday lives, and travel continues to involve risk.

Sage and White (1980) classified societal risk into four main types:

- Individual ‘real’ risk, as determined on the basis of the circumstances and as considered after their full development;
- Statistical risk, which is determined by available data relating to incidents and accidents concerning the issue being analysed;
- Predicted risk, which may be based upon relevant historical studies and analytical modelling;
- Perceived risk, which is the perception of a risk to an individual whether said to be intuitive or otherwise.

Civil aviation is recognised to involve all four areas of risk. Risk has been defined in various ways. Based upon the definition offered by Janic (2000) risk is to be viewed as the probability of an

⁶ The 1988 bombing of PanAm flight 103 over Lockerbie, UK.

⁷ For further commentary on the current liability regime in respect to third party surface damage and loss of life, refer to the 4th Quarter publication in the International Journal of Public Law and Policy and the paper, Sarah Fox (2014) ‘To practice justice and right’ International Aviation Liability: Have lessons been learnt? (Pending publication) Vol. 4 Number 4/2014.

⁸ 3, April, 2008.

occurrence concerning a hazardous event, or events during a given timeframe.

Air transport is viewed as a complicated system with interlinked systems involving human operation and interaction both of a procedural and technical nature/system (Netjasov & Janic, 2008). Unlike other transport modes, aircraft accidents stand to involve added complexities due to the very nature of this form of transport. As Janic (2000) explained, this is because flying takes place over long distances, is global, often involving the crossing into/over various other countries and continents. The associated risk of being involved in an accident when the aircraft is in flight relates to the passengers and crew; however, due to the very nature of flying there is also a probable risk, albeit lower, to individuals, and property on the ground.

Determining risks involves assessment, which may mean re-visiting old and existing data, or factoring in new data and changes in parameters, i.e. due to advancements or new exposures.

In aviation terms, there are a number of ways to determine risk (Ang & Tang, 1975; Johnston, Johnston, & Buse, 1989) and the interpretation of safety is often viewed as being dependent upon the system used and also the purpose for the analysis (Kumamoto & Henley, 1996). In respect to safety, the probability concerns determining the likelihood of an occurrence in respect of two indicators, the frequency and the magnitude/severity (Bahr, 1997); or, normally in aviation terms, the accident rate and fatality rate. Fatal accidents maybe viewed, for example, in terms of passenger kilometres and/or aircraft departures during a defined time.

Social acceptability of risk is a difficult factor to determine, albeit accepted that risk is part of living, the degree of risk, which is individually tolerated, is known to vary depending upon many factors, such as age, experience, life exposure etc. Air travellers' accept a degree of voluntary risk, whether or not they envisage the full potential, such as death of injury, is very much a case of objective and subjective interpretation as to the likelihood of this occurring (Janic, 2000; Netjasov & Janic, 2008).

4. Compensatory frameworks

4.1. Insurance

The origin of insurance has its roots traceable back to the great fire of London, in 1666. The need to 'protect' is a human characteristic, whether it is lives or property; and legislation, such as the Human Rights Act asserts and modifies this premise. So it not surprising that a system that recognises the value of property and life was initiated, albeit that it has been developed and modified to encompass such factors as globalisation, alongside of which has occurred the emergence of new risks, often stemming from catastrophic events, acts of terrorism and challenges to the industry. This has led to the need to disperse risk and has resulted in the integration of the insurance industry (Capar & Kotabe, 2003) and the development of new mechanisms for the transfer of risks (Njegomir, 2011). El-Kasaby, Tarry, and Vlasek (2003) however, point to the fact that despite contemporary trends and developments, the insurance market remains complex citing in particular that it does not employ a standard means of compensation.

In the main, the insurer limits the insured parties requirement to pay out financial compensation by settling any liability according to the specific risks and exclusions of the policy, or by contesting or defending the insured in litigation. The respective parties' responsibilities are determined within the insurance contract.

Risk coverage is normally sold under specified circumstances for losses due to *ex ante* defined improbable events. Risk assessment relates to understanding the probability, frequency and severity of a

'potential' claim (Janic, 2000). Insurance involves the application of mathematics and statistics and careful investment of collected premiums in order to comply with the obligations of all parties involved. By aiding to transfer risk, insurance, ultimately, provides the insured with peace of mind. However, fundamental risks, such as floods and earthquakes have the potential to see huge losses which insurers are unable to carry the burden of alone. It is for this reason that national governments often implement a compensatory package through social insurance mechanisms and subsidy schemes. The role of the nation state is said to play the part as a potential "insurer of last resort." To equate this 'potential' burden, Hurricane Katrina, for example, in August 2005, is reported to be the most expensive weather catastrophe in the US and is estimated to have caused losses of \$68.5 Billion (Njegomir & Morović, 2012).

4.2. Aviation insurance – overview

From a historical perspective, the need for aviation insurance became a matter of concern stemming back to 1784. In this year a police officer in Paris issued a directive that balloons required permission prior to operation, this was viewed as a means to protect the safety of persons and property on the ground (Sand, Pratt, & Lyon, 1961). The earliest record of a judicial decision in the field of air law is the New York, US case of *Guille v. Swan* (1822).⁹ Guille's balloon landed out of control on a vegetable garden belonging to Swan. Both this action and the curious onlookers that rushed to help caused damage to the garden and fence. The Court found that Guille was liable (regardless of fault) for the damage caused by the balloon and also the damage caused by the crowd.

Today, aviation insurance works upon the basics defined above but in a somewhat unique market. Flouris, Hayes, Pukthuanthong-Le, Thientham, and Walker (2009), describe how the industry engages in elaborate reinsurance mechanisms in order to be able to absorb and spread high losses (2009). In differing circumstances, insurance maybe a question of choice, particularly for travelling passengers; but, for the airline industry in most circumstances it is a legal requirement for operating purposes.

The main two areas that are insured relate to property and persons and, the most common forms of insurance in aviation relate to the hull, passengers, third party liability, and airport or fixed base operator (FBO) insurance. Each category seeing varying policy limits being set. Liability and hull risk are generally covered in a single policy – known as the all risk hull and legal liability to passengers and third parties.

In respect to persons, in the main, distinction is made between liability to passengers – second party liability, with liability insurance protecting the insured against passengers claims and other factors arising either directly or indirectly from the conduct of the insured; and, to third parties, persons or property outside the aircraft (El-Kasaby et al., 2003).

Airline insurance remains a small percentage of the total operating costs of airlines. In 2011 an estimated US\$2.3 billion was paid for basic airline insurance worldwide, equating to 80 US cents per passenger (Ascend, 2012). In the aftermath of 9/11, insurance costs increased to between \$1.30 and \$1.85 per passenger.¹⁰

Again, there is a multitude of variance in how insurance is provided and regulated worldwide (Wells & Chadbourne, 2000). Lloyds of London arguable remains the most well-known and respected insurance establishment in the world. Lloyds provide a

⁹ *Guille v. Swan*, 19 Johns, 381 (N.Y. 1822). The case is also instrumental from the perspective as being a source of law regarding the application of torts.

¹⁰ Com (2002) 320, p4.

syndicate system of underwriters and the brokers, agents, and underwriters are largely self-regulated.

Unsurprisingly, war and warlike acts, hijacking and acts of terrorism are extremely unattractive risks for insurers. War is not deemed to be an insurable risk for the traditional role of insurers and some policies (for example hull and liability policies) seek to expressly exclude such risks. However, historically, aviation insurance providers have bundled coverage into broad packages that included many elements relating to 'war perils' in order to seek policyholders (Nyampong, 2013) and, the provision of third party liability insurance for war and terrorist risks was effectively incorporated into the general policy of every company in the aviation sector.¹¹

9/11 was to have repercussions worldwide and risked threatening the future viability of not just airlines, but the insurance market also. In the first few years afterwards, airlines lost billions of dollars, which forced governments to bail out many airlines. A steep increase in fuel prices, which prior to 9/11 accounted for 13% of airlines' operating costs, exacerbated the problem. By May 2011 this had reached 35%. Risk management became a serious concern to airlines both in the short-term and long-term. Whether to exclude war from policies had been an area of contention even prior to 9/11 and there was no standardisation for such. On the 23 September 2001, aviation insurers were forced to apply the "seven-day-clause" which led to all war and terrorism clauses being cancelled in existing policies. This was later to be reintroduced but for limited amounts. The aviation insurance market was virtually on the brink of collapse.

The events of 9/11 were to cause a serious rethink with a re-examination of the risk of terrorism incidents, both in terms of insurance and related legislation.

5. An international framework¹²

There is probably no other area comparable to international aviation in terms of human involvement and activity that would produce such a vast spectrum of conflicts of laws and jurisdiction. Aviation crosses boundaries both physical borders and areas of law. As Abeyratne (1997) identified, a unified system is ultimately the only way to prevent and minimise such conflicts, it seeks to replace the disparity that exists regarding substantive law and jurisdiction, clarifying mutual rights and obligations whilst providing transparency.

However, International law is concerned with the political will of States as expressed through treaties or international custom and provides the means by which contracting States stipulate the rules of private law which is then agreed within their national law.

5.1. Historical implications and conventions

Unification of private air law became a priority very early in the history of aviation; however, there was no mechanism in place for the adoption of international conventions. In 1923 the French government recognised the need for unification of law at an international level when it tried to adopt national law relating to liability in the carriage by air.

There have been numerous Conventions since the first International Conference of Air Law in 1925. In the 1929 "Warsaw" *Convention for the Unification of Certain Rules Relating to International Carriage by Air*¹³ uniform rules were first established. This was very much the pioneer behind the legal principles for the development of international carriage by air by enabling such risk management through insurance.

The Convention has been updated, modified and amended by successive Conventions, which have governed the aspect of second party liability, that is, liability for death, wounding and other bodily injury of passengers, the loss or destruction of baggage and cargo and the liability for delays. Liability limitation has been an issue of contention for decades and led to some of the Conventions and amendments never being ratified by all States (Baden, 1996; Buff, 1996).

The Warsaw System was replaced by the 1999 Montréal Convention,¹⁴ inasmuch as the provisions take precedence over any other rules relating to international carriage by air between States that were previously party to the earlier instruments.¹⁵ The consensus of opinion has always been that the Warsaw Convention's liability limits resulted in under compensation of passengers involved in international aviation disasters (Weber & Jakob, 1996)¹⁶ which the Montréal Convention has sought to address.¹⁷

Airlines are required to have both passenger and third-party liability insurance in order to receive landing rights and also normally as a condition for leasing purposes (Wilkinson & Hartwig, 2011).

In 1933 the Conference on Private Air Law in Rome, adopted the *Convention for the Unification of Certain Rules Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface*.¹⁸ This did not however achieve wide acceptance and is now obsolete¹⁹ having been replaced by the 1952 Rome *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*.²⁰

Within the 1952 Rome Convention the compensation for death and personal injury has a limit, currently, 500,000 francs, this is only twice the limit that was specified for passengers under the Warsaw/Hague system.²¹ The limitations are tied to the weight of the aircraft and as Milde (2012) identifies, this potentially remains a disproportionate benchmark, given the damage that even a light aircraft may cause in sensitive area, such as a nuclear plant or oil refinery. Whilst, under the 1999 Montréal Convention, the

¹³ Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, reprinted in 449 U.S.C. § 1502 (1998) (adherence of United States proclaimed Oct. 29, 1934) [hereinafter Warsaw Convention]. The various instruments comprising the Warsaw System are reprinted and collected in the International Air Transport Association's Essential documents on International Air Carrier Liability (1999) [hereinafter IATA].

¹⁴ Montréal Convention – the *Convention for the Unification of Certain Rules for international Carriage by Air, signed at Montréal on 28 May 1999*. ICAO Doc. 9740. Article 1(1) states, "This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking."

¹⁵ Ibid. Art. 54.

¹⁶ Referring to the 1990s efforts to reform liability limits of the Warsaw System.

¹⁷ Article 21.

¹⁸ Text, Minutes and Documents in ICAO Doc. 106-CD (in French only).

¹⁹ A further Protocol was added to the 1933 Convention (but was only signed by two countries, Brazil and Guatemala) – *Protocol Supplementary to the Convention for the Unification of Certain Rules Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface, Signed in Rome on 29 May 1933, Done at Brussels on 29 September 1938* – (Text, Minutes and Documents in ICAO Doc. 107-CD, available in French only).

²⁰ ICAO Doc. 7364.

²¹ Additionally to note is that this sum may also be reduced if the sum of all claims exceeds the overall limit set.

¹¹ Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council. COD2001/0048.

¹² For further commentary refer to the 4th Quarter publication in the International Journal of Public Law and Policy and the paper, Sarah Fox (2014) 'To practice justice and right' International Aviation Liability: Have lessons been learnt? (Pending publication). Vol. 4 Number 4/2014.

monetary limits for liability for the death of, or injury to a contracting passenger were redefined²² to take into account inflation, more rigid limitations still remain in force for third parties on the ground whom have no relationship with the operator.

6. The relationship between the EU and ICAO

This year, 2014, marks the 70th anniversary of the [Convention on International Civil Aviation](#) in Chicago (commonly called the Chicago Convention) in 1944. In response to the Chicago Convention the Committee in International Convention on Civil Aviation was created. On 4 April 1947 the Convention came into force together with a new organisation, named the International Civil Aviation Organization (sic – US spelling) (ICAO). The Chicago Convention was adopted on 7 December 1944 by 52 states and it remains the primary source of public international air law. It has now been signed and adopted by 191 States; noting that, therefore, many of the current parties have had no say in the earlier negotiations and formulation of the Convention.

ICAO has a legal personality (as stated in Article 47) which is different to that of its member States; and, it is under the Headquarter Agreement that ICAO specifically possess juridical personality. An agreement exists between the United Nations and ICAO²³ and makes it apparent that ICAO is a specialised agency of the UN.

The European Union, as it is now known today, did not exist until 10 years after the founding of ICAO. The Treaty establishing the European Economic Community was not signed until 25 March 1957, entering into force on 1 January 1958. All EU Member States are members of the UN, whilst the European Community has only had observer status at the UN since 1974. That said, the status of the EU at ICAO remains questionable, not least by the EU, which has sought to obtain Community membership of ICAO as a single entity. However, Article 92 of the Chicago Convention states that it is only open to States, and membership on a regional basis would necessitate an amendment to the Convention. There therefore remains consensus by the EU that the role of the Community should be enhanced within ICAO.

7. The EU and the development of the framework²⁴

In 1957 six countries signed the Treaty of Rome,²⁵ creating the European Economic Community (EEC, later the European Community) which had at the heart a ‘common market’.²⁶

However, during the 1980s progress towards the objective of achieving a single market were acknowledged to be continually thwarted by the then Members’ national economies, which were recognised as being uncompetitive and fragmented, and by the European countries failure to reach unanimous agreements necessary to change the situation. In a bid to achieving this, the EU adopted the [Single European Act \(1986\)](#) which was seen as a vital component in making a frontier-free single market by the end of 1992 a reality.

The transport chapter should be viewed as a founding cornerstone of the European Union. The transport policy and objectives continue to overlap and combine with many other aspects of European Union policies.²⁷ However, the written text of the transport chapter, as created by the Treaty of Rome, remains essentially unchanged since 1957. The Treaty of Lisbon, with a few minor amendments, left the original transport policy virtually intact.

Article 91 TFEU refers to the ‘distinctive features of transport,’ although not specifically defining these, it is potentially an acknowledgement of the complexity of the transport sector. Transport remains both an ancillary activity to other sectors and yet it is also a major industry in its own right. Geographical factors also have an impact on the mode of transport each Member State potentially needs or wishes to develop and encourage nationally. Most certainly, historical factors and development initiatives contribute to such distinctive features, which have seen national transport policies evolve in numerous different ways in the Member States. The inevitable consequence is that such differing approaches are not conducive to facilitating integration. Due to this the founders of the European Community were aware that the transport sector could not automatically be subject to every general rule set out in the EC Treaty and, for this reason, the objective was to work towards a Common Transport Policy (CTP). However the measures provided within the transport Title in order to implement the CTP were nevertheless quite vague.

For the first 30 years of the European Community, transport policy remained virtually under the control of individual governments and it is acknowledged that during this period the European Community was either unwilling or unable to implement the CTP as provided by the Treaty of Rome ([COM\(2001\)370 Final](#)). It was as late as 1985, that the Court of Justice ([Case 13/83](#)) stated that there was not a coherent set of rules and that, with regards to certain aspects of the transport policy, the Council had failed to fulfil its obligations. A month later a programme of legislative measures to achieve an internal market by the end of 1992 transpired, which was consequently agreed to by the Council ([COM\(85\)310 final](#)).

Before 1987, the aviation market was protected and fragmented and in order to create a single market a succession of packages were introduced. The creation of a single market for aviation in the 1990s, removed the commercial restrictions for airlines flying within the EU. In 2008 [Regulation \(EC\) 1008/2008](#) on common rules for the operation of air services in the Community (the Air Service Regulation) replaced the Third Package. This Regulation resulted in the consolidation and updating of the text from the Third Package and sets out the EU’s position on the following:

- Market access;
- The granting and oversight of operating licences for Community air carriers;
- Aircraft leasing and registration;
- Public service obligations;
- Traffic distribution between airports;
- And pricing.

It is recognised that air transport within the EU makes a significant contribution to the EU economy. Currently there are more than 150 scheduled airlines, and a network of over 400 airports (EU data).

Through various initiatives the EU has striven to encourage economic and social progress in the field of aviation and this has

²² The 1999 Montréal Convention has a mechanism in place, whereby the limits for liability respond to inflationary trends and are reviewed/readjusted* every five years (*where applicable).

²³ ICAO Doc.7970, UNTS Vol. 8, pp. 315–343.

²⁴ Information based upon Sarah Fox (2009) PhD thesis (University of Northumbria – Law).

²⁵ See <http://eur-lex.europa.eu/en/treaties/index.htm>.

²⁶ ‘The main purpose of the Treaty establishing the European Community (EC Treaty – TEC) was to bring about the gradual integration of the States of Europe and to establish a common market founded on the four freedoms of movement (for goods, services, people and capital) and on the gradual approximation of economic policies.’ (See Europa Eur-Lex – <http://eur-lex.europa.eu> ‘Process and Players’).

²⁷ For example in relation to the environment and energy, communications, health and consumer protection, police and judicial cooperation and the free movement of persons, goods and services.

seen a steady flow of EU Directives and Regulations that aim to provide market integration within the European Union. The creation of a single market has encompassed legislation relating to the entire spectrum of civil aviation from, airports, ground handling, slots, air traffic management, environmental issues, competition rules (and state aid), personnel and social issues, through to passenger rights, safety and security matters.

The [Treaty of Lisbon](#) has added clarity to the fact that transport remains a shared competence and reference is made to the fact that the EU has competence in respect of a framework of a common transport policy (Article 90, as stated within Title VI (Articles 90–100) of the Functioning of the European Union; known as the Lisbon Treaty). However, prior to 9/11, the EU had no legislative competence in the field of aviation security, as it has been the responsibility of each of the individual Member States at a national level to determine. The events and consequences of 9/11 were to lead to a quick rethink of the provisions within the aviation framework in Europe.

7.1. Common rules for civil aviation security

The terrorist attack in the United States also revealed the vulnerability of the air transport sector within Europe. Within days of 9/11, insurers announced the withdrawal, or dramatic reduction in liability cover for war and terrorism risks. This resulted in the introduction of a temporary mechanisms providing liability insurance for airlines for a period of 30 days pending the restoration of an acceptable level of cover by commercial insurers.

In October 2001 the EU responded by proposing the establishment of common rules in the field of civil aviation,²⁸ this followed a request by the Council of the Ministers of Transport on 21 September 2001. The common measures were to increase security control on both international and domestic flights, although acknowledgement was given to the fact that the Community was only able to legislate over territory to which it had competence. Areas to be covered were stated as the following:

- Control of access to sensitive areas both at the airport and on aircraft;
- Control of passengers and their hand luggage;
- Control of the monitoring of handhold luggage;
- Training of ground staff;
- Defining of the equipment for control of the above;
- And, classification system for weapons and other items which were to be prohibited to take on an aircraft or into the sensitive areas of airports

During the first reading the Committee stated that it was felt that airports and airlines should not be required to carry the burden for security following 9/11 and that governments should shoulder this cost, on the 'basis that security threats against aviation are a manifestation of threats against the state.' Member States were urged to coordinate their efforts. However, in a later reading (29 November 2001) Members of Parliament did not agree with the Transport Committee, pointing to the fact that this might lead to distortion of competition. The compromise reached was that for a limited period of time, due to 9/11, and on a one-off basis, financial assistance/compensation would be granted. Following subsequent amendments the act was signed on 16 December 2002, becoming the first framework Regulation to establish common rules within the EU ([Regulation \(EC\) 2320/2002](#)) in relation to security. It was subsequently replaced by a new amendment in 2008. The new

[Regulation \(EC\) 300/2008](#) cited the need to repeal the earlier legislation 'in the light of experience gained.' The current Regulation is said to harmonise, clarify and simplify the rules to improve levels of security within Europe, whilst recognising the need for flexibility to adopt security measures that meet evolving risk assessments.

The preamble contextualises the aim of the Regulation, which is to provide a common interpretation of Annex 17 to the Chicago Convention and mechanisms for monitoring compliance. With regards to meeting the cost of security, Article 5 refers to the fact that each Member State shall determine whether the cost is borne by the State, the airport, air carriers, users or other responsible agencies.

Determining responsibility and who should bear the cost of terrorism remains a contentious issue and has particularly concerned the industry since the events of 2001 and the attack against the United States. [Ghobrial and Irvin \(2004\)](#) produced a conceptual model of the effects of 9/11 on the aviation industry, which focused on airlines, airports and passengers; but regardless of whether government, the airports, the airlines, etc., bears the cost, the cost is ultimately borne by the economy, and inevitably society.

It should be noted that on occasions, terrorist incidents have been dealt with as an 'accident' thus making the airline liable under the 1929 Warsaw and 1999 Montréal Conventions; in some instances, due to the sheer contention associated with determining cost as well as responsibility.

By increasing EU competence in this field, the EU has provided the basis to allow harmonisation of aviation security measures within Europe. The framework Regulation provided the means to set rules across the EU, with binding effect. This has seen the development and coordination of approaches through additional legislative acts and policy initiatives.

7.2. Insurance and common rules for the operation of air services in the Community

7.2.1. Carrier liability in the event of accidents

Before 9/11 the EU had a Regulation ([EC 2027/97](#)) on air carrier liability in the event of an accident. This Regulation recognised the need to improve the level of protection for passengers stating that the then liability provided by the Warsaw Convention was too low by EU economic and social standards. The issue of lengthy litigation was also recognised and reference was made to the review that was being undertaken by ICAO to revising the Warsaw system. The Regulation clearly showed that the EU was prepared to take action independent of ICAO in order to reduce the risk of distorting competition within Europe and providing adequate protection for passengers. The Regulation necessitated Community air carriers having insurance according to that specified within it.

In 2002 there was an amending [Regulation \(EC 889/2002\)](#) in light of the [Montréal Convention \(1999\)](#) which set new rules globally on liability in the event of accidents involving international air travel. It was stated that it was necessary to reinforce the protection of passengers and their dependents, so as not to weaken the protection compared with the Montréal Convention.

The title of the Regulation was also amended to take into account passengers' baggage, which is also covered by the Regulation in terms of baggage delays, destruction, loss or damage. The Regulation became the Regulation on carrier liability in respect of the carriage of passengers and their baggage by air. As well as compensating in the event of death or injury the Regulation also loosely touches upon passenger delays,²⁹ stating, '[i]n the case of passenger delay, the air carrier is liable for damage unless it took all

²⁸ 2001/0234(COD) – 10/10/2001.

²⁹ Also see Regulation 261/2004.

reasonable measure to avoid the damage or it was impossible to take such measures. The liability for passenger delay is limited to 4150 SDRs (approximate amount in local currency).³⁰ SDR relates to the Special Drawing Rate³⁰ as defined by the International Monetary Fund. It is not as such a 'real currency', rather it is a measure of value determined on a daily basis by the leading trade currencies, and is often referred to as '*paper gold*.' In terms of compensation, there have constantly been issues in specifying an acceptable currency that will be universally accepted worldwide. After World War One the monetary limit was expressed in a 'gold-clause' and the limit of liability for death (wounding or other injury to a passenger) was applied in terms of francs.

The setting of fixed maximum monetary amounts has also proved to be a contentious issue as it goes contrary to the general principles of liability and that compensation should be restitution or equivalent monetary compensation. There is also a presumption of fault of the carrier linked to compensation but from the perspective of the carrier, such limitations allow the carrier to negotiate realist insurance coverage within these boundaries. However, from a risk management approach, these limits were often unrealistic. Historically, for an early industry, the limits set no doubt aided to protect it, and, given that most airlines were originally State-owned and State-operated, the respective governments. No doubt the issue of fixed limitations for liability will continue to be an issue for aviation compensation pay-outs, subject to international law.

7.3. Insurance requirements for air carriers and aircraft operators

Regulation (EC)785/2004 was introduced to partly address the reduced insurance supply for the risks of war and terrorism. The preamble to the Regulation identified the following points:

- It is necessary to ensure a proper 'minimum' level of insurance to cover liability of air carriers in respect of passengers, baggage, cargo and third parties; as well as foster consumer protection.
- In the EU the distinction between national and international air travel has been eliminated and thus there is a need to ensure appropriate minimum insurance requirements for all Community air carriers.
- That a united 'common' action is required to ensure that the stipulated requirements also apply to air carriers from non EU, third countries, in order to ensure, 'a level playing field.'

Reference is made within the introduction to the EU Communication's, immediately in the aftermath of 9/11, that the then current insurance requirements merely required that air carriers "be insured to cover liability in case of accidents, in particular in respect of passengers, luggage, cargo, mail and third parties" (Section 7.2.1 above). It is clearly stated, in the post 9/11 Communications, that in light of 9/11 it is considered necessary to clearly identify that insurance regarding passengers, baggage, cargo and mail liability shall also cover acts of war and/or terrorism. The international position is also identified in respect to the 1933 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, as amended in 1952 and 1978. This introduced minimum amounts for third party liability and follows a strict principle in relation to liability for damage sustained on the ground. The Convention identifies exclusions in relation to nuclear damage, and damage caused by acts of war and terrorism. It should be noted that the Rome Convention has not been signed or ratified by all Member States. From an individual Member State perspective it was also identified

that carrier liability vis-à-vis third parties is in the main undertaken through proven tort as opposed to a strict liability; the United Kingdom, for instance, having unlimited third party liability.

In light of the non-standardised insurance mechanism the EU determined to provide for minimum insurance for third party liability for damage sustained on the ground, both as a result of an air accident, or due to war or terrorism.

The proposed Regulation identified categories as determined by stated Maximum Take Off Weight (MTOW) in respect of liability for third parties. Against each was a specified minimum liability. Through the respective passage of the proposal, the SDR was questioned and identified as a cause of concern, particularly for smaller aircraft within the original category 1, resulting in some modifications. What should be noted is that there remains a difference in the MTOW as stated within the Rome Convention (see also the Montréal Protocol of 1978) and the now implemented EU Regulation.

The EU Regulation covers 10 classifications from the lowest 750,000 SDR (less than 500 kg of MTOM) to the highest 700,000,000 SDR (more than 500,000 kg of MTOM) (Table 1).

In contrast the Rome Convention – Article 11, refers to:

- aircraft with MTOW < 2000 kg: 300,000 SDRs
- aircraft with MTOW < 6000 kg: 300,000 SDRs + 175 SDRs per kg
- aircraft with MTOW > 6000–30,000: 1,000,000 SDRs + 62.5 SDRs per kg
- aircraft with MTOW > 30,000 kg: 1,000,000 SDRs + 65 SDRs per kg.

In reality, there is still a degree of variance between the Member States regarding the minimum coverage applied as is demonstrated (Table 2).

7.3.1. Entry into force and scope

The Regulation was signed on 21 April 2004 but did not enter into force until 30 April, 2005. The scope was slightly amended from that initially proposed, so as to apply to 'all air carrier and to all aircraft operators flying within, into, out of, or over the territory of a Member State' party to the Treaty. The basic principle is that all carriers and aircraft operators are subject to the Regulation 'except' those listed, (as defined in Article 2) which refers to State Aircraft referred to in Article 3(b) of the Chicago Convention; model aircraft with a MTOM of less than 20 kg; foot-launched flying machines; captive balloons; kites; parachutes and aircraft; including gliders with a MTOM of less than 500 kg, with specific mention to microlights used for the purposes defined.

7.3.2. Principles of insurance

Article 4 of the Regulation specifies the risk of war or terror and other allied perils, which covers passengers, baggage, cargo and

Table 1
Regulation 785/2004, Article 7 (in respect of liability for third parties, the minimum insurance cover per accident, for each and every aircraft).

Category	MTOM (kg)	Minimum insurance (million SDRs)
1	<500	0.75
2	<1000	1.5
3	<2700	3
4	<6000	7
5	<12,000	18
6	<25,000	80
7	<50,000	150
8	<200,000	300
9	<500,000	500
10	≥ 500,000	700

MTOM - Maximum Take-Off Mass.

³⁰ 1 SDR = ca. 1.1289€ (End of Jan. 2014).

Table 2
Analysis (2012) in relation to requirements for MTOM < 2700 kg.

Member states	Minimum insurance coverage per passenger
France	100,000 SDR
Germany	100,000 SDR
Netherlands	100,000 SDR
Poland	100,000 SDR
Romania	100,000 SDR
UK	100,000 SDR
Italy	250,000 SDR
Spain	250,000 SDR

Source: based on data from [SDC](#).

third parties for insured risks relating to not only war, but acts of 'terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion.'

It is also reinforced that the insurance coverage is irrespective of ownership, making no distinction between lease agreement, joint franchise operations, code-sharing or any other arrangement of a similar nature.

The aviation liability for third parties is specified on a 'per accident basis,' whilst Article 6 in respect to liability for passengers, baggage and cargo applies a minimum insurance coverage as follows:

- (1) 250,000 SDR's per passenger (although for non-commercial operations with a MTOM of 2,700 kg or less it for the Member States to set a low level of insurance as long as the minimum coverage is at least 100,000 SDR's per passenger (see [Table 2](#)).
- (2) For liability in respect of baggage, the minimum cover is set at 1000 SDRs for passengers travelling in a commercial operation.
- (3) For cargo liability it is set at a minimum coverage of 17 SDRs per kilogram (for commercial operations).

Reference is made to the fact that levels may be amended where international treaties indicate this.

The Montréal Convention, by comparison, provides a two-tiered system in relation to the death of, or bodily injury to, an aircraft passenger (also see [Table 3](#)):

- Up to 113,100 SDR there is strict liability (which is only able to be reduced or excluded in the case of contributory negligence)
- For those in excess of 113,100 SDR liability is fault-based, whereby there is no limit to the carriers' liability.

7.3.3. Compliance

All air carriers, and when so required, aircraft operators, must demonstrate compliance with the insurance requirements by providing the Member State concerned the insurance certificate or other valid evidence of insurance.

In the period since it has been in force the Regulation has effectively ensured that insurance coverage is in place for all aircraft flying within, to or from the Community. The EU reports that there have been very few cases of aircraft operators not complying with the requirements set for insurance.³¹

When the Regulation first came into affect the third package of measures were still being applied and hence the Regulation made initial reference to Article 7 of [Council Regulation \(EEC\) 2407/92](#). As previously identified, 2407/92 was replaced by [Regulation \(EC\) 1008/2008](#) which refers to common rules for the operation of air

Table 3
A summary of [Regulation 785/2004](#) and a comparison of the Montréal Convention.^a

	Regulation 785/2004	Montréal Convention
Passenger	Minimum insurance requirements: 250,000 SDR No maximum limitation of liability	113,100 SDR strict liability, No maximum limitation of liability
Baggage	Minimum insurance requirement of 1131 SDRs per passenger	Limitation of the liability in relation to baggage to 1131 SDRs per passenger
Cargo	Minimum insurance requirement of 19 SDRs per kg	Limitation of liability in relation to cargo to 19 SDRs per kg
Mail	Mail not covered	Mail not covered
Third parties	Minimum insurance cover per accident, for each category of aircraft (as Table 1).	Third party not covered by this Convention

^a ICAO Doc. 9740.

services in the Community. It is Article 3(h) which defines that, for an EU carrier, it is a condition for obtaining an operating licence to comply with [Regulation 785/2004](#). [Regulation 1008/2008](#), Article 11, relates to the requirements in respect to insurance for mail, stating that an air carrier shall be insured to cover liability in case of accidents regarding mail.

7.3.4. Review

In 2012 a report was published on behalf of the EU Commission that evaluated [Regulation 785/2004](#). The report formed part of the review into the fitness check on the internal aviation market (the Roadmap Fitness check). One comment of the report related to the protection in respect to third parties. It identified that although the EU had harmonised requirements on insurance, liability to third parties still remained inconsistent, not only in the EU but internationally. This arguably remains not only a failing within the EU, but a failing at an international level, particularly in relation to acts of terrorism. In respect to this, it can be seen that ICAO has sought to create two Conventions to deal with varying aspects, a *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft*³² and a *Convention on Compensation for Damage Caused by Aircraft to Third Parties*³³ and to alleviate these gaps. However, there has been little enthusiasm for replacing the Rome Convention globally. This is endorsed by the low number of signatories to each of the proposed amending Conventions. According to the EU 2012 report, the Stakeholders consulted within the EU did not believe the fragmented position was a problem; however, the report also identified, that in any case, that it would be a difficult issue to resolve, as Member States were unlikely to agree a common position.

A further aspect identified, by the EU review, related to the bandings for aircraft, in particular for lighter aircraft. With the advent of unmanned aircraft (UA) and drones on the increase, this is likely to be an issue raised in coming years and it would be logical to expect an international and EU position on this, with a likelihood of amendments in the future to cater for such.

The issue of using the Special Drawing Rights (SDR) still remains a factor of concern, as insurance is contracted in hard currencies, normally in US dollars. Therefore there remains the concern that operators could end up under-insured due to fluctuating exchange rates.

Currently, there are no plans to amend or replace [Regulation 785/2004](#) and the current consensus remains that it is fit for purpose.

³² Signed at Montréal, 2 May 2009 (ICAO Doc. 9920).

³³ Signed at Montréal, 2 May 2009 (ICAO Doc. 9919).

³¹ Com(2008) 216 Final 24.4.2008.

The EU has endeavoured to recognise and relate EU Regulations to International provisions in order to keep a status-quo; however, what is able to be seen is that the EU Regulation tends to be more favourable than the respective international counterpart (Table 3).

Finally it should be noted that Article 5(5) refers to the fact that 'in exceptional cases of insurance-market failure,' the EU Commission may determine other measures in order to establish the objective of ensuring minimum insurance for those listed within the Regulation – air carriers, aircraft operators (in respect of passengers, baggage, cargo and third parties).

Regulation 785/2004 has largely achieved the objectives it sought by harmonising insurance requirements with the EU, it has laid down minimum requirements for all operators regardless of nationality and it set high minimum limits of protection. The Regulation has aided consumer protection and, could be said, to have therefore aided consumer confidence, providing assurance and reassurance. In so doing, it has contributed to the development of safer air travel across Europe, as well as creating a degree of market consistency and market security. However, since the time it has come into force, there have been no major incident, resulting in the testing of the insurance market and the ultimate effectiveness of the Regulation.

8. Conclusion

In 2001, shortly after 9/11, the air transport industry in Europe was described as suffering from 'chronic under-capitalisation and excessive fragmentation ... heavily in debt and [with] permanent cash-flow problems.'³⁴ The terrorist attacks in the United States exposed the EU air transport market to new challenges at a time when it was already hurting from increased fuel prices. As well as security modifications to prevent and minimise future breaches and ensure the safety of passengers, there was an inherent and urgent need to make modifications to the insurance mechanism. In the short-term Member States introduced temporary mechanisms for providing insurance for airlines for a period of 30 days, pending restoration of an acceptable level of cover. This caused an examination of the compatibility of this action with the competition rules of the Treaty in relation to factors that saw the increase of premiums through surcharges corresponding to approximately \$3.10 per passenger, as well as Government funding. This was cited by the EU, as being highly prejudicial to the functioning of air transport with the potential to lead to serious economic and social disruption.

The EU Commission stressed the fact that Government pay-outs must not compromise the policy on State aid and that Government assistance to aid restructuring must be based on the principle of a "one-time, last-time" application.

The crisis revealed that without further amendments to the insurance system there was the likelihood that similar future events would also lead to withdrawal of cover from aviation industry operators. It was cited that the Commission was to draw up guidelines 'at the request of the Member States' to ensure 'efficient and coherent response in such cases.'

The need to ensure equality within Europe in respect to competition and the operations of air transport was paramount, but this also extended to the conditions of competition with third country airlines.

What 9/11 revealed was that security and safety were being compromised in Europe, which also affected market integration and the very objectives behind the establishment of the European Union, which had always had at the forefront the objective to create an internal market. A single market is based on the principles of

bringing down barriers and simplifying existing rules. The air transport industry in Europe lacked the mechanisms to protect it from exposure to this new challenge, both internationally and through a European mechanism. The EU turned to the transport chapter, it could not rely on the justice and home affairs provisions for security measures in the same way, and Europe took action. It had recognised the need to take appropriate, coordinated action, not just in the short-term, but for the long-term. This required a revision of practices, which necessitated the EU extending its competence into aviation security by establishing common rules for the security of civil aviation, as well as establishing new insurance requirements for air operators and carriers, 'flying within, into, out of, or over the territory of a Member State.'

What had been a catastrophic security incident in the United States, led to a rethink in Europe, not only in respect to aviation security but adequate provisions in the commercial insurance market. The European Union showed that it was prepared to act, and to lead the way through innovative measures.

The EU had started piecing back together the fragmented air transport industry, protecting the industry, and its users and trying to make it shatterproof in the future.

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³⁴ Com(2001) 574 final.

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