EU Regulation

AVIATION SECURITY SCREENING EQUIPMENT

cep**PolicyBrief** No. 2016-33

Centrum für Europäische Politik

KEY ISSUES

Objective of the Regulation: An EU certification scheme for aviation security screening equipment – e.g. metal detectors – based on EU type-approval will prevent fragmentation of the internal market.

Affected parties: Manufacturers of aviation security screening equipment.

Pro: An EU-wide uniform type-approval for screening equipment strengthens both the internal market and competition.

Contra: –

CONTENT

Title

Proposal COM(2016) 491 of 7 September 2016 for a **Regulation** of the European Parliament and of the Council establishing a Union **certification system for aviation security screening equipment**

Brief Summary

► **Context and objectives**

– "Aviation security screening equipment" for detecting prohibited articles in aviation (Art. 3 Abs. 7; "screening equipment") – e.g. metal or explosives detectors, body scanners – currently has to be certified by a Member State before it can be put on the market in that Member State.
  - A national certificate confirms that screening equipment fulfils the requirements of EU law [Regulation (EC) No. 300/2008] and the law of the Member State.
  - Where a Member State has certified the screening equipment, other Member States are free (p. 2)
    - to recognise this certification or
    - to carry out their own certification procedure or
    - to "impede" its use in their territory.

– In 2008, in order to "at least partially address" the "fragmentation" of the internal market for screening equipment, the Commission, the Member States and third countries developed a "common evaluation process" with "common testing methodologies" within the framework of the European Civil Aviation Conference (ECAC) (p. 2). The ECAC test result for screening equipment serves as non-binding "reference information" in the national certification process but does not yet constitute an approval in itself. The summary of the ECAC test result is published.

– In future, an EU certification scheme will (p. 6)
  - completely eliminate fragmentation of the internal market for screening equipment – e.g. due to multiple testing and additional requirements in the Member States – and
  - improve international competitiveness of EU industry, particularly with respect to US manufacturers who can rely on a seal of approval from the US Transportation Security Administration (TSA) which, according to the Commission, is "a globally recognised approval" (see Impact Assessment SWD(2016) 261, p. 12).

– The future EU certification scheme for screening equipment is based on EU-wide requirements, "EU type-approvals" from Member States, testing by "technical services" in accordance with the standard ECAC testing methodologies and "certificates of conformity" from the manufacturers. In addition to this, there are EU rules on market surveillance and scrutiny of national approval authorities by the Commission.

– The principle of mutual recognition applies (Art. 4). This means: The Member States must not
  - impede the marketing of certified screening equipment or
  - impose additional requirements in respect of screening equipment.

► **EU requirements and EU type approval procedure**

– "EU type-approval" certifies that the "type and configuration" of screening equipment complies with the EU requirements [Regulation (EC) No. 300/2008] (Art. 9 (1), Annex I).

– EU type-approval is issued by a national approval authority (Art. 6 (1).
  - Manufacturers can apply for it in the Member State of their choice (Recital 7, Art. 7 (2)).
  - It applies EU wide (Art. 7 (2)).

Authors: Dr. Martin Menner and Dr. Götz Reichert, LL.M. | menner@cep.eu
cep | Kaiser-Joseph-Strasse 266 | 79098 Freiburg | Germany | Telephone +49 (0)761 38693-107 | www.cep.eu

– The approval authority may refuse EU type-approval despite compliance with EU requirements if screening equipment presents a "serious risk" to safety or a "serious risk" of harm to the environment or public health (Art. 9 (2)).
  - The approval authority notifies the approval authorities in the other Member States and the Commission about this.
  - Where the Commission believes that an approval authority has incorrectly issued or refused the approval, it will require the approval authority to correct its decision (Art. 9 (5)).

► **Technical services**

– During the EU type-approval procedure, a testing laboratory ("technical service") tests whether the type and configuration of the screening equipment complies with the EU requirements (Art. 8 (1)).
– Tests are carried out according to the "common testing methodologies" developed in the framework of ECAC with the participation of the Member States (Art. 8 (2) in conjunction with Annex IV).
– Technical services must
  - possess "appropriate" skills, technical knowledge and experience (Art. 22 (3)),
  - comply with specific technical standards (Annex VII),
  - be approved by a national accreditation body (Art. 23) and
  - be "notified" to the Commission by an approval authority (Art. 21 (1), (2)).
– An approval authority may itself act as a "technical service" (Art. 22 (5)).
– Where there is doubt as to whether a technical service fulfils the approval requirements, the Commission must investigate the case and request the notifying approval authority to take corrective measures – including withdrawal of the notification (Art. 26).
– Tests can last "on average" a maximum of 6 months (Art. 22 (4)).

► **Manufacturer's certificate of conformity**

– The manufacturer must guarantee that each piece of screening equipment is in conformity with the EU type-approval and that this is ensured in the production process (Art. 5 (5) and (9)).
  - All screening equipment must display an EU type-approval mark and an EU type-approval number (Art. 5 (7)) affixed by the manufacturer.
  - The manufacturer must ensure that each piece of screening equipment is accompanied by a "certificate of conformity" confirming that the equipment complies with the EU type-approval (Art. 5 (1), (2) and (5) in conjunction with Annex II).
– Where the manufacturer finds that screening equipment does not conform to EU type-approval, it must take corrective measures or withdraw the equipment from the market (Art. 5 (13)).
– Where screening equipment presents a risk, the manufacturer must "immediately" inform the authorities in the Member States, in which it has made the equipment available, of the risks and of any corrective measures taken (Art. 5 (13)).

► **Market surveillance**

– Where the market surveillance authorities of a Member State find that screening equipment presents a risk to the health or safety of persons or to "other aspects of public interest protection" and "does not comply with the requirements laid down in this Regulation" ("non-compliance"), they must
  - require the manufacturer to take corrective action or to withdraw the equipment from the market (Art. 17 (1)) and
  - inform the Commission and national approval authorities of this (Art. 17 (2)).
– Where the manufacturer fails to take corrective action, the market surveillance authorities must (Art. 17 (4))
  - take "provisional measures" to prohibit or restrict the marketing of the equipment on their territory, and
  - inform the Commission and the approval authorities in the other Member States.
– Where no objection to a provisional measure is raised, either by an approval authority or by the Commission, within three months, that measure is deemed justified (Art. 17 (7)).
– The approval authorities must
  - ensure that where necessary "appropriate restrictive measures" – including a marketing ban – are taken in their respective Member State (Art. 17 (8)) and
  - inform the Commission and the other approval authorities of this (Art. 17 (6)).

► **Scrutiny of the national approval authorities by the Commission**

– Where the Commission or the approval authority of another Member State considers that a measure taken by an approval authority is contrary to EU law, the Commission enters into consultation with the relevant approval authority and the manufacturer and decides whether the measure is justified or must be withdrawn. All Member States must comply with the Commission's decision. (Art. 18)
– If the approval authority finds that screening equipment does not comply with the EU type-approval which it has issued, it will take the "necessary measures" including the withdrawal of EU type-approval. It will inform the other approval authorities and the Commission of this. (Art. 19 (1) and (2))

Authors: Dr. Martin Menner and Dr. Götz Reichert, LL.M. | Telephone +49 (0)761 38693-107 | menner@cep.eu

– If an approval authority finds that screening equipment does not comply with the EU type-approval of another Member State, it will request the approval authority of this Member State to carry out an assessment (Art. 19 (5)).

- **Delegated acts**
  The Commission is empowered to adopt delegated acts for the amendment of the Annexes (Art. 27), in order
  – to include amendments to the EU requirements for screening equipment passed by the European Parliament and the Council [Regulation (EC) No. 300/2008] in this Regulation (Annex I),
  – to accommodate changes in ECAC's "common testing methodologies" (Annex IV),
  – to adapt the other Annexes to the development of scientific and technical knowledge.

Main Changes to the Status Quo

- New: the EU certification scheme for screening equipment which is based on EU-wide requirements, EU type-approvals of the Member States and certificates of conformity from the manufacturers.
- Until now, screening equipment could only be placed onto the market in the Member State in which it had been certified. Now, the principle of mutual recognition applies: Member States cannot impede the marketing of certified screening equipment which has a certificate of conformity and they cannot impose additional requirements in respect of such equipment.

Statement on Subsidiarity by the Commission

According to the Commission, an EU certification scheme for the mutual recognition of EU type-approvals and certificates of conformity, between Member States, can only be established at EU level due to its scale and effects (p. 4).

Policy Context

In 2008, in order to "at least partially address" the fragmentation of the internal market (p. 2), the EU developed a non-binding "common evaluation process" for screening equipment, within the framework of the European Civil Aviation Conference (ECAC).
In 2015, the European Commission adopted the European Agenda on Security [COM(2015) 185] for the period 2015-2020 with which it intends to combat terrorism and security threats in the EU and aims to improve the competitiveness of the European Security Industry.

Legislative Procedure

7 September 2016	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	GD Migration and Home Affairs (leading)
Committees of the European Parliament:	Transport and Tourism (leading), Rapporteur: Luis de Grandes Pascual (EVP Group, E); Internal Market and Consumer Protection; Civil Liberties, Justice and Home Affairs
Federal Ministries:	Home Affairs (leading); EU; Transport and Digital Infrastructure
Committees of the German Bundestag:	Home Affairs Committee (leading)
Decision-making mode in the Council:	Qualified majority (adoption by 55% of the Member States making up 65% of the EU population)

Formalities

Legislative competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The aim of overcoming the fragmentation of the internal market for aviation security screening equipment is justified. **An EU-wide type-approval for screening equipment** will allow it to be marketed in all Member States, following successful certification by the approval authority in the applicant's Member State. This

strengthens both **the internal market** of the EU **and competition** whilst at the same time guaranteeing high safety standards.
The main condition for this is that all competent authorities comply with uniform standards when it comes to type-approval and surveillance of the safety requirements. In this regard, the Regulation provides for suitable surveillance procedures which must also be put into practice.

Impact on Efficiency and Individual Freedom of Choice

The common certification system removes the need for repeated testing of equipment due to country-specific requirements and reduces the administrative costs and time to market. This increases the efficiency of the market for aviation security screening equipment and strengthens competition. It also increases customer choice because national approval authorities can no longer impede the sale of equipment certified in other EU countries. It is doubtful, however, whether, by comparison with the simple ECAC test, EU type-approval will actually gain any higher status than a quality label in international trade and thus whether the alleged competitive disadvantages vis-à-vis TSA-certified screening equipment will in fact be eliminated, because, although the ECAC test does not currently entail a legally binding approval of screening equipment, it has already become an important selling point in trade with third countries.

Impact on Growth and Employment

Negligible.

Impact on Europe as a Business Location

Negligible.

Legal Assessment

Legislative Competency

Unproblematic. The EU can adopt provisions in order to remove obstacles to the free movement of goods in the internal market (Art. 114 TFEU).

Subsidiarity

EU action is justified because an effective EU certification system for screening equipment, which is based on EU-wide requirements, "EU type-approvals", standard testing methodologies and "certificates of conformity" that are recognised EU wide, can only be introduced at EU level.

Proportionality with respect to Member States

The principle of "mutual recognition" of EU type-approvals and certificates of conformity constitutes a less severe intervention in the sovereign rights of the Member States than a central certification scheme at EU level – put forward by the Commission as an alternative (p. 6 et seq.) – under which EU type-approval would be issued e.g. by an EU agency. As a less severe approach it is therefore proportionate.
The powers of intervention of the Member States, which can even include a marketing ban, are basically proportionate for preventing risks to human health and safety or the environment.
In addition, using a directly applicable Regulation rather than a Directive, which would open up scope for the Member States to exercise their own discretion on implementation, is appropriate, necessary and proportionate for the uniform and effective EU-wide application and enforcement of EU requirements for screening equipment.

Compatibility with EU Law in other respects

Scrutiny by the Commission of the legality of measures taken by Member States is compatible with EU law (Art. 114 (10) TFEU).
Authorisations to adopt delegated acts apply to amendments to technical and therefore "non-essential elements" (Art. 290 (1) TFEU). The sovereign rights of the Member States are also protected, in particular, in relation to changes to the EU requirements for screening equipment because these must take place by way of the amendment of the Regulation (EC) No. 300/2008 in the ordinary legislative procedure, with the participation of the European Parliament and the Council, and is then simply subject to formal approval by the Commission by way of a delegated act in Annex I (Art. 27 in conjunction with Annex I). The same applies to amendments to the "standard testing methodologies" (Art. 27 in conjunction with Annex IV) because such amendments are developed by ECAC with the participation of the Member States.

Conclusion

An EU-wide uniform type-approval for screening equipment strengthens both the internal market and competition.