

COMMON POSITION (EC) No 8/2004**adopted by the Council on 5 December 2003****with a view to adopting Regulation (EC) No .../2004 of the European Parliament and of the Council of ... on insurance requirements for air carriers and aircraft operators**

(2004/C 54 E/04)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF
THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the Opinion of the European Economic and Social Committee ⁽²⁾,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

- (1) In the framework of the common transport policy, and in order to foster consumer protection, it is important to ensure a proper minimum level of insurance to cover liability of air carriers in respect of passengers, baggage, cargo and third parties.
- (2) In the Community aviation market, the distinction between national and international air transport has been eliminated and it is, therefore, appropriate to establish minimum insurance requirements for Community air carriers.
- (3) Common action is necessary to ensure that these requirements also apply to air carriers from third countries in order to ensure a level playing field with Community air carriers.
- (4) In its Communication of 10 October 2001 regarding the repercussions of the terrorist attacks in the United States on the air transport industry, the Commission stated its intention to examine the amounts and conditions of insurance required for the grant of operating licences by Member States in order to ensure a harmonised approach. Moreover, in its Communication of 2 July 2002 regarding insurance in the air transport sector following the terrorist attacks of 11 September 2001 in the United States, the

Commission stated that it would continue to monitor the developments on the aviation insurance market with regard to the revision of the amounts and conditions of insurance required for the grant of operating licences by Member States.

- (5) By Council Decision 2001/539/EC of 5 April 2001 ⁽⁴⁾ the Community concluded the Convention for the Unification of Certain Rules Relating to International Carriage by Air, agreed at Montreal on 28 May 1999 ('Montreal Convention'), which lays down new rules on liability in respect of the international carriage by air of persons, baggage and cargo. These rules are expected to replace those of the Warsaw Convention of 1929 and its subsequent amendments.
- (6) Article 50 of the Montreal Convention requires parties to ensure that air carriers are adequately insured to cover liability under that Convention. The Warsaw Convention of 1929 and its subsequent amendments will continue to exist alongside the Montreal Convention for an indefinite period. Both Conventions provide for the possibility of unlimited liability.
- (7) Article 7 of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers ⁽⁵⁾, requires air carriers to be insured to cover liability in case of accidents, in particular in respect of passengers, baggage, cargo, mail and third parties, albeit without specifying minimum amounts and conditions of insurance.
- (8) It is appropriate to take into account the fact that the European Civil Aviation Conference adopted on 13 December 2000 Resolution ECAC/25-1 on minimum levels of insurance cover for passenger and third party liability, which was modified on 27 November 2002.
- (9) It is necessary to define minimum insurance requirements to cover passengers, baggage, cargo and third parties for air carriers and aircraft operators flying within, into, out of, or over the territory of a Member State, including its territorial waters.
- (10) Insurance obligations should remain with air carriers with a valid operating licence, and, in the case of Community air carriers, with a valid operating licence granted in accordance with Regulation (EEC) No 2407/92. The absence or expiry of such licence does not relieve the undertaking from such obligation.

⁽¹⁾ OJ C 20 E, 28.1.2003, p. 193.

⁽²⁾ OJ C 95, 23.4.2003, p. 16.

⁽³⁾ Opinion of the European Parliament of 13 May 2003 (not yet published in the Official Journal), Council Common Position of 5 December 2003 and Position of the European Parliament of ... (not yet published in the Official Journal).

⁽⁴⁾ OJ L 194, 18.7.2001, p. 38.

⁽⁵⁾ OJ L 240, 24.8.1992, p. 1.

- (11) While the Montreal Convention specifically regulates liability in respect of passengers, baggage and cargo, the liability for mail is, according to Article 2 of that Convention, to be subject to 'the rules applicable to the relationship between the carriers and the postal administrations'. In the Community, insurance for such liability is sufficiently regulated by Article 7 of Regulation (EEC) No 2407/92.
- (12) Mandatory insurance should not be required for State aircraft and for certain other types of aircraft.
- (13) Minimum insurance cover should be provided in situations where an air carrier or aircraft operator is liable in respect of passengers, baggage, cargo and third parties in accordance with rules of international Conventions, Community or national law, without interfering with such rules.
- (14) The insurance should cover aviation-specific liability in respect of passengers, baggage, cargo and third parties. Regarding passengers, baggage and cargo, insurance should include cover for death and personal injury caused by accidents and for loss or destruction of or damage to baggage and cargo. Regarding third parties, insurance should include cover for death, personal injury and damage to property caused by accidents.
- (15) This Regulation should not be interpreted as requiring double insurance. As far as the contracting carrier and the actual carrier within the meaning of Article 39 of the Montreal Convention can be held liable for the same damage, Member States may establish specific measures to avoid double insurance.
- (16) While the market practice of offering insurance on an aggregate basis may be conducive to insurability, in particular for risks of war and terrorism, by allowing insurers better control over their liabilities, this practice does not release an air carrier or aircraft operator from the obligation to respect minimum insurance requirements when the aggregate fixed by its insurance contract is reached.
- (17) It is necessary to require air carriers to provide evidence that they respect at all times the minimum insurance requirements to cover liability, as provided for in this Regulation. With regard to Community air carriers and with regard to aircraft operators using aircraft registered in the Community, depositing evidence of insurance in one Member State should be sufficient for all Member States, such insurance being effected by an undertaking authorised to do so under the applicable law.
- (18) With respect to overflights of the territory of a Member State by non-Community air carriers or aircraft registered outside the Community which do not involve a landing on or take-off from any Member State, any overflowed Member State may, in accordance with international law, request evidence of compliance with the insurance requirements of this Regulation, for example by carrying out random checks.
- (19) The minimum insurance requirements should be reviewed after a period of time.
- (20) Procedures for monitoring the application of the minimum insurance requirements should be transparent and non-discriminatory and should not impede the free movement of goods, persons, services and capital.
- (21) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽¹⁾.
- (22) Where further rules are required to establish adequate insurance covering aviation-specific liability on points which are not covered by this Regulation, the Member States should have the possibility to introduce such rules.
- (23) Arrangements for greater cooperation over the use of Gibraltar airport were agreed in London on 2 December 1987 by the Kingdom of Spain and the United Kingdom in a joint declaration by the Ministers of Foreign Affairs of the two countries. Such arrangements have yet to enter into operation.
- (24) Since the objective of this Regulation, namely the introduction of minimum insurance requirements which can contribute to the objectives of the internal aviation market by reducing distortions of competition, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective,
- HAVE ADOPTED THIS REGULATION:
- Article 1*
- Objective**
1. The objective of this Regulation is to establish minimum insurance requirements for air carriers and aircraft operators in respect of passengers, baggage, cargo and third parties.
2. In respect of the carriage of mail, the insurance requirements are those set out in Regulation (EEC) No 2407/92 and in the national laws of the Member States.
- ⁽¹⁾ OJ L 184, 17.7.1999, p. 23.

*Article 2***Scope**

1. This Regulation shall apply to all air carriers and to all aircraft operators flying within, into, out of, or over the territory of a Member State to which the Treaty applies.

2. This Regulation shall not apply to:

(a) State aircraft as referred to in Article 3(b) of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944;

(b) Model aircraft with an MTOM of less than 20 kg;

(c) Foot-launched flying machines (including powered para-gliders and hang gliders);

(d) Captive balloons;

(e) Kites;

(f) Parachutes (including parascending parachutes).

3. The application of this Regulation to the airport of Gibraltar is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated.

4. Application of this Regulation to Gibraltar airport shall be suspended until the arrangements included in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 enter into operation. The Governments of Spain and the United Kingdom will inform the Council of such date of entry into operation.

*Article 3***Definitions**

For the purposes of this Regulation:

(a) 'air carrier' means an air transport undertaking with a valid operating licence;

(b) 'Community air carrier' means an air carrier with a valid operating licence granted by a Member State in accordance with Regulation (EEC) No 2407/92;

(c) 'aircraft operator' means the person or entity, not being an air carrier, who has continual effective disposal of the use or operation of the aircraft; the natural or legal person in whose name the aircraft is registered shall be presumed to be the operator, unless that person can prove that another person is the operator;

(d) 'flight' means:

— with regard to passengers and unchecked baggage, the period of transport of the passengers by aircraft including their boarding and disembarkation,

— with regard to cargo and checked baggage, the period of transport of baggage and cargo from the moment the baggage or cargo is handed to the air carrier until the moment of delivery to the entitled recipient,

— with regard to third parties, the use of an aircraft from the moment when power is applied to its engines for the purpose of taxiing or actual take-off until the moment when it is on the surface and its engines have come to a complete stop; additionally, it shall mean the moving of an aircraft by towing and push-back vehicles or by powers which are typical for the drive and the lift of aircraft, particularly air streams;

(e) 'SDR' means a Special Drawing Right as defined by the International Monetary Fund;

(f) 'MTOM' means the Maximum Take Off Mass, which corresponds to a certified amount specific to all aircraft types, as stated in the certificate of airworthiness of the aircraft;

(g) 'passenger' means any person who is on a flight with the consent of the air carrier or the aircraft operator, excluding on-duty members of both the flight crew and the cabin crew;

(h) 'third party' means any legal or natural person, excluding passengers and on-duty members of both the flight crew and the cabin crew;

(i) 'commercial operation' means an operation for remuneration and/or hire.

*Article 4***Principles of insurance**

1. Air carriers and aircraft operators referred to in Article 2 shall be insured in accordance with this Regulation as regards their aviation-specific liability in respect of passengers, baggage, cargo and third parties. The insured risks shall include acts of war, terrorism, hijacking, acts of sabotage, unlawful seizure of aircraft and civil commotion.

2. Air carriers and aircraft operators shall ensure that insurance cover exists for each and every flight, regardless of whether the aircraft operated is at their disposal through ownership or any form of lease agreement, or through joint or franchise operations, code-sharing or any other agreement of the same nature.

3. This Regulation is without prejudice to the rules on liability as arising from:

- international Conventions to which the Member States and/or the Community are parties,
- Community law; and
- national law of the Member States.

Article 5

Compliance

1. Air carriers and, when so required, aircraft operators, as referred to in Article 2, shall demonstrate compliance with the insurance requirements set out in this Regulation by providing the competent authorities of the Member State concerned with a deposit of an insurance certificate or other evidence of valid insurance.

2. For the purpose of this Article 'Member State concerned' shall mean the Member State which has granted the operating licence to the Community air carrier or the Member State where the aircraft of the aircraft operator is registered. For non-Community air carriers and aircraft operators using aircraft registered outside the Community, 'Member State concerned' shall mean the Member State to or from which the flights are operated.

3. By way of exception from paragraph 1, Member States overflown may require that air carriers and aircraft operators referred to in Article 2 produce evidence of valid insurance in accordance with this Regulation.

4. With regard to Community air carriers and aircraft operators using aircraft registered in the Community, the deposit of evidence of insurance in the Member State referred to in paragraph 2 is sufficient for all Member States, without prejudice to the application of Article 8(6).

5. In exceptional cases of insurance-market failure, the Commission may determine, in accordance with the procedure referred to in Article 9(2), the appropriate measures for the application of paragraph 1.

Article 6

Insurance in respect of liability for passengers, baggage and cargo

1. For liability in respect of passengers, the minimum insurance cover shall be 250 000 SDRs per passenger. However, in respect of non-commercial operations by aircraft with a MTOM of 2 700 kg or less, Member States may set a lower level of minimum insurance cover, provided that such cover is at least 100 000 SDRs per passenger.

2. For liability in respect of baggage, the minimum insurance cover shall be 1 000 SDRs per passenger in commercial operations.

3. For liability in respect of cargo, the minimum insurance cover shall be 17 SDRs per kilogramme in commercial operations.

4. Paragraphs 1, 2 and 3 shall not apply with respect to flights over the territory of the Member States carried out by non-Community air carriers and by aircraft operators using aircraft registered outside the Community which do not involve a landing on, or take-off from, such territory.

5. The values referred to in this Article may be amended, as appropriate, where amendments in the relevant international treaties indicate the necessity thereof, in accordance with the procedure referred to in Article 9(2).

Article 7

Insurance in respect of liability for third parties

1. In respect of liability for third parties, the minimum insurance cover per accident, for each and every aircraft, shall be:

Category	MTOM (kg)	Minimum insurance (million SDRs)
1	< 500	0,75
2	< 1 000	1,5
3	< 2 700	3
4	< 6 000	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

If at any time insurance cover for damage to third parties due to risks of war or terrorism is not available to any air carrier or aircraft operator on a per-accident basis, such air carrier or aircraft operator may satisfy its obligation to insure such risks by insuring on an aggregate basis. The Commission shall closely monitor the application of this provision in order to ensure that such aggregate is at least equivalent to the relevant amount set out in the table.

2. The values referred to in this Article may be amended, as appropriate, where amendments in the relevant international treaties indicate the necessity thereof, in accordance with the procedure referred to in Article 9(2).

*Article 8***Enforcement and sanctions**

1. Member States shall ensure that air carriers and aircraft operators referred to in Article 2 comply with this Regulation.
2. For the purposes of paragraph 1 and without prejudice to paragraph 7, with respect to overflights by non-Community air carriers or aircraft registered outside the Community which do not involve a landing on or take-off from any Member State, as well as with respect to stops in Member States by such aircraft for non-traffic purposes, the Member State concerned may request evidence of compliance with the insurance requirements laid down in this Regulation.
3. Where necessary, Member States may request additional evidence from the air carrier, the aircraft operator or the insurer concerned.
4. Sanctions for infringement of this Regulation shall be effective, proportional and dissuasive.
5. With regard to Community air carriers, these sanctions may include the withdrawal of the operating licence, subject to and in accordance with the relevant provisions of Community law.
6. With regard to non-Community air carriers and to aircraft operators using aircraft registered outside the Community, the sanctions may include refusal of the right to land on the territory of a Member State.
7. Where Member States are not satisfied that the conditions of this Regulation are met, they shall not allow an aircraft to take off, before the air carrier or aircraft operator concerned has produced evidence of adequate insurance cover in accordance with this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at ...

For the European Parliament
The President

*Article 9***Committee procedure**

1. The Commission shall be assisted by the Committee set up by Article 11 of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes ⁽¹⁾.
 2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.
- The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.
3. The Committee shall adopt its rules of procedure.
 4. The Committee may furthermore be consulted by the Commission on any other matter concerning the application of this Regulation.

*Article 10***Report and cooperation**

1. The Commission shall submit a report to the European Parliament and the Council on the operation of this Regulation by ... (*).
2. Upon request, Member States shall submit information on the application of this Regulation to the Commission.

*Article 11***Entry into force**

This Regulation shall enter into force twelve months following the date of its publication in the *Official Journal of the European Union*.

For the Council
The President

⁽¹⁾ OJ L 240, 24.8.1992, p. 8. Regulation as last amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1).

(*) 3 years after the date of entry into force of this Regulation.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

In the framework of the codecision procedure (Article 251 EC-Treaty), the Council reached on 9 October 2003 a political agreement on the draft Regulation of the European Parliament and of the Council on insurance requirements for air carriers and aircraft operators.

The Regulation aims at introducing minimum insurance requirements for air carriers and aircraft operators flying within, into, out of, or over the territory of a Member State in respect of their liability for passengers, baggage, cargo and third parties.

In taking its position, the Council took account of the opinion of the European Parliament in first reading, as well as of the opinion of the Economic and Social Committee.

II. ANALYSIS OF THE COMMON POSITION

1. General

The Council was able to agree on the major lines of the Commission proposal. On some points, however, the Council decided to modify the text, generally in order to make it clearer, simpler and easier to understand. The modifications often resulted from amendments presented by the European Parliament.

The main modifications operated by the Council are the following (unless otherwise indicated, the Articles and recitals referred to are those of the common position):

1. In Article 1(2), the Council agreed to exclude 'mail' from the scope of the Regulation, since the insurance requirements in respect of the carriage of mail are sufficiently dealt with by Regulation (EEC) No 2407/92 on licensing of air carriers ⁽¹⁾ and by the national laws of the Member States.
2. In Article 2(2), the Council felt that it was appropriate to exclude certain types of aircraft and 'flying machines' from the scope of the Regulation.
3. In Articles 2(3) and 2(4), the Gibraltar clauses have been inserted.
4. In Article 3, the Council deleted some definitions ('insurer', 'insurance', 'insurer's principal place of business', 'incident', 'air service', 'scheduling period'), either because the term concerned was sufficiently self-explanatory — in view notably of established Community law — or because the definition had become superfluous because of redrafting exercises in the rest of the text. The Council revised the definitions of 'aircraft operator' and 'flight', and added new definitions regarding 'passenger', 'third party' and 'commercial operation'.
5. In Articles 4(1) and 4(2), the Council redrafted the 'general principles of insurance' in order to clarify the insurance requirements that air carriers and aircraft operators have to observe.
6. In Article 4(3), the Council underlined that the minimum insurance requirements of this Regulation are without prejudice to the rules on liability as defined by rules of international conventions, Community law and national law of the Member States.
7. The Council deleted the former Article 5(2), relating to alternative security requirements for air carriers and aircraft operators registered in a third country, since this could lead to a situation in which Community air carriers and aircraft operators using aircraft registered in the Community would be discriminated against.

⁽¹⁾ OJ L 240, 24.8.1992, p. 1.

8. In Article 5(3), the Council, acknowledging that the enforcement of the insurance requirements could pose practical problems in respect of 'overflying aircraft', stated that 'Member States overflown may require that air carriers and aircraft operators referred to in Article 2 produce evidence of valid insurance in accordance with this Regulation.' This provision should be read in conjunction with Article 8(2) and recital 18.
9. In Article 6, the Council confirmed that in respect of passengers, the minimum insurance cover should be 250 000 SDRs per passenger. However, in order to take account of the particular situation of operators using small aircraft for private purposes, the Council provided an exception to this rule, according to which in respect of non-commercial operations by aircraft of 2 700 kg or less, Member States have the possibility of setting a lower minimum insurance cover, provided that such cover is at least 100 000 SDRs per passenger. Since these are minimum levels, Member States have the freedom of setting higher levels of insurance cover.
10. The Council considerably simplified Article 7, concerning insurance in respect of liability for third parties. It lowered the minimum insurance cover in respect of third parties, and agreed upon a more detailed classification of aircraft, which allows a more accurate determination of the minimum insurance cover in each case.
11. Article 8 on enforcement and sanctions was clarified by the Council in view notably of existing Community law.
12. In Article 11, the entry into force of the Regulation has been put at twelve months following its publication in the Official Journal.

2. Amendments of Parliament

As regards the amendments of Parliament, the Council endeavoured to incorporate them to the greatest extent possible. However, in some cases it was impossible to integrate an amendment, because the relevant text had been substantially modified or had even been deleted.

This being said, the Council was able to accept, literally or in substance, in part or in full, the following amendments:

Amendment 1 has been accepted almost literally by modifying *recital 17*;

Amendment 2 has been accepted by applying a broad definition of 'passenger' in *Article 3(g)*;

Amendment 3 has been accepted by modifying *Article 2(1)*, which now refers to air carriers and aircraft operators 'flying within, into, out of, or over the territory of a Member State';

Amendment 4 has been accepted partly by modifying *Article 2(1)*, and partly by modifying the definition of 'aircraft operator' in *Article 3(c)*;

Amendment 5 has been accepted by inserting a new *Article 2(2)(a)*, which explicitly excludes State aircraft from the scope of the Regulation;

Amendment 6 has been fully accepted by deleting any reference to the exclusion of local flights from the scope of the Regulation;

Amendment 21 has been accepted by inserting a definition of 'passenger' in *Article 3(g)*;

Amendment 23 has been accepted by modifying the definition of 'flight' in *Article 3(d)*;

Amendment 10 has been accepted by inserting a new *Article 5(4)*;

Amendment 14 has been accepted by inserting a table in *Article 7(1)*, which contains, like in the EP amendment, a more detailed classification of aircraft, as well as by providing lower levels of minimum insurance cover in respect of liability for third parties;

Amendment 16 has been accepted by the insertion of the two sentences under the table in *Article 7(1)*;

Amendments 19 and 31 have been accepted by the new *Articles 8(5) and 8(6)*;

Amendment 20 has been accepted in the modified *Article 8(7)*.

III. CONCLUSION

The Council submits that the text of its common position is appropriate and balanced. With respect to the amendments proposed by the European Parliament in first reading, the Council observes that a large majority of these amendments have been integrated – to the letter or in spirit, partially or in full – in the common position. The Council holds therefore that the text of its common position ensures by and large that the aim sought by the amendments of Parliament is achieved.
