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THE EUROPEAN PARLIAMENT

THE COUNCIL

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Subject: REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/CE

COMMON GUIDELINES
Consultation Deadline: 01.12.2005

**REGULATION (EC) No .../2005 OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL**

of

**on the establishment of a Community list of air carriers subject to an operating ban within
the Community and on informing air transport passengers of the identity of the operating air
carrier, and repealing Article 9 of Directive 2004/36/CE
(Text with EEA relevance)**

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,

Having regard to the Opinion of the European Economic and Social Committee¹,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty²,

¹ Opinion of 28 September 2005 (not yet published in the Official Journal)

² Opinion of the European Parliament of 16 November 2005 (not yet published in the Official
Journal) and Council decision of

Whereas:

- (1) Action by the Community in the field of air transport should aim, as a priority, at ensuring a high level of protection for passengers from safety risks. Moreover, full account should be taken of the requirements of consumer protection in general.
- (2) A Community list of air carriers that do not meet relevant safety requirements should be brought to the notice of passengers so as to ensure the utmost transparency. This Community list should be based on common criteria drawn up at Community level.
- (3) Air carriers included in the Community list should be subject to an operating ban. The operating bans included in the Community list should apply throughout the territory of the Member States to which the Treaty applies.
- (4) Air carriers that do not enjoy traffic rights in one or more of the Member States may nonetheless fly to and from the Community when their aircraft, with or without crew, are leased by companies that do enjoy such rights. Provision should be made for an operating ban included in the Community list to apply equally to such air carriers, since these air carriers could otherwise operate in the Community while not complying with the relevant safety standards.

- (5) An air carrier which is subject to an operating ban could be permitted to exercise traffic rights by using wet-leased aircraft of an air carrier which is not subject to an operating ban, provided that the relevant safety standards are complied with.
- (6) The procedure for updating the Community list should allow for decisions to be taken swiftly, in order to provide adequate and up-to-date safety information to air passengers and to guarantee that air carriers that have remedied safety deficiencies are taken off the list as soon as possible. At the same time, the procedures should respect the air carrier's rights of defence and should be without prejudice to international agreements and conventions to which the Member States or the Community are parties, in particular the 1944 Chicago Convention on International Civil Aviation. The implementing measures on matters of procedure, to be adopted by the Commission, should notably cater for these requirements.
- (7) When an operating ban has been imposed on an air carrier, appropriate action should be taken with a view to assisting that air carrier in remedying the deficiencies that gave rise to that ban.

- (8) In exceptional cases, Member States should be allowed to take unilateral measures. In cases of urgency and when confronted with an unforeseen safety problem, Member States should have the possibility to impose immediately an operating ban in respect of their own territory. Moreover, where the Commission has decided not to include an air carrier in the Community list, Member States should also be able to impose or maintain an operating ban in view of a safety problem which does not exist in the other Member States. Member States should make restrictive application of these possibilities, taking account of the Community interest and with a view to presenting a common approach in respect of aviation safety. This should be without prejudice to Article 8 of Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation¹ and to Article 10 of Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency².
- (9) Information on the safety of air carriers should be published in an effective manner, such as through use of the Internet.
- (10) In order for the competitive framework in air transport to yield the greatest possible benefits for companies and passengers, it is important that consumers receive the necessary information to be able to make informed choices.

¹ OJ L 373, 31.12.1991, p. 4. Regulation as last amended by Commission Regulation (EC) No 2871/2000 (OJ L 333, 29.12.2000, p. 47).

² OJ L 240, 07.09.2002, p. 1. Regulation as last amended by Commission Regulation (EC) No 1701/2003 (OJ L 243, 27.9.2003, p. 5).

- (11) The identity of the air carrier or carriers actually operating the flight is an essential piece of information. However, consumers concluding a contract of carriage, which could comprise both an outward and a return flight, are not always informed about the identity of the air carrier or carriers actually operating the flight or flights concerned.
- (12) Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours¹ requires certain information to be made available to consumers, but that information does not include the identity of the operating air carrier.
- (13) Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computer reservation systems (CRS)² entitles consumers booking a flight via a computer reservation system to be informed of the identity of the operating air carrier. Nevertheless, even in scheduled air transport, industry practices exist, such as wet leasing, or code-sharing if booked without a CRS, where the air carrier which has sold the flight under its name does not actually operate it and where there is currently no legal right for the passenger to be informed of the identity of the air carrier actually performing the service.

¹ OJ L 158, 23.6.1990, p. 59.

² OJ L 220, 29.7.1989, p. 1. Regulation as last amended by Regulation (EC) No 323/1999 (OJ L 40, 13.2.1999, p. 1).

- (14) These practices increase flexibility and allow a better provision of services to passengers. Moreover, a certain number of last minute changes, in particular for technical reasons, is unavoidable and contributes to the safety of air transport. This flexibility should, however, be balanced by verification that the companies actually operating the flights meet safety requirements and by transparency for consumers in order to guarantee them the right of making an informed choice. A fair balance between the commercial viability of air carriers and passenger access to information should be sought.
- (15) Air carriers should pursue a policy of transparency vis-à-vis passengers regarding safety-related information. Publishing such information should contribute to passenger awareness of the reliability of air carriers in safety terms.
- (16) Air carriers are responsible for reporting safety deficiencies to the national air safety authorities as well as for addressing such deficiencies without delay. Air and ground crew are expected to take appropriate action when safety deficiencies are apparent to them. It would be contrary to the interests of aviation safety if staff were to be penalised for doing so, as follows from Article 8(4) of Directive 2003/42/EC of the European Parliament and of the Council of 13 June 2003 on occurrence reporting in civil aviation¹.

¹ OJ L 167, 4.7.2003, p. 23.

- (17) In addition to the situations covered by Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights¹, passengers should be offered the right to reimbursement or to re-routing in certain specific other situations falling within the scope of this Regulation, if there is a sufficiently close connection with the Community.
- (18) In addition to the rules set out in this Regulation, the implications of changes to the identity of the operating carrier for the performance of the contract of carriage should be governed by the laws of the Member States applicable to contracts and by relevant Community law, in particular Council Directives 90/314/EEC and 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts².
- (19) This Regulation is part of a legislative process pursuing an efficient and coherent approach to reinforcing air safety in the Community, in which the European Aviation Safety Agency plays an important role. With an extension of the competencies of this Agency, such as in respect of third-country aircraft, its role under this Regulation could be further expanded. Special attention should be given to further improving the quality and quantity of safety inspections of aircraft and to harmonising these inspections.

¹ OJ L 46, 17.2.2004, p. 1.

² OJ L 95, 21.4.1993, p. 29.

- (20) Where there is a risk to safety that has not been adequately resolved by the Member State(s) concerned, the Commission should have the possibility of adopting immediate measures on a provisional basis. In such cases, the committee assisting the Commission in its work under this Regulation should act in accordance with the advisory procedure provided for in Article 3 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission¹.
- (21) In all other cases, the committee assisting the Commission in its work under this Regulation should act in accordance with the regulatory procedure provided for in Article 5 of Decision 1999/468/EC.
- (22) Since the relation between this Regulation and Article 9 of Directive 2004/36/CE of the European Parliament and of the Council of 21 April 2004 on the safety of third-country aircraft using Community airports² would otherwise be unclear, that Article should be repealed with a view to providing legal certainty.
- (23) Member States should lay down rules on penalties applicable to infringements of the provisions of Chapter III of this Regulation and ensure that these penalties are applied. The penalties, which may be of a civil or administrative nature, should be effective, proportionate and dissuasive.

¹ OJ L 184, 17.7.1999, p. 23.

² OJ L 143, 30.04.2004, p. 76.

- (24) The Commission should analyse the application of this Regulation and, after a sufficient period, report on the efficiency of its provisions.
- (25) Any competent civil aviation authority in the Community may decide that air carriers, including those not operating in the territory of the Member States to which the Treaty applies, might lodge a request with that authority to subject the air carrier so requesting to systematic checks in order to verify its likelihood of compliance with the relevant safety standards.
- (26) This Regulation should not preclude the Member States from introducing a quality labelling system for air carriers at national level, for which the criteria might include considerations other than minimum safety requirements, in accordance with Community law.
- (27) 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,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

General provisions

Article 1

Subject matter

1. This Regulation establishes rules:
 - (a) on the establishment and publication of a Community list, based on common criteria, of air carriers which, for safety reasons, are subject to an operating ban in the Community, and
 - (b) on informing air passengers of the identity of the air carrier operating the flights on which they travel.
2. 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.

3. 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 2

Definitions

For the purpose of this Regulation, the following definitions shall apply:

- (a) "air carrier" means an air transport undertaking with a valid operating licence or equivalent;
- (b) "contract of carriage" means a contract for or including air transport services, including one where the carriage is composed of two or more flights operated by the same or different air carriers;
- (c) "air carriage contractor" means the carrier which concludes a contract of carriage with a passenger or, where the contract comprises a package, the tour operator. Any ticket seller shall also be deemed an air carriage contractor;

- (d) "ticket seller" means the seller of an air ticket who arranges a contract of carriage with a passenger, whether for a flight on its own or as part of a package, other than an air carrier or a tour operator;
- (e) "operating air carrier" means an air carrier that performs or intends to perform a flight under a contract of carriage with a passenger, or on behalf of another person, legal or natural, having a contract of carriage with that passenger;
- (f) "operating authorisation or technical permission" means any legislative or administrative act by a Member State, which provides either that an air carrier may operate air services to and from its airports or that an air carrier may operate in its airspace or that an air carrier may exercise traffic rights;
- (g) "operating ban" means the refusal, suspension, revocation or restriction of an air carrier's operating authorisation or technical permission for safety reasons, or any equivalent safety measures in respect of an air carrier which has no traffic rights in the Community but whose aircraft might otherwise be operated in the Community under a lease agreement;
- (h) "package" means those services defined in Article 2(1), of Directive 90/314/EEC;

- (i) "reservation" means the fact that the passenger has a ticket or other proof, which indicates that the reservation has been accepted and registered by the air carriage contractor;
- (j) "relevant safety standards" means the international safety standards contained in the Chicago Convention and its Annexes as well as, where applicable, those in relevant Community law.

CHAPTER II

Community List

Article 3

Establishment of the Community List

1. With a view to reinforcing air safety, a list of air carriers that are subject to an operating ban in the Community (hereinafter referred to as "the Community list") shall be established. Each Member State shall enforce, within its territory, the operating bans included in the Community list in respect of the air carriers that are the subject of those bans.

2. The common criteria for imposing an operating ban on an air carrier, which shall be based on the relevant safety standards, are set out in the Annex (and are hereinafter referred to as "the common criteria"). The Commission may modify the Annex, in particular in order to take account of scientific and technical developments, in accordance with the procedure referred to in Article 15(3).
3. For the purpose of establishing the Community list for the first time, each Member State shall, by*, communicate to the Commission the identity of the air carriers that are subject to an operating ban in its territory, together with the reasons which led to the adoption of such bans and any other relevant information. The Commission shall inform the other Member States of these operating bans.
4. Within one month of receiving the information communicated by the Member States, the Commission shall, on the basis of the common criteria, decide on the imposition of an operating ban on the air carriers concerned and shall establish the Community list of air carriers on which it has imposed an operating ban, in accordance with the procedure referred to in Article 15(3).

* One month after the date of entry into force of this Regulation.

Article 4
Updating of the Community list

1. The Community list shall be updated:
 - (a) to impose an operating ban on an air carrier and include this air carrier on the Community list, on the basis of the common criteria;
 - (b) to remove an air carrier from the Community list, if the safety deficiency or deficiencies that gave rise to the inclusion of the air carrier on the Community list have been remedied and there is no other reason, on the basis of the common criteria, to maintain the air carrier on the Community list;
 - (c) to modify the conditions of an operating ban imposed on an air carrier which is included on the Community list.
2. The Commission, acting on its own initiative or at the request of a Member State, shall decide to update the Community list as soon as this is required under paragraph 1, in accordance with the procedure referred to in Article 15(3) and on the basis of the common criteria. At least every three months, the Commission shall verify whether it is appropriate to update the Community list.

3. Each Member State and the European Aviation Safety Agency shall communicate to the Commission all information that may be relevant in the context of updating the Community list. The Commission shall forward all relevant information to the other Member States.

Article 5

Provisional measures for updating of the Community list

1. Where it is evident that the continued operation of an air carrier in the Community is likely to constitute a serious risk to safety, and that such a risk has not been resolved satisfactorily by means of urgent measures taken by the Member State(s) concerned in accordance with Article 6(1), the Commission may provisionally adopt the measures referred to in Article 4(1)(a) or (c), in accordance with the procedure referred to in Article 15(2).
2. As soon as possible, and at most within 10 working days, the Commission shall submit the matter to the Committee referred to in Article 15(1) and shall decide to confirm, amend, revoke or extend the measure which it has adopted under paragraph 1 of this Article, acting in accordance with the procedure referred to in Article 15(3).

Article 6
Exceptional measures

1. In cases of urgency, this Regulation shall not preclude a Member State from reacting to an unforeseen safety problem by imposing an immediate operating ban in respect of its own territory, taking into account the common criteria.
2. A decision by the Commission not to include an air carrier in the Community list in accordance with the procedure referred to in Article 3(4) or 4(2) shall not preclude a Member State from imposing or maintaining an operating ban on the air carrier concerned in view of a safety problem specifically affecting that Member State.
3. In either of the situations referred to in paragraphs 1 and 2, the Member State concerned shall immediately inform the Commission, which shall inform the other Member States. In the situation referred to in paragraph 1, the Member State concerned shall without delay submit a request to the Commission to update the Community list, in accordance with Article 4(2).

Article 7
Rights of defence

The Commission shall ensure that, when it adopts decisions as referred to in Articles 3(4), 4(2) and 5, the air carrier concerned is given the opportunity of being heard, taking into account the need, in some cases, for an urgency procedure.

Article 8
Implementing measures

1. The Commission, acting in accordance with the procedure referred to in Article 15(3), shall, where appropriate, adopt implementing measures in order to lay down detailed rules in respect of the procedures referred to in this Chapter.
2. In deciding these measures the Commission shall take due account of the need for decisions to be taken swiftly on updating the Community list and shall, where appropriate, provide the possibility of an urgency procedure.

Article 9
Publication

1. The Community list and any modification thereto shall be published immediately in the *Official Journal of the European Union*.
2. The Commission and the Member States shall take the measures necessary to facilitate public access to the Community list, as most recently updated, in particular through the use of the Internet.

3. Air carriage contractors, national civil aviation authorities, the European Aviation Safety Agency and airports in the territory of the Member States shall bring the Community list to the attention of passengers, both via their websites and, where relevant, in their premises.

CHAPTER III

Information to passengers

Article 10

Scope

1. The provisions of this Chapter shall apply in respect of the carriage of passengers by air, where the flight is part of a contract of carriage and that carriage started in the Community, and
 - (a) the flight departs from an airport on territory of a Member State to which the Treaty applies, or
 - (b) the flight departs from an airport in a third country and arrives at an airport on territory of a Member State to which the Treaty applies, or
 - (c) the flight departs from an airport in a third country and arrives at another such airport.

2. The provisions of this Chapter shall apply whether the flight is scheduled or non-scheduled and whether the flight is part of a package or not.
3. The provisions of this Chapter shall not affect the rights of passengers under Directive 90/314/EEC and Regulation (EEC) No 2299/89.

Article 11

Information on the identity of the operating air carrier

1. Upon reservation, the air carriage contractor shall inform the passenger of the identity of the operating air carrier or carriers, whatever the means used to make the reservation.
2. Where the identity of the operating air carrier or carriers is not yet known at the time of reservation, the air carriage contractor shall ensure that the passenger is informed of the name or names of the air carrier or carriers that is or are likely to act as operating air carrier or carriers on the flight or flights concerned. In such case, the air carriage contractor shall ensure that the passenger is informed of the identity of the operating air carrier or carriers as soon as such identity is established.
3. Wherever the operating air carrier or carriers is or are changed after reservation, the air carriage contractor shall, irrespective of the reason for the change, take immediately all appropriate steps to ensure that the passenger is informed of the change as soon as possible. In all cases, passengers shall be informed at check-in, or on boarding where no check-in is required for a connecting flight.

4. The air carrier or the tour operator, as the case may be, shall ensure that the relevant air carriage contractor is informed of the identity of the operating air carrier or carriers as soon as this is known, in particular in the event of a change of such identity.
5. If a ticket seller has not been informed of the identity of the operating air carrier, it shall not be responsible for not complying with the obligations provided for in this Article.
6. The obligation of the air carriage contractor to inform passengers of the identity of the operating air carrier or carriers shall be specified in the general terms of sale applicable to the contract of carriage.

Article 12

Right to reimbursement or re-routing

1. This Regulation shall not affect the right to reimbursement or re-routing as provided for in Regulation (EC) No 261/2004.
2. In cases where Regulation (EC) No 261/2004 does not apply, and
 - (a) the operating air carrier notified to the passenger has been entered on the Community list and is subject to an operating ban which has led to the cancellation of the flight concerned, or which would have led to such cancellation if the flight concerned had been operated in the Community, or

- (b) the operating air carrier notified to the passenger has been replaced by another operating air carrier which has been entered on the Community list and is subject to an operating ban which has led to the cancellation of the flight concerned, or which would have led to such cancellation if the flight concerned had been operated in the Community,

the air carriage contractor which is party to the contract of carriage shall offer the passenger the right to reimbursement or re-routing provided for in Article 8 of Regulation (EC) No 261/2004, provided that, where the flight has not been cancelled, the passenger has chosen not to take that flight.

3. Paragraph 2 of this Article shall apply without prejudice to Article 13 of Regulation (EC) No 261/2004.

Article 13

Penalties

Member States shall ensure compliance with the rules set out in this Chapter and shall lay down penalties for infringement of these rules. The penalties shall be effective, proportionate and dissuasive.

CHAPTER IV

Final provisions

Article 14

Information and amendment

By*, the Commission shall report to the European Parliament and to the Council on the application of this Regulation. The report shall be accompanied, where necessary, by proposals for the amendment of this Regulation.

Article 15

Committee

1. The Commission shall be assisted by the Committee referred to in Article 12 of Regulation (EEC) No 3922/91 ("the Committee").
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

* Three years after the date of entry into force of this Regulation.

3. 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 referred to in Article 5(6) of Decision 1999/468/EC shall be set at three months.
4. The Commission may consult the Committee on any other matter concerning the application of this Regulation.
5. The Committee shall adopt its Rules of Procedure.

Article 16

Repeal

Article 9 of Directive 2004/36/EC is hereby repealed.

Article 17
Entry into force

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

Articles 10, 11 and 12 shall apply from* and Article 13 shall apply from**.

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

Done at Brussels,

For the European Parliament
The President

For the Council
The President

* Six months after the date of entry into force of this Regulation.
** One year after the date of entry into force of this Regulation.

ANNEX

Common criteria for consideration of an operating ban for safety reasons at Community level

Decisions on action at Community level shall be taken according to the merits of each individual case. Depending upon the merits of each case, a carrier or all the carriers certified in the same state might be eligible for action at Community level.

In considering whether an air carrier should be totally or partially banned, it shall be assessed whether the air carrier is meeting the relevant safety standards taking into account the following:

1. Verified evidence of serious safety deficiencies on the part of an air carrier:
 - Reports showing serious safety deficiencies, or persistent failure by the carrier to address deficiencies identified by ramp inspections performed under the SAFA programme previously communicated to the carrier.
 - Serious safety deficiencies identified within the framework of the provisions for the gathering of information in Article 3 of Directive 2004/36/EC on the safety of third-country aircraft.
 - Operating ban imposed on a carrier by a third country because of substantiated deficiencies related to international safety standards.

- Substantiated accident-related information or serious incident-related information indicating latent systemic safety deficiencies.
2. Lack of ability and/or willingness of an air carrier to address safety deficiencies as demonstrated by:
- Lack of transparency or adequate and timely communication on the part of a carrier in response to an enquiry by the civil aviation authority of a Member State regarding the safety aspect of its operation.
 - Inappropriate or insufficient corrective action plan presented in response to an identified serious safety deficiency.
3. Lack of ability and/or willingness of the authorities responsible for the oversight of an air carrier to address safety deficiencies as demonstrated by:
- Lack of cooperation with the civil aviation authority of a Member State by the competent authorities of another state, when concerns about the safety of the operation of a carrier licensed or certified in that state have been raised.
 - Insufficient ability of the competent authorities with regulatory oversight of the carrier to implement and enforce the relevant safety standards. Particular account should be taken of the following:

- (a) audits and related corrective action plans established under ICAO's Universal Safety Oversight Audit Programme or under any applicable Community law;
 - (b) whether the operating authorisation or technical permission of any carrier under the oversight of that state has previously been refused or revoked by another state;
 - (c) the air operator's certificate has not been issued by the competent authority of the state where the carrier has its principle place of business.
 - Insufficient ability of the competent authorities of the state in which the aircraft used by the air carrier is registered to oversee the aircraft used by the carrier in accordance with its obligations under the Chicago Convention.
-