

‘The 27th Annual Conference of the European Air Law Association’ Brief Report of a Conference Held in Edinburgh on 6 November 2015

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On 6 November 2015, the 27th Annual Conference of the European Air Law Association (EALA) was held at the Signet Library, Parliament Square, in Edinburgh, Scotland.

The agenda was divided into seven overarching topics:

- (1) The Lockerbie case: legal and practical implications.
- (2) Accidents and incidents: crimes?
- (3) Aviation security.
- (4) Reducing aviation’s CO2 emissions: will 2016 mark a global breakthrough?
- (5) Drones/Remotely-Piloted Aircraft Systems (RPAS).
- (6) Airport/airline relations: conjoint twins – how airlines and airports can improve the legal framework of their relationship.
- (7) Regulation 261 developments.

The topics were explored by expert speakers from across the world from legal, policy, and regulatory perspectives.

Welcoming addresses were delivered by Prof *Pablo Mendes de Leon*, President of EALA, professor of air and space law, University of Leiden, and Mr *Jonathon Counsell*, group head of sustainability, International Airlines Group, London.

The first topic was addressed by the Hon *Lord Turnbull*, Senator of the College of Justice, Court of Session, Edinburgh. In September 1998, Lord Turnbull was engaged as one of the two senior counsel leading the Crown team in the

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Lockerbie bombing trial and gave a fascinating account of the collection of evidence in the trial and of how it was used to piece together the prosecution's case.

The second session, dealing with accidents and incidents, was introduced by moderator, Dr *Francis Schubert*, chief corporate officer and deputy CEO, Skyguide, Swiss Air Navigation Services Ltd., Geneva. He introduced the concept of 'just culture' and raised the issue of the potential negative impact of media technologies and public disclosure on the relationship between judicial proceedings and safety investigation.

Ms *Ann Frédérique Pothier*, head of section, CRCO, Eurocontrol, Brussels, elaborated on the topic of 'just culture' and suggested the need for an expert course designed for prosecutors to help bridge the gap between safety and the administration of justice.

Mr *Pietro Antonio Sirena*, president of the fourth division, Supreme Court of Cassation, Rome, examined the influence of the media on the prosecution and judges and highlighted that the media are not restricted by the same procedural factors that apply to legal proceedings.

Mr *Kenneth P. Quinn*, partner, Pillsbury Winthrop Shaw Pittman LLP, Washington, addressed the increasing criminalization of aviation accidents and the need for a more comprehensive international framework for accident and incident investigation. He discussed the new Standards and Recommended Practices (SARPs) proposed for Annex 19 to the Chicago Convention by the ICAO Safety Information Protection Task Force and, in particular, the need to employ exceptions to the principle of protection, a pillar of just culture, where there is evidence of criminal intent. After addressing recent advancements relating to safety investigations in France, the UK and Spain, he also pointed out the recent non-binding European Corporate Just Culture Declaration, signed by the European Commissioner for Transport and aviation industry stakeholders on 1 October 2015, and specifically expressed the need for this Declaration to be followed by enabling legislation.

Mr *Andreas Spaeth*, freelance aviation journalist, Hamburg, provided an interesting change of perspective based on his personal experience as a journalist specializing in aviation-related matters. He discussed the ethical considerations in deciding whether or not to release information, with specific reference to the 2015 Germanwings crash. He also spoke of the difficulty faced in finding journalists who are knowledgeable, independent and willing to talk on issues of aviation in a world of fast-paced media where journalists are required to report on a range of topics.

The third panel addressed aviation security matters and was presided over by Ms *Kate Staples*, general counsel and secretary to the Civil Aviation Authority (CAA), London.

Mr *David Trembaczowski Ryder*, head of aviation security, ACI, first discussed the problem of aviation security legislation being reactive rather than proactive. Taking the comparative illustration of Tiree and Heathrow airports, he emphasized that for airport regulation, a ‘one-size-fits-all’ approach is not suitable, and that a risk-based approach should be adopted. He also addressed the evolving threats faced by aviation security, for example, cyber-attacks drones’ liquids and 3D printed guns.

Mr *Adam Borkowski*, aviation security audit and capacity building officer, European Civil Aviation Conference (ECAC), Paris, described the four ECAC operational programmes that are currently underway at ECAC: (1) aviation security audits, (2) capacity building, (3) vulnerability programme, and (4) common evaluation process of security equipment, and he also underlined ECAC’s role in developing and supporting aviation security. He explained that regulation is only the start of the process, and outlined the ECAC aviation security priorities, which are: anticipation, support to implementation and international partnership.

Mr *Ian Shaw*, aviation security strategy, planning and regulatory transformation, UK CAA, London, discussed the challenges of the relationship between the UK CAA and the wider EU, including the European Aviation Safety Agency (EASA), insofar as aviation security is concerned. He also addressed the role of the Risk-Based Regulation (RBR), involving performance based oversight, security and risk management, security improvement, flexible resourcing and sharing knowledge. Finally, he discussed the growing challenges faced by aviation security in relation to cyber-attacks.

Ms *Marie-Caroline Laurent*, assistant director security and travel facilitation, IATA, Brussels, explored the new challenges of data protection and the sharing of data. She focused on the shift towards data driven security and the concern of the EU in relation to airport security in third States, which remains a diplomatic challenge linked to the issue of extraterritoriality. According to Ms Laurent, four new challenges need to be dealt with: data protection, data sharing, recognition of third countries’ security measures and, extra-territorial impact.

Mr *Oleg Aksamentov*, director, Institute of Air and Space Law AEROHELP, St Petersburg, focused on recent aviation security cases, including MH17, from a Russian perspective and questioned whether the current international legal framework is sufficient to protect civil aircraft flying over conflict zones. In doing so, he addressed existing treaty obligations of States involved in armed conflicts, rules of customary international law, and SARPs adopted by the ICAO Council.

He then presented proposals for improvements to the international framework to enhance the protection of civil aircraft flying over conflict zones.

Mr *Michael Gill*, director, aviation environment, IATA, Geneva, addressed the topical issue of aviation and climate change, questioning whether 2016 will mark a global breakthrough. He presented the political context, including the global framework based on the UNFCCC and the Kyoto Protocol, and the EU Protocol based on an emissions trading scheme, as well as the importance of the ICAO Resolution A38-18 which explicitly requests that ICAO 'develop a global MBM for international aviation' and that the Council finalizes work on details in time for the next Assembly. He then briefly addressed the different MBM options and highlighted global carbon offsetting as the preferred option. Finally, he provided an update on the ICAO negotiations surrounding the adoption of a global market-based measure, discussed several legal vehicles and argued in favour of a worldwide political deal to regulate the CO₂ emissions produced by international civil aviation.

Mr *Patrick Slomski*, partner, Clyde & Co., London, moderated the fifth session of the day. This panel discussion stressed the need to develop the law in relation to RPAS and to raise awareness of these laws amongst the public.

Mr *Frank Manuhutu*, chief legal advisor, the legal department of EASA, presented EASA's proposal to create common rules for operating drones in Europe and, more specifically, the proposed Concept of Operations of drones, explaining the three categories of risk on which the proposal is based: open, specific and certified. The open category is characterized by a low risk and no involvement of the CAA, but limits the operation of RPAS to within the visual line of sight, up to a maximum altitude, and at a certain distance from airports and sensitive zones. The specific category is characterized by increased risk, operations authorizations with an operations manual, specific qualifications of drones, and personnel and equipment based on safety assessment. The final category, the certified category, involves a regulatory regime similar to manned aviation. This proposal is currently under review by the agency and will soon be submitted to the EU Commission.

Ms *Alison Slater*, legal advisor, CAA, UK, discussed the regulatory approach taken, and the enforcement challenges faced, by the UK CAA, including the need to raise awareness of the regulations amongst drone users. She addressed these challenges through examples, by considering who, what, when, where and how the regulations will be enforced.

Prof *Brian Havel*, distinguished research professor of law and director of the International Aviation Law Institute, DePaul University College of Law, began by noting the different philosophy taken by the US Federal Aviation Administration (FAA) and EASA in terms of drone regulation. Turning to the international level, he provided an overview of the applicability of the Chicago Convention to RPAS.

Ms *Regula Dettling-Ott*, VP European affairs, Lufthansa Group, Brussels, guided the sixth session of the day, which explored airport-airline relations. She presented the current legal framework at the EU and national levels, applying the metaphor of ‘conjoint twins’ – born ‘physically connected to each other’, they ‘develop to form two “individuals”’ but they ‘remain physically connected’ – in order to demonstrate how airlines and airports can improve the legal framework of their relationship. She specifically raised four shared issues: customer satisfaction, operational efficiency, connectivity (traffic rights) and financial efficiency (commercial success).

Prof *Laura Pierallini*, partner, Studio Pierallini, Rome, presented her observations on the effect of low-cost carriers on airport-airline relations from an Italian perspective. She raised three main areas of discussion, namely, airport charges, traffic rights and incentives to low-cost carriers. In order to improve airport-airline relations in Italy, she recommended less bureaucracy, more transparency, and fair competition leading to specialization of airports.

Mr *Guillaume Hecketsweiler*, general counsel of Air France-KLM, Paris, discussed the relationship of Aéroport de Paris (ADP) with its airlines, in particular Air France-KLM. He first addressed the issue of airport charges at French airports. He explained how they are determined, underlining the importance of the Directive 2009/12/CE in providing for a common framework and he discussed the relevant provisions of the French Aviation Code and the specific implementation of airport charges between the French State and ADP via a five-year economic regulations agreement (CRE). He also addressed the recent designation of the Directorate General for Civil Aviation (DGAC) as an Independent Safeguarding Authority (ISA), which was invalidated by the French Supreme Court on 29 April 2015. This led to a complaint to DG MOVE from airline associations on the same legal grounds, as well as a complaint to the same court from the French federation of airlines against the new five-year CRE.

Ms *Noura Rouissi*, legal officer, DG Move, European Commission, Brussels, gave an interesting insight into the current perspective of EU regulations on airport/airline relations, and outlined the goal of the Commission to bring airlines and airports to the same negotiating table.

The day of sessions was concluded by a discussion between Mr *Morten L. Jakobsen*, partner, Gorrissen Federspiel, Copenhagen, and Mr *Jochem Croon*, partner, Croon & Co., Amsterdam on Regulation 261/2004. Mr Croon examined the liability of carriers in light of the CJEU decisions of *van der Lans* and *Wallentin-Herman*, discussing the nature of events which are inherent in the normal exercise of the activity of the air carrier and are beyond its actual control. In that sense, the remaining defences of airlines seem to be manufacturing defects, bird strikes, crew illness, strikes, weather conditions and air traffic management

decisions. Finally, they recalled the importance of the next European Aviation Summit, which will be held at Schiphol on 20–21 January 2016, under the Dutch EU Presidency.

The formal part of the conference was concluded by the announcement of this year's winners of the EALA Prize (best paper) competition, which was made by Prof *Vincent Correia*, chairman of EALA's Academic Committee. Mr *Ridha Aditya Nugraha*, a recent graduate of the Advanced LL.M. in Air & Space Law at the IIASL, Leiden University, was awarded first prize for his paper on passenger data protection in the EU. The audience was fortunate enough to be given a brief insight into the paper by Mr Aditya Nugraha. Ms *Deepika Jeyakodi*, also a recent graduate of the IIASL, received the second prize for her paper on cyber security in civil aviation.

The slides of the above presentations are available on the EALA website at www.eala.aero.