

160128 Mr. Patrick Ky MH17

VERSLAG VAN EEN GESPREK

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Verbatim report of the public hearing by the standing committee on Foreign Affairs of the House of Representatives of the Netherlands, held on Thursday 28 January 2016 in the Klompé-room of the premises of the House of Representatives in The Hague.

The expert heard is **Mr Patrick Ky, Executive Director European Aviation Safety Agency (EASA)**, who is accompanied by Ms Marieke van Hijum, the Head of his Private Office

Start 17.00 hours.

Chair: Mr Fred Teeven MP

Present are the members of the House: Mr Han Ten Broeke, Mr Harry van Bommel, Mr Pieter Omtzigt, Mr Michiel Servaes, Mr Sjoerd Sjoerdsma and Mr Fred Teeven,

as well as Mr Theo van Toor, clerk of the standing committee on Foreign Affairs.

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The **Chairman**: A warm welcome to you, Mr Ky. We are very glad that you had the opportunity to come see us here. We appreciate it very much that you are taking the time to speak with us.

I briefly introduce to you the members of the standing committee on Foreign Affairs present today. They are Mr Omtzigt of the Christian Democratic Party, Mr Sjoerdsma of the Social Liberal Party, Mr Van Bommel of the Socialist Party. I think that more members will be joining us later on. We have exactly one hour to speak with you. After that we have a number of video conferences planned that we need to start on time.

I gladly give you the floor for a short introduction of five to six minutes, or a further elaboration on the note you previously sent to us and which the members have received and read. Please go ahead, Mr Ky. The floor is yours.

Mr **Ky**: Mr Chairman, dear members of parliament, it is a real pleasure and honour for me to be here. I am here with Marieke van Hijum, who is the Head of my Private Office.

First of all: the European Aviation Safety Agency (EASA) is an agency of the European Union, but we are an independent agency when it comes to safety matters. I mention that to you, because it is one of the major differences between EASA and organizations such as ICAO or EUROCONTROL. These are intergovernmental organisations, for which each member state has a veto right. We, on the other hand, are completely independent from any kind of political pressure in taking safety measures. Of course I am accountable for it, but we are independent in the safety measures we take.

You have seen our note. Following the tragic accident involving flight MH17, the world changed and it did not change for the better; it changed for the worse. We saw that this kind of event was possible, but we were not the only ones to see that. Possible terrorists or other wrong-doers saw that they could create a lot of chaos by shooting down aircrafts while they are at a flying level.

What we have tried to do in EASA and in Europe really, following this accident, is to make sure that whenever there is a risk seen or analysed by somebody -- I will come back to who or what "somebody" can be -- we see it as our duty as EU-safety agency to provide information on that risk to the member states and to the airlines, in order

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for the airlines, in particular, to take their decisions on whether or not to fly over the zone concerned or to take other mitigating measures.

Just to give you an example: we started ten days after the accident with Tel Aviv. It is quite interesting a case, which is not mentioned in my note. The day in question, I received a phone call telling me that the Americans (USA) had decided to prohibit all flights to Tel Aviv because of a security threat to Ben Gurion Airport. In fact, a rocket had landed closer than 1 km from Ben Gurion Airport. Because of that the Americans decided to stop flying to Tel Aviv. At that point, we had to decide what to do. We received this information from the United States. What do we do? Of course we analyse the information. Are we able to analyse it? Who is able to analyse it? And how do we react, based on that analysis? Do we do nothing? Or do we do something?

I am mentioning this example because it is a good illustration of the problems that we are facing in this domain. If we receive information about a given risk, who is going to analyse this information and who is going to do something with the analysis? What we really tried to do in the last, say 18 months, is to try and set up, in Europe, a mechanism to analyse the risk, to analyse information reaching us from the USA in particular, but also from other countries. We have tried to build a common understanding of that risk from a European perspective and, on the basis of this common understanding, we have tried to disseminate the information to the various member states and to the various airlines, in order for them to take the appropriate decisions.

This is really what we are trying to achieve. We faced a lot of difficulties, because a lot of information that we get, is military intelligence information and it is very difficult to have military intelligence agencies working together to arrive at a common picture, but also to work together with non-military entities in order to provide this information to other entities. We have been working a lot on this. We have also worked on what we do with the said information. Do we just inform? Do we make recommendations? Do we make strong recommendations? Do we prohibit? We are working on that.

There are quite some institutional issues linked to it and there are also consequences for the decision-making powers of the various actors. In order to have all the relevant bodies participate in the definition of a solution, we have decided to create a Task Force consisting of representatives of the national aviation authorities. The Dutch Civil Aviation Authority is represented, for instance, as well as representatives of military intelligence agencies, representatives of the airlines, representatives of the EU-intelligence services, of the military services and so on. This Task Force is

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intended to build a way forward, knowing -- and I think we will all agree to that -- that it is not acceptable to do nothing.

That is what we are currently doing. Our hope is that this Task Force will deliver its report with concrete solutions in the course of March. Of course we will present it to the Dutch Presidency, because we fall under the Dutch Presidency and we will need to discuss with the Dutch government and the Dutch institutions how to take things further and how to use the Dutch Presidency in order to make good progress based on this report.

So that is all I wanted to say by way of introduction. I am of course available to answer any questions you may have.

The **Chairman**: Thank you very much, Mr Ky. Before I give the floor to my colleagues for their questions, I would like to introduce you to two more committee members who have joined us. They are Mr Ten Broeke of the Liberal Party and Mr Servaes of the Social Democratic Party.

The committee members can now ask you their questions. I would like to ask the members to put forward short and precise questions. We will do one round of questions and then listen to your answers, Mr Ky, so perhaps you can take notes. We have to end this session at 17.50 hours sharp, because we have to start the next meeting at 18.00 hours sharp.

The floor is to Mr Omtzigt to open the question round.

Mr **Omtzigt** (CDA): Thank you, Mr Ky, for coming here and for your introduction. I would like to go back a bit. I am impressed by the work you are doing and I am obviously looking forward very much to the report of the Task Force that we will get in March and based on which we can take political actions.

I would like to go back to the spring of 2014. You already had an agreement with Ukraine, which is not a full member of EASA, but some sort of an associate member. EASA has all sorts of cooperation agreements. What kind of information was available to EASA on safety issues at the time? Was it known to you that the radar did not work? Did you have any specific knowledge that there were military actions going on in the sky, which might interfere with civic aircraft? I guess you are not monitoring Buks, but there was a lot more going on. There were air fights going on, there were bombardments going on in the east of Ukraine. How was this information processed within your organization?

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Mr **Sjoerdsma** (D66): Thank you for your introduction, Mr Ky. I have a question on the plan you presented to start a European institution to advise on whether or not to fly over certain conflict zones. As I understand it, you are not advocating a mandate to forbid airlines to fly certain routes. I would like to ask you why this is the case, given the fact that the UK, but I think also France, currently have this ability. Also, if I look at your equivalent across the Atlantic Ocean, the Federal Aviation Administration (FAA), I see that it does have that competence. Why are you not arguing in favour of getting it, too?

Mr **Van Bommel** (SP): Thank you very much, Mr Ky. Right now the sovereign country itself is responsible for security in its air space and for making recommendations on flight routes. Still you are looking for your own responsibility in this respect. You said that the question is whether we need to make strong recommendations or whether we prohibit certain routes. Obviously, right now the latter is not a possibility for your organisation, to my knowledge. In many cases, including the Netherlands, prohibiting a flight path is not even an option available to the national government. It is not in the tool box. However, in the case of Ukraine, you would already have the possibility to make strong recommendations. So elaborating on an earlier question: have you, during the conflict prior to the attack, made any recommendations concerning certain parts of Ukraine?

Mr **Ten Broeke** (VVD): Thank you, Mr Ky, for coming. My question is what your current possibilities are. In your letter you explained that basically, you issue Safety Information Bulletins (SIBs), which is a way to draw together all the information you have from the various civil aviation authorities. If I take that as a beginning, and if I assume that a supranational clearing house would be the ideal situation, where would you like to have your organization placed and what would it look like if it was up to you?

Mr **Servaes** (PvdA): Thank you, sir, and apologies for arriving late and missing part of your introduction. We found it very interesting to read your announcement, two weeks ago, of your plans. You are probably aware that the Dutch government initiated a similar initiative at ICAO last year, asking for a website where safety information from individual member states could be shared. It does not seem to function very well, or at least that is the picture we get from the meeting we had last week. In your statement you said that security services, intelligence services from

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EU-countries, should share the results of their analyses. Why are you confident that intelligence services within the European Union would be more willing to share such information amongst themselves than they prove to be in a global context?

The **Chairman**: Mr Ky, would you like a short break to prepare your answers or are you able to answer the questions right away?

Mr **Ky**: I prefer the latter.

Thank you all very much for these questions.

The first question was on cooperation agreements with Ukraine. We had indeed a cooperation agreement with Ukraine, which covered mainly the certification of Antonov-aircraft. It did not cover air traffic management and therefore we had no way of doing inspections in Ukraine. We did not perform any inspection of their air traffic management capabilities. We negotiated with Ukraine an extension of this working arrangement to cover air traffic management and aerodromes. This working arrangement I just signed last week. So this is something we have now.

Whether or not the radars were working: it was not within our limits to perform inspections of the Ukrainian status of operations in matters of air traffic management. From now on, based on the new working arrangement we have signed, we will be able to perform inspections of their air traffic management oversight capability, that means the way in which the authority, the Ukrainian government, is making sure that there are enough safety measures implemented by their navigation service provider.

Mr **Omtzigt** (CDA): Just to clarify: I understand that it was not under the mandate at the time, but sometimes things are not under your mandate, but you may still be aware of them. Was there any information available at EASA at the time on what was going on in Ukraine? Was there any action on it?

Mr **Ky**: No. We already have difficulty sometimes to manage all the information that we get on our 32 states, the EU member states plus the ones which are associated to EASA. We did not have any type of specific information on the status of operations in Ukraine. We did not. As far as military activities in Ukraine are concerned, which was the second part of your question, we did not know more than anyone could read in press reports. I also want to mention to you that when we started to issue Safety Information Bulletins on conflict zones, there were some reactions from some member states, telling us that this was outside of our mandate, because it was

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security-related and not safety-related. My answer to that was that firstly, at the end of the day, we are talking about the life of citizens and the safety of their flights, and secondly, safety or security, I do not care; if we do not do it, who is going to do it in Europe? So just for you to understand that before that accident, we did not have any way to get information on military operations or on things that were completely out of our mandate, outside of the EU.

Mr Sjoerdsma (D66): You mentioned that certain member states were not very keen on your starting to issue those bulletins. Was the Netherlands one of those member states?

Mr Ky: No. It was typically the United Kingdom, it was France, Germany, where people had very strong ideas about this lying beyond the limits of our mandate. As for your question whether or not we should have a mandate to forbid, to prohibit flights: this is one of the things we are discussing in the Task Force. There are different ideas around the table. Again, countries such as France and the UK are strongly against an EU-body imposing on their airlines measures which would not take into account the specific risk under which a French or a British carrier would be. I have to say that I have a lot of sympathy for that, because it is true that the "value" of a flight for a terrorist may depend on the flight carrier as well. So it is true that having a unique European solution may not take into account the extra risks to which some flight carriers are exposed in different regions of the world. This being said, we would of course not be against having some member states take measures that go beyond what we propose for the common European airlines. This is something we are currently discussing.

We have also discussed with the member states the possibility for EASA to publish what we call operational directives. In the field of aircraft certification, when there is a defect on an Airbus, an aircraft that we have certified, we have in our legal arsenal, our toolbox, the possibility to ground all the aircraft if there is a serious safety risk. We are now looking at the possibility to do the same all over Europe for an operational procedure if there is a serious risk that needs to be taken care of immediately, knowing that -- as you mentioned -- some member states do not have the possibility to prohibit flights from being operated.

There is another thing I want to mention to you. I will give you an example that might be mentioned this afternoon by IATA, namely the period in which all flights from the UK to Sharm El-Sheik were prohibited, after the Metrojet-accident. There were no

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flights anymore between any Italian city and Sharm El-Sheik, because the flights from Milan and Rome to Sharm El-Sheik are operated by EasyJet. EasyJet is a UK-operator, meaning that it is subject to UK-operational measures, even though the flights departed from Italy. This is because we have a single market within the EU. So we believe that in our common market, the notion of national prohibitions does not make a lot of sense anymore. This is why we would like to have at least a common level playing field, by which EASA gives a recommendation or provides information at different levels.

My last point. When we made strong recommendations, 99% of the airlines followed these strong recommendations. Should an accident occur after EASA has issued a strong recommendation not to operate the flight or to do something differently, then of course the airline in question would have severe difficulties to explain to the families of the victims why they did not follow the strong recommendation.

So it is true that today we cannot legally prohibit things. Is that something we would want? Yes, perhaps in very specific cases, not necessarily related only to this topic, by the way, but also related to other topics. The GermanWings-accident is a very good example. Two people in the cockpit: should we not have an operational directive mandating two people in the cockpit instead of making an information bulletin recommending things like we did?

Mr Ten Broeke (VVD): I would like to know what constitutes a strong recommendation. How does that differ from other recommendations? When do you speak of a "strong recommendation"?

The Chairman: Mr Van Bommel has asked a question to the same effect. Perhaps you can combine both questions in your answer. What is a recommendation and how strong are your strong recommendations?

Mr Ky: That is a tricky question, because a strong recommendation is based on our analysis of the risk and the urgency of the risk. We used a strong recommendation for Tel Aviv. So far that was the only occasion on which we made a strong recommendation. We were very open and heavily criticized for doing so, but we believed that given the urgency, we needed to have something which would mean immediate action, particularly from the airlines. In the Task Force we are looking at different degrees in the level of recommendations. In particular, it is my own belief that when the urgency is such that we say "we strongly recommend to you not to do

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something in a certain way", then any airline or member state deciding to do otherwise, should need to justify why they decided to do otherwise and how they took the proper risk mitigation measures to ensure that the risk actually was mitigated.

Mr Ten Broeke (VVD): Comply or explain.

Mr Ky: Yes. So we are working on that. Today we make recommendations only. The only strong recommendation we made so far was in the case of Tel Aviv.

Coming back to the question on the sovereignty: you are right, it is the duty and the responsibility of a state to determine whether or not to close the airspace to civil traffic. What we have to understand is that whenever a state is in a difficult situation, the assessment it will make of the risk -- it can be a conflict, a war situation, it can be terrorism -- will be different from the assessment made by somebody who is outside of this context.

Typically, when we took the decision on Israel, receiving a rocket within 1 km of Ben Gurion Airport, to the Israelis this did not justify an increased risk level. For us, our risk assessment was that it constituted a high risk. This is also the limit of things which are declarative, if you rely only on a member state to declare that a situation is safe or unsafe. It all depends on their own assessment then, whereas sometimes there may also be monetary issues, economic issues. Ukraine is a good example. It was not in the conflict zone, it was over Crimea, after the annexation of Crimea by the Russians.

The Russians took over the airspace of Ukraine in Crimea and the result was a loss of revenues for the Ukrainian air traffic control by 60%. Ukraine then decided to reopen routes lying within this airspace, which was claimed by both the Russian and the Ukrainian authorities. They declared it safe. ICAO declared it safe.

EUROCONTROL declared it safe. We declared it unsafe, because we had experts going to Ukraine and looking into the situation. They found that there were not enough measures taken in order to mitigate the risk. This was last summer.

We were working with the Ukrainians for six months, finding operational procedures and such to make it work. And now, we will reassess the risk and certainly allow Ukraine to fly on two routes out of the four. I say this just to show you the limits of the exercise when you rely only on the member states, because they have a vested interest, basically, in declaring that their air space is safe. Organisations in which the states have a veto right in the entire decision-making process are biased as well. You

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cannot go against somebody who can basically veto all your decisions. That is one of the limits.

If you will allow me, I would also like to come back to the question of Mr Servaes on ICAO. That is the limit of the exercise. In ICAO, the first limit is that it is a voluntary system in which you declare the closure of the air space and things like that. Each state has the possibility to disagree with an assessment that has been made. And sometimes, the dispute mechanism does not allow to have a common view on the subject. Take Pakistan as an example. The French state published an advisory for the French operators to avoid the Pakistani air space. It was for the airspace.

Pakistan disagreed with it. And what do they do in ICAO? You have one state saying: I think there is a problem, but the state concerned disagrees. What do you do? How do you solve that? That is the limit of the exercise.

The other limit that we see in the ICAO-mechanism is the length of the process, in some instances. Tel Aviv was a typical example, but also when we decided to publish an information bulletin on the Caspian Sea. Do you remember when the Russians decided to launch rockets on Syria, from boats stationed in the Caspian Sea? Within 24 hours we emitted an information bulletin saying: do not fly over this zone. In ICAO the process takes two weeks, but McMillan will tell you more about it. It is a lengthy process.

I think the fact that in ICAO there is a repository of all publicly available information is very good. EUROCONTROL makes its information available to all the air space users as well, which is very good. Personally I do not think that it is sufficient.

Mr **Servaes** (PvdA): So you are saying that ICAO faces serious problems in its efforts to become a sufficiently rapid-response organisation to deal with the issues at hand? Can you describe why your organisation, on the other hand, is capable of doing it not only faster, but also based on all the information that the member states and their intelligence services have at their disposal? Is it maybe because of your French background? You used to be chair of the French organisation and in that position you may have been in direct contact with the French intelligence services. If they had any specific information regarding French air space or maybe certain flights that Air France was operating, you would have been informed. How do you get that information from individual member states such as France, but also the UK, at European level?

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The **Chairman**: There is also one last question from Mr Van Bommel. I remind you of the ticking clock.

Mr **Van Bommel** (SP): I can be very brief. I asked whether there were recommendations on Ukraine in 2014. Did I hear you say that it was unsafe?

Mr **Ky**: After the attack.

Mr **Van Bommel** (SP): I see, you meant after the attack. Before the attack, there were no recommendations. Okay, then it is clear.

Mr **Omtzigt** (CDA): I had the same misunderstanding as mister Van Bommel, because you were talking about the time when there was this conflict over Crimea, which obviously predated the conflict in Eastern Ukraine. At that point you already got the prohibition to fly over Crimea from all international organisations, because both the Russians and the Ukrainians claimed airspace control. What was your action at that point and when did you approve or disapprove of certain airways above Eastern Ukraine? Can you give us a bit more information on that? I think there is a slight misunderstanding here.

The **Chairman**: Mr Ky, perhaps you could answer this question and then continue with the other answers, so that we can finish this session at 17.50 hours. Thank you for your understanding.

Mr. **Ky**: I am sorry about the confusion. After the annexation by Russia, Russia took over the air traffic control facility in Simferopol and claimed that they were the state controlling this airspace. After that, Ukraine closed the airspace, so that no flight could enter the airspace over Crimea. It is no longer a conflict zone. It is an area where there are no armed conflicts. The problem is that the airspace is claimed by the Simferopol new air traffic control services, which falls under the Russians. In the summer of 2015, the Ukrainians said: since it is our airspace legally -- which is legally a fact -- we are going to reopen four routes from north to south and from south to north. They followed all operational procedures and things like that to reopen those routes. That was last summer, in 2015. It is on this that we performed a safety risk assessment, to which we received no satisfactory answer from the Ukrainian side and on which we have been working for the last six months.

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Only when we will have solved all the issues -- which I think we will be able to do eventually -- will we be able to cancel the said information bulletin that we issued last year, in which we recommended not to follow these routes. So this is about two different things. I am sorry that this is a bit technical, but that is what happens.

On the key topic that you mentioned: why are we better placed than ICAO to share intelligence? Why is the European Union in a better place to share intelligence? First of all, even within the EU it is extremely difficult to get everybody around the table, but we have in the EU-institutions some mechanisms that allow for the different intelligence agencies to work together, to share information and to come up with a common risk picture. We have the mechanisms to do that, typically for the airport security topics, looking at the risks on airports for passengers, but also sharing overall strategic intelligence on where the risks lie that are due to conflicts in the world. There is a mechanism in the EU that allows for that. We are trained to use that mechanism to work more specifically on aviation in those conflict zones. Basically we were piggybacking, if you want, on something that existed already.

I never had any kind of such responsibility in France. I left the French civil aviation authority three years after I had joined it, so I cannot answer your question on the relationship between the French civil aviation authority and the intelligence agencies. However, I can say to you that in the case of Tel Aviv -- I always take this example because I think it is a good illustration -- when I tried to have information validated as to whether or not it is dangerous, I could find nobody to help me. To an EU-institution like EASA the French intelligence agency would say: why would we give you information? We would give information to the Dutch intelligence service or to the Dutch government, but not to an EU-body. This is also why we tried to put together a mechanism allowing us all to work together and share information within a framework making that possible. Otherwise I, and EASA, will never be able to get information from specific intelligence agencies. We need a common framework allowing for the sharing of information and for working together, in order to get that information.

Why do we think that it will work better at the EU-level? That is because we have this mechanism for sharing information, but we have also this agency which works hand in hand with the national authorities in order to have a common approach towards safety issues. We work very well together. So the way we are doing it today is that whenever we receive a piece of information from the USA or from any other specific state and we intend to issue a recommendation, we have a network of national authorities with whom we validate what we intend to do. When a case is urgent, like it was in the case of the Caspian Sea, we will sometimes give them less than one hour

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to react. In this way, we manage to arrive at a common European approach. I think it will work.

The **Chairman**: Mister Ky, we have two more minutes to go. Perhaps you can finish answering, because we really need to close this meeting at 17.50 hours.

Mr **Ky**: I hope I covered most of your questions.

One of the things that I wanted to mention is that the notion of national flight carriers does not mean anything anymore in Europe. Dutch citizens travel on EasyJet, Ryan Air, Air France and KLM. So I understand the logic behind saying that we prohibit flights for a certain country or for a certain flag, but it does have its limits.

The other point is that we also need to look at how to share information within the airline alliances. In the case of the Malaysian flight, the majority of the passengers on board were Dutch. Some of them bought a KLM-ticket, I guess, but they were on a Malaysian flight. So if you share information within the Dutch community with KLM on a certain risk, we believe that this information should be shared with the airlines which share the code of KLM, just to take this example. After all, at the end of the day what matters to us, as does to you, are the lives of the citizens and not necessarily one particular company.

The **Chairman**: Thank you very much Mr Ky for helping us. We really appreciate your finding the time to come to see us. Thank you very much and have a nice evening.

Closing: 17.50 hours.