



European Cockpit Association
'Piloting Safety'



INTERNATIONAL FEDERATION OF AIR
TRAFFIC CONTROLLERS' ASSOCIATIONS

AMENDMENTS TO THE COMMISSION PROPOSAL FOR A REGULATION ON INVESTIGATION AND PREVENTION OF ACCIDENTS AND INCIDENTS IN CIVIL AVIATION

Amendment 1 **European Cockpit Association**

Proposal for a Regulation **Recital 10**

Text proposed by the Commission

Safety investigation of accidents and incidents should be carried out by or under the control of an independent safety investigation authority in order to avoid any conflict of interest and any possible external interference in the determination of the **causes** of the occurrences being investigated.

Amendment

Safety investigation of accidents and incidents should be carried out by or under the control of an independent safety investigation authority in order to avoid any conflict of interest and any possible external interference in the determination of the **factors** of the occurrences being investigated.

Justification

The proposed new ICAO Annex 13 (soon to be formally adopted by ICAO), questions the use of the term "causes". This term risks creating problems when dealing with the justice authorities, as 'causes' could presume the apportioning of blame and/or liability. ICAO has recognized the need for a separation of 'judicial' and 'safety' terminology.

The ideal term would be "contributing factors", but the proposed Regulation does not use this term, nor does it contain a definition for it. Unless a definition of contributing factor is provided for, the term 'causes' should be replaced by 'factors'. (See also amendment 6)

Amendment 2 **European Cockpit Association**

Proposal for a Regulation **Recital 15**

Text proposed by the Commission

The Member States should, in compliance with the legislation in force as regards the powers of the authorities responsible for the judicial inquiry and, where appropriate, in close collaboration with those authorities, ensure that the authorities responsible for safety investigations of civil aviation accidents and

Amendment

The Member States should, in compliance with the legislation in force as regards the powers of the authorities responsible for the judicial inquiry and, where appropriate, in close collaboration with those authorities, ensure that the authorities responsible for safety investigations of civil aviation accidents and

incidents are allowed to carry out their tasks **in the best possible conditions; the objectives of a judicial inquiry should not be compromised either.**

incidents are allowed to carry out their tasks *without being hampered, while allowing for the proper administration of justice.*

Justification

The text for this amendment comes from ICAO Annex 13 and reflects better the separation of the judicial and accident investigations. The accident investigators cannot take into account the objectives of the judiciary and vice versa. Further guidance should be developed on how to coordinate the two proceedings (see also Amendment 9).

Amendment 3 European Cockpit Association

Proposal for a Regulation Recital 17

Text proposed by the Commission

The civil aviation safety system is based on feedback and lessons learned from accidents and incidents which require strict application of confidentiality to ensure the future availability of valuable sources of information; in this context sensitive safety information should not be used for purposes other than prevention of accidents and incidents **unless there is an overriding public interest in its disclosure.**

Amendment

The civil aviation safety system is based on feedback and lessons learned from accidents and incidents which require strict application of confidentiality to ensure the future availability of valuable sources of information; in this context sensitive safety information should not be used for purposes other than prevention of accidents and incidents. ***Member States should enact legislation preventing the inappropriate use of sensitive safety information.***

Justification

The reference to 'overriding public interest' creates uncertainty as there is no guidance to decide what constitutes such "an overriding public interest" and how the fundamental rights of the involved parties will be protected. Inappropriate use of safety information could lead to the following breaches of fundamental rights:

- *the right to a fair trial (including the right against self-incrimination) and*
- *the right to privacy*
- *the right to testimony during the safety investigation as a witness and not as an accused person (linking it to the overriding principle of accident investigation, which is not to apportion blame but improve safety)*

The inappropriate use of safety information will inevitably reduce the flow of safety information and hence destroy the ability to learn from accidents to prevent future ones. It is therefore crucial that Member States develop legislation to ensure sensitive safety information is protected. (see also Amendment 4).

Amendment 4
European Cockpit Association

Proposal for a Regulation
Recital 17bis (new)

Text proposed by the Commission

Amendment

An accident raises a number of different and sometimes conflicting public interests such as the prevention of future accidents and the good administration of justice. These go beyond the individual interests of the parties involved and beyond the specific event. The right balance among all interests including safety, justice and the protection of the victims and the persons involved is necessary to guarantee the overall public interest.

Justification

An accident is a traumatic experience for the victims and their families but also for the rest of society. The accident activates a number of processes:

- *search and rescue operations aimed at saving a maximum of persons and taking care of the injured;*
- *an accident investigation aimed at identifying the factors of the accident to prevent future accidents and save lives;*
- *a judicial procedure aimed at delivering justice to the persons involved whether on a civil procedure or at a criminal procedure.*

All these processes respond to an overriding public interest. The actors involved in these processes work under very strong pressure to deliver their work. All actors should realise the importance of the other processes and avoid damageable interference among the processes to preserve the overall public interest.

Amendment 5
European Cockpit Association

Proposal for a Regulation
Recital 21bis (New)

Text proposed by the Commission

Amendment

The provision of assistance to the victims, their families or their associations should be separate from the accident investigation itself. Nevertheless, the accident investigation authority has a responsibility to provide relevant and timely information to the victims' families and the accident survivors.

Justification

Accidents represent a traumatic shock for survivors and families of victims. The responsibility for assisting them and providing them the necessary information – but without endangering the objectives of the investigation – should be clearly established.

Amendment 6 European Cockpit Association

Proposal for a Regulation Article 2 – paragraph 4

Text proposed by the Commission

'causes' means actions, omissions, events, conditions, or a combination thereof, which led to the accident or incident; the identification of **causes** does not imply the assignment of fault or the determination of administrative, civil or criminal liability;

Amendment

'**factors**' means actions, omissions, events, conditions, or a combination thereof, which led to the accident or incident; the identification of **factors** does not imply the assignment of fault or the determination of administrative, civil or criminal liability;

Justification

The proposed new ICAO Annex 13 (soon to be formally adopted by ICAO), questions the use of the term "causes". This term risks creating problems when dealing with the justice authorities, as 'causes' could presume the apportioning of blame and/or liability. ICAO has recognized the need for a separation of 'judicial' and 'safety' terminology.

The ideal term would be "contributing factors", but the proposed Regulation does not use this term, nor does it contain a definition for it. Unless a definition of contributing factor is provided for, the term 'causes' should be replaced by 'factors'.

Note: This implies replacing the term 'causes' by 'factors' in the rest of the proposal for a Regulation (recitals 10 and 12 and Articles 9.2(e) and 13.3.

Amendment 7 European Cockpit Association

Proposal for a Regulation Article 2– paragraph 16 (new)

Text proposed by the Commission

Amendment

'Preliminary Report' means the communication used for the prompt dissemination of data obtained during the early stages of the investigation.

Justification

The event of an accident creates legitimate expectations in the public and in the victims to obtain information about the event. Preliminary reports constitute a widely-accepted instrument for the Investigators to communicate before the publication of the final report, with contrasted information and

in a controlled way without endangering the safety investigation. This definition is directly taken from ICAO Annex 13 chapter 1.

Amendment 8 European Cockpit Association

Proposal for a Regulation Article 2– paragraph 17 (new)

Text proposed by the Commission

Amendment

‘Inappropriate use of safety information’: the use of information gathered from safety data collection and processing systems for purposes different from the purposes for which it was collected, namely, use of the information for disciplinary, civil, administrative and criminal proceedings against operational personnel, and/or disclosure of the information to the public.

Justification

The protection of safety information from inappropriate use is essential to ensure its continued availability, since the use of safety information for other than safety-related purposes may inhibit the future availability of such information, with an adverse effect on safety. This definition is directly taken from ICAO Annex 13 Attachment E.1.1.5c).

Amendment 9 European Cockpit Association

Proposal for a Regulation Article 4—paragraph 4

Text proposed by the Commission

Amendment

Safety investigations referred to in paragraph 1 and 3 shall in no case be concerned with apportioning blame or liability. They shall be **separate from and without prejudice to** any judicial or administrative proceedings **to apportion blame or liability.**

Safety investigations referred to in paragraph 1 and 3 shall in no case be concerned with apportioning blame or liability. They shall be **independent of** any judicial or administrative proceedings. **Member States shall enact appropriate legislation to coordinate accident investigations with judicial or administrative proceedings and to prevent the inappropriate use of safety information.**

Justification

The aims of the judicial and administrative proceedings are different and sometimes conflicting with the aims of the investigation. The judicial and administrative procedure are aimed at giving proportionate responses to the torts provoked by the accident, proven by lawful evidence apportioning blame and liability. The interest of aviation safety is to identify the factors that contributed to the accident and prevent future accidents and save lives through the collection and analysis of a maximum of safety data.

The independence of the safety investigation is paramount for the preservation of each of the two proceedings and the overall general interest.

Without a legal framework protecting safety information obtained during the accident investigation, this paragraph is a mere declaration of principles without any legal value. It is important to have a strong legal framework protecting against improper use of safety information. Because of the differences in the Member States' judicial systems, each country should establish this legal framework in compliance with its legal and constitutional systems.

Countries, such as Canada, New Zealand or Australia, have adopted strict laws on the independence of accident investigations and the use of safety data for aviation safety purposes only. In those countries the quality of accident investigation but also of judicial proceedings has increased thanks to a clear delimitation of each actor's prerogatives and the setting up of advance cooperation arrangements. – On the contrary, where the judiciary and the accident investigation authorities do not understand each other's remit and can unduly interfere with the other's proceedings, both the safety and the judicial investigation suffer.

Amendment 10 **European Cockpit Association**

Proposal for a Regulation **Article 11– paragraph 2**

Text proposed by the Commission

The safety investigation authority shall notify without delay the Commission, EASA and the Member States concerned of the occurrence of all accidents and serious incidents of which it has been notified.

Amendment

The safety investigation authority shall notify without delay the Commission, EASA, **ICAO** and the Member States concerned of the occurrence of all accidents and serious incidents of which it has been notified.

Justification

Notification to ICAO is an international standard. The action of the EU in accident investigation and in all areas concerning aviation should be done in full respect of the Member States' obligations under the Chicago convention.

Amendment 11 **European Cockpit Association**

Proposal for a Regulation **Article 12– paragraph 2– subparagraph (a)**

Text proposed by the Commission

have unrestricted and unhampered access to the site of the accident or incident as well as to the aircraft, its contents or its wreckage;

Amendment

have **immediate** unrestricted and unhampered access to the site of the accident or incident as well as to the aircraft, its contents or its wreckage;

Justification

It is important that accident investigators have access to the site of the accident as soon as possible to gather and secure all evidence necessary to analyse and explain the factors related to the accident.

Amendment 12 European Cockpit Association

Proposal for a Regulation Article 13– paragraph 2

Text proposed by the Commission

If, in the course of the safety investigation, the safety investigation authority **suspects** that an act of unlawful interference was involved in the accident or incident, the investigator-in-charge shall immediately inform the judicial authorities thereof, **at the request of which the control of the accident site shall be transferred to these authorities. Subject to Articles 15 and 16, the relevant information collected in the safety investigation shall be also transferred to these authorities upon their request. This shall be without prejudice to the right of the safety investigation authority, in coordination with the authorities to which the control of the site was transferred, to continue the safety investigation.**

Justification

The existence of an unlawful interference does not cancel the need for a proper safety investigation with all necessary standards and guarantees. However, the Accident Investigators shall inform the judicial authorities when there is a concrete finding leading them to believe that an unlawful interference has occurred, so the judicial process can start. Unlawful interference constituting an overriding public interest, the relevant parts of the safety information that are necessary for the judicial investigation could be used by the judicial authority as indicated in proposed Amendment 14.

Amendment 13 European Cockpit Association

Proposal for a Regulation Article 13– paragraph 3– subparagraph (a)

Text proposed by the Commission

To ensure proper coordination of inquiries into the causes of accidents and incidents, the safety

Amendment

If, in the course of the safety investigation, the safety investigation authority **finds** that an act of unlawful interference was involved in the accident or incident, the investigator-in-charge shall immediately inform the judicial authorities thereof.

Amendment

To ensure proper coordination of inquiries into the causes of accidents and incidents, the safety

investigation authority shall cooperate with other authorities in particular through advance arrangements with the judicial, civil aviation, search and rescue and other authorities likely to be involved in the investigation.

investigation authority shall cooperate with other authorities in particular through advance arrangements with the judicial, civil aviation, search and rescue and other authorities likely to be involved in the investigation. **Member states shall ensure that advance arrangements with the judiciary follow the guidelines set out in Annex [X] of this Regulation.**

Justification

The Regulation should propose a model for coordination of accident related activities to ensure that every party is informed of the needs and objectives of each process and to avoid inefficient overlaps and interference between the different institutions involved. Experience shows that where such arrangements exist the quality of all processes increases.

Amendment 14 European Cockpit Association

Proposal for a Regulation Article 15– paragraph 2

Text proposed by the Commission

Without prejudice to Directive 95/46/EC, the following records shall not be made available or used for purposes other than safety investigation, or other purposes aiming at the improvement of aviation safety:

- (a) all communications between persons having been involved in the operation of the aircraft;
- (b) recordings and transcriptions of recordings from air traffic control units;
- (c) covering letters for the transmission of safety recommendations from the safety investigation authority to the addressee, if so requested by the safety investigation authority issuing the recommendation;
- (d) occurrence reports filed under Directive 2003/42/EC of the European Parliament and of the Council;

However, the competent authority for the administration of justice in a Member State may decide that the benefits of the disclosure of the records referred to in paragraphs 1 and 2 for any other purposes permitted by law outweighs the adverse

Amendment

Without prejudice to Directive 95/46/EC, the following records shall not be made available or used for purposes other than safety investigation, or other purposes aiming at the improvement of aviation safety:

- (a) all communications between persons having been involved in the operation of the aircraft;
- (b) recordings and transcriptions of recordings from air traffic control units;
- (c) covering letters for the transmission of safety recommendations from the safety investigation authority to the addressee, if so requested by the safety investigation authority issuing the recommendation;
- (d) occurrence reports filed under Directive 2003/42/EC of the European Parliament and of the Council;

domestic and international impact that such action may have on that or any future investigation and on the management of civil aviation safety and that there is an overriding public interest in their disclosure.

Justification

This paragraph shows the conflict of laws between the need to ensure aviation safety and to administer justice. Both interests extend beyond the interest of the parties: The public interest in the administration of justice includes the availability and reliability of evidence before court while the public interest in aviation safety includes the protection of data and sources as a way to collect and analyse as much evidence as possible to prevent future accidents.

The judicial authority has a vested interest and cannot alone resolve this conflict. There should be clear parameters to help judicial authorities to decide when the society considers that one interest should be placed above the other. These parameters are proposed in a new paragraph 4 to Art. 15 (see below).

Amendment 15 European Cockpit Association

Proposal for a Regulation Article 15– paragraph 4 (new)

Text proposed by the Commission

Amendment

Notwithstanding paragraphs 1 and 2, safety data referred to in these paragraphs may be used as evidence and be demanded for inspection or be seized, if it concerns a criminal investigation into a hostage-taking, murder or an offence with the intention of frightening the population or part of the population of a country, or forcing a government or an international organisation to do, omit or tolerate something, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

Justification

The aim of the safety investigation – namely the identification of the factors that contributed to an occurrence – relies on the collection of data and testimonies of involved parties both obtained in confidence. If the accident investigator cannot ensure that testimonies or data will not be used in an administrative or judicial procedure, parties involved will not speak in confidence nor they will consent to the processing of their personal data, thus preventing the possible repetition of the occurrence. On the other side, the judge has a legitimate interest in delivering justice

This paragraph shows the conflict of laws between the need to ensure aviation safety and to administer justice. Both interest extend beyond the interest of the parties: The public interest in the administration

of justice includes the availability and reliability of evidence before court while the public interest in aviation safety includes the protection of data and sources as a way to collect and analyse as much evidence as possible to prevent future accidents.

The judicial authority has a vested interest and cannot alone resolve this conflict. This amendment proposes clear parameters to help judicial authorities to decide when the society considers that one interest should be placed above the other.

Amendment 16
European Cockpit Association

Proposal for a Regulation
Article 15– paragraph 5 (New)

Text proposed by the Commission

Amendment

When safety data is used as evidence in criminal proceedings following paragraph 4, the fundamental rights of the persons involved, notably the right to privacy and to a fair trial, shall be respected. Only the data strictly necessary for the criminal proceedings shall be disclosed, the rest being preserved by the investigation authority to the maximum extent possible.

Justification

Safety data is protected to ensure that evidence is given in confidence. Recording personal data at the work place is in principle not permitted by European Legislation (Directive 95:42 and European Charter of Fundamental Rights). The recording of safety data is an exception to this prohibition in as long as air crews, air traffic controllers etc. have consented to it for the only purpose of improving aviation safety.

If the safety data is used for the purposes of the proposed new paragraph 4, the rights of the parties involved shall be protected to a maximum. Furthermore, persons involved are protected by the right to a fair trial, including the right against self-incrimination. Information given in the framework of the accident investigation cannot be used against the reporter in other proceedings as it would breach the fundamental right to a fair trial.

Amendment 17
European Cockpit Association

Proposal for a Regulation
Article 15 – paragraph 6 (New)

Text proposed by the Commission

Amendment

When safety data is used as evidence in criminal proceedings following paragraph 5, the information provided by a person in the framework of the safety investigation cannot be used against that person.

Justification

Article 6 of the European Convention of Human Rights recognises the right to a fair trial. The Court of Human Rights recognised in its Judgement Saunders vs. the UK (case 43/1994/490/572) that information obtained under coercion cannot be used against that person in a criminal proceeding (right against self-incrimination). However, refusal to give information is punishable under the proposed Article 2. It is therefore crucial to stipulate that all information given to the accident investigation cannot be used against the person providing that information.

Amendment 18 **European Cockpit Association**

Proposal for a Regulation **Article 16– paragraph 1**

Text proposed by the Commission

Except with the consent of all crew members concerned, cockpit voice **and image** recorders and their transcripts shall not be made available or used for purposes other than safety investigation.

Amendment

Except with the consent of all crew members concerned, cockpit voice recorders and their transcripts shall not be made available or used for purposes other than safety investigation.

Justification

Reference to video recordings could be interpreted as an authorisation to install video recordings onboard of aircrafts. There are no provisions in ICAO allowing for the installation of video recorders and there is no request pending for certification of any type of video recorders. The installation of cockpit video recordings raises issues concerning the privacy of mobile staff and passengers on board and its utility is questioned by a majority of experts. The conditions for the protection of video recorders onboard of airplanes shall be treated specifically when and if approved internationally and properly certified.

Amendment 19 **European Cockpit Association**

Proposal for a Regulation **Article 16– paragraph 2**

Text proposed by the Commission

The flight data recorder recordings shall not be made available or used for purposes other than safety investigation, except when such records are:

- (a) used for airworthiness or maintenance purposes only; **or**
- (b) de-identified; **or**
- (c) disclosed under secure procedures.

Amendment

The flight data recorder recordings shall not be made available or used for purposes other than safety investigation, except when such records are:

- (a) used for airworthiness or maintenance purposes only; **and**
- (b) de-identified; **and**
- (c) disclosed under secure procedures.

Justification

The conditions for disclosure shall be cumulative to prevent the improper use of safety information. Data disclosed for airworthiness and maintenance must be de-identified and disclosed under secure procedures. Only in this manner it is guaranteed that the disclosed data will not be used for purposes other than improving safety.

The term “secure procedures” is not defined and is ambiguous. Protocols shall be developed among the categories of persons involved to determine what constitutes a secure procedure.

The information contained in the flight data recorder can be obtained by other means, and without unnecessary manipulations of the recorder which can entail a physical deterioration of the “black box” rendering it ineffective thereafter.

Amendment 20 **European Cockpit Association**

Proposal for a Regulation **Article 18 – paragraph 3**

Text proposed by the Commission

The head of the safety investigation authority is authorised to inform victims and their families or their associations or, make public any information on the factual observations and the proceedings of the safety investigation **and possibly preliminary conclusions and/or recommendations**, provided that it does not compromise the objectives of the investigation.

Amendment

The head of the safety investigation authority is authorised to inform victims and their families or their associations or, make public any information **on issues of immediate concern, such as the release of human remains and personal effects held as part of the investigation**, information on the factual observations and the proceedings of the safety investigation, **preliminary reports and safety recommendations**, provided that it does not compromise the objectives of the investigation.

Justification

Accidents create legitimate interest in the public who questions aviation as a safe means of transportation. Victims look for a logical explanation to the tragic event they have experienced. It is not conceivable that no information is made public within the 12 months that the investigation can last.

Victim and their families deserve timely information on the accident. ICAO has published a circular on how to organise the communication of information to the victims. Information on the release of human remains and personal belonging of victims is a highly sensitive question for the victims and prompt information on this is absolutely needed. The additions proposed are inspired by this circular (ICAO Circular 285-AN/166, art 5.8). The head investigator should be aware that any information given to the victims is very likely to become public.

This article should clearly define which type of information can be communicated without compromising the objectives of the investigation. The communication of “possibly preliminary conclusions” shall not be allowed. This would only create confusion and increase the distress of the public and the victims, especially if those preliminary conclusions are then not confirmed. Publication of non-confirmed evidence would also put public and/or political pressure on the safety investigation; it

could also encourage opening of civil or criminal actions in different directions. Only facts, procedural information, preliminary reports, and safety recommendations shall be released.

Amendment 21 European Cockpit Association

Proposal for a Regulation Article 25

Text proposed by the Commission

Member States shall lay down the rules on penalties applicable to infringement of the provisions of this Regulation. The penalties provided for shall be effective, proportionate and dissuasive and shall, in particular, allow sanctioning any person who, contrary to this Regulation:

- releases information protected by this Regulation;
- obstructs the actions of a safety investigation authority, in particular by preventing the investigators from performing their duties or refusing to provide useful recordings, material, information and documents, hiding, altering or destroying them;
- having knowledge of an occurrence of the accident or incident does not inform the relevant authorities of this fact.

Amendment

Member States shall lay down the rules on penalties applicable to infringement of the provisions of this Regulation. ***Without prejudice to the right against self-incrimination***, the penalties provided for shall be effective, proportionate and dissuasive and shall, in particular, allow sanctioning any person who, contrary to this Regulation:

- releases information protected by this Regulation;
- obstructs the actions of a safety investigation authority, in particular by preventing the investigators from performing their duties or refusing to provide useful recordings, material, information and documents, hiding, altering or destroying them;
- having knowledge of an occurrence of the accident or incident does not inform the relevant authorities of this fact.

Justification

Article 6 of the European Convention of Human Rights recognises the right to a fair trial. The Court of Human Rights recognised in its Judgement Saunders vs. the UK (case 43/1994/490/572) that information obtained under coercion cannot be used against as person in a criminal proceeding (right against self incrimination). Refusal to give information is punishable under this proposed Article 25; therefore, all information given to the accident investigation cannot be used against the person providing that information.

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Final, 01/02/2010