



European Cockpit Association
'Piloting Safety'



INTERNATIONAL FEDERATION OF AIR
TRAFFIC CONTROLLERS' ASSOCIATIONS

ACCIDENT INVESTIGATION IN EUROPE Improvements Necessary for the European Aviation Safety

Joint ECA / IFATCA Position Paper on the Commission Proposal for a Regulation on Investigation and Prevention of Accidents and Incidents in Civil Aviation

Executive Summary

ECA and IFATCA

- welcome the initiative to revise Directive 94/56/EC by proposing a new comprehensive Regulation on Accident Investigation; nevertheless, a number of serious shortcomings in the proposed Regulation are noticed. Parliament and Council should properly examine the proposal without undue time pressure;
- are concerned that the proposed Regulation would open the door to the use of safety information, flight data and pilots and traffic controllers' reports in judicial proceedings. This will inevitably reduce the flow of safety information and hence destroy the ability to learn from accidents to prevent future ones;
- call upon the Parliament and the Council to amend the proposal to
 - strengthen the independence of the safety investigation
 - better protect safety data and the sources of information and
 - Clearly define the specific cases where certain types of safety information can be disclosed and the conditions under which it can be disclosed;
- urge for the proposal to be brought fully in line with Member States' obligations under ICAO, to clarify the respective competencies of the European Union and the Member States and to include a "non regression clause" allowing Member States to maintain and adopt legislation that is more protective in terms of aviation safety;
- welcome that EASA is more closely associated with accident investigations but are concerned about a potential conflict of interest for an Agency that is both a rule-making and an aircraft certification body;
- consider that further provisions on the rights of victims should be considered in a separate legislative piece in order to give a harmonised and complete response to the needs of the victims of air accidents;
- ask for the development of the "prevention" dimension of the Regulation though the incorporation of ICAO Annex 13 Chapter 8 provisions and the possible incorporation of a revised version of the Occurrence Reporting Directive in this Regulation.

Improvements Necessary for the European Aviation Safety

1. Good Initiative – Serious Shortcomings – Improvements Needed

The European Cockpit Association (ECA), representing over 38.600 pilots from across Europe, and the International Federation of Air Traffic Controllers' Associations (IFATCA), representing 50.000 air traffic controllers from across the globe, welcome the initiative to revise Directive 94/56/EC by proposing a new comprehensive Regulation on Accident Investigations.

Both our organisations have been asking for a revision for many years, to obtain a legislative framework that fully enshrines the concept of “just culture¹” which is crucial to ensure the safe development of air transport.

Our associations welcome in particular the proposed creation of a ‘Network’ of accident investigation authorities, the ability of individual authorities to request and obtain assistance from other Member States’ authorities, the stricter rules on safety recommendations and the legal format of a Regulation.

However, IFATCA and ECA are concerned about a number of serious shortcomings in the proposed Regulation. Had there been more stakeholder consultation on the draft before its publications these issues could have been clarified and improved. To ensure that the quality of accident investigations does not decrease, these shortcomings must be addressed by the Council and European Parliament.

It is therefore necessary that Parliament and Council take sufficient time to properly examine the proposal without undue time pressure. It is better to take some time to achieve a good legislation, rather than to rush through a text that will not serve its purpose – or at worst be counter-productive.

To contribute to this process, ECA and IFATCA suggest a number of concrete amendments and invite Council and Parliament to take them into consideration.

2. Protect the Messenger – Protect the Passenger: Independent Safety Investigation & Protection of Safety Information

The threat of individual criminal prosecution following the participation in an aviation accident investigation and the use of safety data mean the end of flight safety advancement. Only if those involved in an accident can provide evidence to a safety investigation *without fear of ending up in jail*, they will provide such evidence – allowing the aviation system to learn from errors to prevent similar accidents and incidents to happen again.

As safety professionals, pilots and air traffic controllers instinctively want to provide information that will allow future accidents to be prevented. However, the proposed Regulation does not provide for sufficient unambiguous protection from prosecution. It might actually increase the risk that their testimony may incriminate them in a judicial proceeding. If the proposed Regulation is not amended to strengthen the independence of the safety accident investigation and to better protect safety information, controllers and pilots might increasingly make use of their right to remain

¹ Eurocontrol/IFATCA/CANSO define just culture as “A culture in which front line operators or others are not punished for actions, omissions or decisions taken by them that are commensurate with their experience and training, but where gross negligence, wilful violations and destructive acts are not tolerated”

silent before accident investigators (right against self-incrimination). The big loser would be aviation safety.

ECA and IFATCA therefore call on the European Institutions to:

- enhance the independence of the safety investigation from the judicial and any other procedures;
- improve the protection both of safety information and of the contributors to the safety accident investigation;
- provide for cooperation arrangements agreed in advance between safety and judicial processes, while safeguarding each-others' independence.

Background:

When an accident occurs several processes start: help and rescue, accident safety investigation and possibly police and judicial procedures. Each process is necessary for society and for the persons involved. Each process has its own objective and guiding principles which are sometimes incompatible. It is therefore of outmost importance to have coordination rules to allow each process to take place in the best possible conditions, but without interfering in the other processes.

The independence of safety investigation and the protection of the safety data are not incompatible with the good administration of justice. 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 delineation of each actor's prerogatives and the setting in advance up cooperation arrangements. – On the other hand, where the judiciary and the accident investigation authorities do not understand each other's remits and can unduly interfere with the other's proceedings, both the safety and the judicial investigation suffer.

The proposed Regulation repeats on many occasions that the sole purpose of the investigation is to improve aviation safety. However, the text leaves the door wide open for the use of safety information in judicial procedures, with the judge in charge of criminal proceedings being the one who determines whether there is an 'overriding public interest' in the disclosure of the information. – For our Associations this is inadequate; it should not be the same body that seek to obtain the information for purposes other than safety, who decides if the public interest it represents (i.e. administration of justice) overrides other public interests at stake (i.e. safety, fundamental rights). We therefore propose the determination of clear and defined cases where certain types of safety information can be disclosed and the conditions under which it can be disclosed.

3. Ensuring Compliance with ICAO Annex 13

All EU Member States are signatory parties to the Chicago Convention. ICAO has a system by which any deviation from the internationally agreed ICAO common standards should be justified by 'filing a difference'.

IFATCA and ECA consider it paramount that the future EU Accident Investigation Regulation is aligned as much as possible to the ICAO Annex 13, thereby reducing the need for EU Member States to file a difference with ICAO.

Regrettably, there are many areas where the proposed text differs from ICAO, such as in the proposed *definitions* of the Regulation, the omission of provisions that correspond to Annex 13 Chapters 4 (“notification”) and 8 (“accident prevention measures”), and the absence of notes and guidance.

ECA and IFATCA are therefore concerned that the EU Member States would not fulfil their obligations under Annex 13 by relying solely on the adoption of the new regulation. The current text run the risk of leading to conflicts of laws (EU versus ICAO) and to a large number of differences to be filed with ICAO. Such a fragmented approach would be counter to the aim of interoperability and uniformity in accident prevention and improving safety in a sector which is truly global.

All these questions should, in our Associations views be clarified though the definition of competencies and the establishment of an enforceable “non regression” clause allowing Member States to adopt or continue to apply more favourable standards..

ECA and IFATCA therefore urge the European Parliament and the Council to bring the proposal fully in line with the ICAO obligations of the Member States, to clarify the respective competencies of the European Union and the Member States, and to include a “non regression clause” allowing Member States to maintain or adopt legislation that is more protective in terms of aviation safety.

4. Which Role for EASA?

The proposed Regulation foresees an increased role for the European Aviation Safety Agency (EASA) in accident investigations. While IFATCA and ECA welcome that EASA is more closely associated with such investigations, we are concerned that there is a potential conflict of interest for an Agency that is both a rule-making and aircraft certification body. EASA’s proposed role and participation in accident investigations therefore needs to be very carefully evaluated and be adapted to ensure the full independence of investigations and compliance with the spirit of ICAO Annex 13.

5. Assistance to Victims and their Families

The assistance to the victims and their families is a priority for the authorities in the event of an accident. In many accidents, flight crew are among the victims, and proper assistance to victims’ families is important.

ICAO provides detailed guidelines (CIRCULAR 285-AN/166), including listing the items which interest directly the victims and/or their families (swift recovery of personal objects and possibly human remains, clear information on the ongoing timelines and procedures etc.). We believe these guidelines are adequate, and any further provisions should be considered in a separate legislative piece in order to give a harmonised and complete response to the needs of the victims of air accidents.

6. Prevention of Accidents

The Regulation’s title refers to the investigation and *prevention* of accidents. However, the text itself does not provide any concrete measures designed to prevent accidents, except for a reference (Article 15.3) to the exchange and analysis of information covered by the Directive on Occurrence Reporting (2003/42/EC).

If this Regulation is also about accident *prevention*, it needs to reflect the provisions of ICAO Annex 13, Chapter 8. In addition, it is crucial that the Occurrence Directive 2003/42/EC is reviewed swiftly and possibly be incorporated swiftly in the Accident Investigation Regulation, together with the key elements of Chapter 8 of Annex 13 and it's guidance material in Attachment E .

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Annex: List of Amendments

01/02/2010