

THE PROPOSED EU ACCIDENT INVESTIGATION REGULATION – ARE YOU PREPARED?

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As early as 1951 the Chicago Convention introduced Annex 13 which provides for international standards and recommended practices in respect of aircraft accident and incident investigation. Since this date, the International Civil Aviation Organisation (ICAO) has constantly updated Annex 13 as a result of the continuing need for the aviation industry to learn from previous incidents and investigations. This demonstrates the importance that ICAO attaches to Annex 13 itself. The main purpose of Annex 13 is to separate technical air accident investigations from any juridical or legal investigations and to safeguard the integrity of the air accident report.

The overriding objective of the air accident investigation is clearly defined in chapter 3 of Annex 13 as follows:

The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.

The core objective is safety and the aviation industry has worked tirelessly to ensure that relevant safety information is utilised in order to prevent similar accidents or incidents from

occurring. Consistent with the purpose of Annex 13, the European Commission (EC) developed Council Directive 94/56/EC ('the Directive') which established the fundamental principles governing the investigation of civil aviation accidents and incidents. The Directive essentially follows the principles and provisions of Annex 13 and its

main aim was to bring together the legal and operational framework governing air accidents investigations within Europe.¹

Following its implementation, the Directive had never been

the subject of a comprehensive review until the EC published a proposal for a regulation in respect of the investigation and prevention of accidents and incidents in civil aviation in October 2009.² The proposal recognised that the current European community system in respect of civil aviation accident investigation and occurrence reporting as it currently stands '*functions below optimum efficiency*'.³ There is no doubt within the aviation industry that this observation is entirely correct as there has been an increasing trend within Europe to criminalise aviation accidents. The proposal for a regulation could not have come at a better time.

Prior to detailing the main provisions of the proposed regulation it is essential to highlight

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¹ Council Directive 94/56/EC of 21 November 1994 establishing a fundamental principle governing the investigation of Civil Aviation Accidents and Incidents OJ L 319, 12.12.1994.

² Proposal for a regulation of the European parliament and of the Council on investigation and prevention of accidents and incidents in civil aviation COM(2009) 611 final.

³ *Ibid*, p.2.

the fact that the EC has opted to meet this proposed regulation and its implementation in an entirely unorthodox, but perfectly legal, way. Following the initial proposal and opportunity to comment, the three European institutions (the European Commission, the European Parliament and the European Council of Transport Ministers) have opted to deviate from the usual law making process and have chosen to produce a 'fast track' agreement behind closed doors. This is a process which has been used for the first time in respect of the proposed air accident investigation regulation. As a result, the regulation is due to become law within a few months having been the subject of a vote within the EC on the 21st of September 2010.⁴

This 'fast track' process prohibits any changes to the text that are not agreed in advance between the European Parliament and the Council. Unfortunately, whilst there is no public information available at the time of writing (3rd November 2010), the rumour mill seems to indicate that some of the recommendations made by various respondents to the proposal have been considered but very little has been adopted in the final draft of the regulation. The rest of this article will therefore focus on the main provisions of the 2009 proposal and draft regulation pending publication of the final regulation.

European Network of Civil Aviation Safety Investigation Authorities (the 'Network')

Article 7 of the proposed regulation deals with the creation and implementation of the Network.

This would comprise various heads of the safety investigation authorities in each of the Member States or their representatives.⁵ The intention behind the creation of the Network is to encourage the cooperation and exchange of information between the safety investigation authorities of the Member States concerned. It is also envisaged that this cooperation should extend to the European Aviation Safety Agency (EASA).⁶

Unfortunately the proposal does not go as far as to grant legal personality to the Network and could lead to the group finding itself open to the influence of various safety investigation authorities that have their own agendas to promote.

One of the original considerations within the proposal was for the creation of a European Civil

Aviation Safety Board or Agency; however this was not included within the draft regulation as the proposal document states that this would be a premature development. This is not necessarily a view shared by aviation

experts who feel that European aviation has evolved and matured sufficiently to accept the creation of such an agency which would draw upon the expertise of various Member States and ensure that there are no political influences at play when investigating air accidents. This is even more important when considering the role of criminalisation in air accidents and the fact that some smaller European Member States may not have the expertise or manpower required to conduct a thorough investigation and may not appreciate or understand the need to separate the technical and legal investigations. It is essential to bear in mind that there is no 'minimum' qualification level by which to benchmark air

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4 Press release: Commission welcomes European parliament vote endorsing new rules for investigation and prevention of air accidents, reference: IP/10/1147, 21st September 2010, www.europa.eu.

5 Proposal for a regulation of the European parliament and of the Council on investigation and prevention of accidents and incidents in civil aviation COM(2009) 611 final, Article 7.1.

6 *Ibid*, article 7.2

accident investigators and as such the 'chief investigator' within a small Member State may never have overseen a major aviation accident investigation previously. The creation of a European agency could also have assisted in controlling manufacturers' input in air accident investigations. They often appear to control the investigation process by placing emphasis on non-manufacturing causes and thereby guide inexperienced accident investigators to focus on aircraft operators' alleged deficiencies in error.

The role of EASA is a welcome development as clearly the European agency responsible for safety has a legitimate role to play in the prevention of future accidents; it is nevertheless important for EASA's role to be clearly defined in order to avoid the lines of investigation being blurred by the introduction of airline operator deficiencies which are not necessarily relevant to an aircraft accident. It is understood that the EU has accepted the need for this definition although the details remain to be seen.⁷

Coordination of Inquiries

This issue is dealt with in Article 13 of the proposed regulation and recognises, to a certain extent, the requirement for the air accident investigation to remain separate from any judicial inquiries. However it does provide for coordination between the 'investigator-in-charge' and other authorities including judicial, civil aviation, search and rescue and other authorities likely to be involved in the investigation.⁸

Protection of Sensitive Safety Information

The draft regulation discusses various records and the requirement that they shall not be made available or used for purposes other than safety investigation and proceeds to list a number of items including, but not limited to, witness evidence, material collected by safety investigation authority related to persons involved in an accident, evidence provided by foreign investigators and drafts of the final reports.⁹

Article 15.2 however ends with a provision that states that a competent authority for the administration of justice in a member state may decide to 'override' this requirement if they

deem that there is an overriding public interest in the disclosure of such information over and above any impact this may have on any future investigation or civil aviation safety. It is hoped that this requirement will be

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deleted from the final draft of the regulation as it could lead to political pressure within Member States on judicial authorities to exercise this right. This would have an adverse effect on aviation safety in the long term.

Indeed it has already been suggested by various aviation associations that their members may refuse to offer information voluntarily to air accident investigation teams if by doing so they may find themselves liable to criminal investigation or prosecution at a later stage. If the regulation is intended to enhance the provisions of Annex 13 the inclusion of Article 15.2 within the regulation would have the opposite effect.

⁷ Andy Clarke, Adviser Air Transport Policy, European Regional Airlines Association, "The New EU Accident Investigation Regulation", Regional International, 22nd September 2010, page 68

⁸ Proposal for a regulation of the European parliament and of the Council on investigation and prevention of accidents and incidents in civil aviation COM(2009) 611 final, Articles 13.1 and 13.3.

⁹ Ibid, Article 15.1

Investigation Report

The draft regulation provides for the solicitation of observations from the 'undertakings concerned', however, it does not go so far as to express in a clear way the right of the operator to participate in the air accident investigation.¹⁰ Such an inclusion would be welcomed by the aviation industry as Annex 13 currently contains only a recommendation that the operator comments on the draft investigation report (although many states have opted against implementing it into their domestic laws). What this currently means is that the airline operator sits on the periphery of any accident investigation and there is no obligation on an air accident investigation board to involve the operator. This is clearly not in the interests of aviation safety. It is highly likely that the operator will be treated with suspicion during the investigation and media pressure only serves to enhance these suspicions. An airline operator clearly has a part to play in an investigation and it is hoped that this right will be enhanced in the final draft.

Another major issue is the timeframe within which the final accident report should be published. To date there is no fixed time limit for the publication of a final report following an air accident. Many believe that an overly speedy publication of a report could lead to vital information being missed. The proposed regulation seeks to implement a provision that a final report should be published '*in the shortest possible time and if possible within 12 months of the date of the accident at the latest*'.¹¹

Depending on the size and scale of the accident in question it is not unusual for investigations to go on for many months or years (excluding the wreckage clean up periods). For a large scale

accident a 12 month time frame would suggest that speed rather than a thorough investigation is the overall objective. Article 19.6 does go on to state that if the report cannot be released within this time period, the safety investigation authority should release an interim report on each anniversary of the accident providing a progress report, however it is entirely likely that inexperienced safety investigators may seek to issue a speedy final accident report in an effort to comply.

Availability of Passenger Lists

The provision regarding the production of passenger lists is dealt with in Article 22.1 and provides that:

Community airlines and airlines departing from an airport located in the territory of a member state to which the Treaty applies, shall implement procedures allowing to produce (sic) a list of all the persons on

board an aircraft within one hour of the notification of the occurrence of an accident to this aircraft.

This time frame is of particular concern to airlines as there are various passenger lists that are produced in day to day operations. For example (depending on the airline), there is a passenger manifest that is produced for every ticket sold; a manifest for checked in passengers and a list of passengers actually on board. It is not unknown for passengers to be booked, checked in and then for some reason fail to produce themselves at the gate for boarding because they have not heard an announcement. If an accident were to occur on take-off, it is highly likely that passenger manifests are still being cross checked at the very

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¹⁰ Ibid, Article 19.3

¹¹ Ibid, Article 19.5

time the accident takes place, therefore the requirement to provide an accurate list within an hour of an accident is extremely strict. Anyone who has been involved in an air accident investigation where fatalities are concerned would endorse the need for an accurate passenger list to be provided in order to avoid unnecessary emotional distress to family members involved.

Assistance to the victims of air accidents and their families

The proposed regulation provides for a plan to be implemented by Member States in respect of assistance for the victims of civil aviation accidents and their families at national level. However, the current construction of the provision could lead to the interpretation of the provision to suggest that families of the victims of an air accident could appoint a representative or expert to visit the scene of the accident and have access to sensitive information as well as receive a copy of the final report. This is

a significant burden for airlines and obliges them to provide for something over and above current legal obligations under the Montreal Convention and European law.

In conclusion it is clear that there will be very little interaction with the aviation industry in respect of the proposed regulation and we will have to wait and see what the final draft actually encompasses. It is unfortunate that the EU has chosen to deal with such a critical regulation behind closed doors as opposed to encouraging industry and expert participation. The overriding objective for all involved is to improve and enhance air safety which is a positive step for

both passengers and industry. Whilst criminal prosecutions in respect of airline accidents are on-going, the decision to deal with the regulation in this way does appear to be somewhat short sighted as airlines appreciate and understand that it is

a fundamental requirement to operate safely and to encourage the exchange of information in the interest of safety; after all their future operation depends on it.

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