

## Just Culture Policy





# EXECUTIVE SUMMARY

The implementation of the concept of “Just Culture” is now widely seen as key for further improvement of aviation safety through more and better reporting of aviation occurrences. An essential condition for establishing a “Just Culture” at national level is an enhanced cooperation and coordination between safety and judicial authorities. The EUROCONTROL Just Culture Task Force, which is composed of legal and safety experts of the Member States, European Commission, ATM and Air Transport associations and EUROCONTROL, has developed a **“Model Policy regarding criminal investigation and prosecution of civil aviation incidents and accidents”**.

This paper presents the said Model Policy, together with additional information in support of the application of such a policy within the Member States. The information should be useful for any organisation willing to undertake the substantial, but otherwise rewarding, task of implementing such a policy within the state. The paper also presents background information relative to the development of this policy.

The Provisional Council of the EUROCONTROL Organisation has unanimously endorsed this Policy at its session of 10th May 2012. This is a crucially important step in the quest for better aviation safety, commensurate with the expected traffic growth of the following decades.

# EUROCONTROL MODEL POLICY REGARDING CRIMINAL INVESTIGATION AND PROSECUTION OF CIVIL AVIATION INCIDENTS AND ACCIDENTS

## **Objective**

The objective of this Policy is to provide directions regarding the criminal investigation and prosecution of potential criminal offences resulting from aviation accidents or that come to the attention of prosecutors through the reporting of civil aviation incidents.

Those directions are warranted by the recognition that safety is paramount to aviation, and that preserving safety is in the public interest. Ensuring a judicial process in the aftermath of aviation incidents or accidents which achieves a balance between justice and safety requirements is essential. This is recognised in a number of international legal texts: ICAO Annex 13 regarding accident and incident investigation (in particular Attachment E providing legal guidance); ESARR 2; EU Regulation No 996/2010 and EC Directive 2003/42, relevant provisions of national Aviation laws.

## **Scope of application**

This Policy applies to the criminal investigation and prosecution of criminal offences resulting from civil aviation accidents or from incidents reported under mandatory and voluntary occurrence reporting schemes.

## **Contact with investigation bodies/safety managers**

In case of accidents or serious incidents, the representatives of the judicial authorities (police, prosecutors) will contact the investigation board in charge of the ICAO Annex 13 investigation with a view of coordinating positions and priorities.

Upon becoming aware of an incident, through, *inter alia*, an incident report, prosecutors will contact the relevant national safety authority, such as the investigation board or the Civil Aviation Authority. They will also contact, as appropriate, the safety managers of the Air Navigation Service Providers, the airlines or the airport authorities in order to exchange necessary information, discuss use of evidence and possible coordination.

This should be done with due respect for and recognition of the responsibilities and independence of each entity, and relevant applicable laws. The objective is to ensure effective investigation and decision making processes in order to maintain and improve public safety as well as the administration of justice.

## Evidence

- **Report**

An incident report filed under a mandatory and voluntary occurrence reporting scheme cannot be used as evidence in criminal proceedings against the reporter.

Accidents and incident reports done by investigating bodies or entities under ICAO Annex 13 and EU Regulation No 996/2010 cannot be used in criminal proceedings against individuals.

- **Witness Declaration**

A witness declaration received in the context of a safety investigation cannot be used as evidence in criminal proceedings against the person having made that declaration.

- **Prosecution**

No prosecution will be brought against individuals for actions, omissions or decisions which reflect the conduct of a reasonable person under the same circumstances, even when those actions, omissions or decisions may have lead to an unpremeditated or inadvertent infringement of the law.

Nothing in this Policy should prevent criminal prosecutions in the event of intentional wrongdoing or gross negligence.<sup>1</sup>

- **Expert support**

Prosecutors should avail themselves of the necessary expert support from the aviation domain.

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<sup>1</sup> Gross negligence is referred to in a number of EC instruments but there does not seem to be a commonly agreed definition of gross negligence in Europe. It seems to be however generally agreed that gross negligence implies a degree of severity, serious disregard to an obvious risk and profound failure to take such care that is evidently required in the circumstances. Although a number of States assimilate gross negligence and intentional harm/wrongdoing, it is not always the case. Hence the proposal to add intentional wrongdoing in the list of cases that should be subject of prosecution – it will ultimately be up to each State implementing the Model Policy to refer or not to intentional wrongdoing in view of its national legal framework.

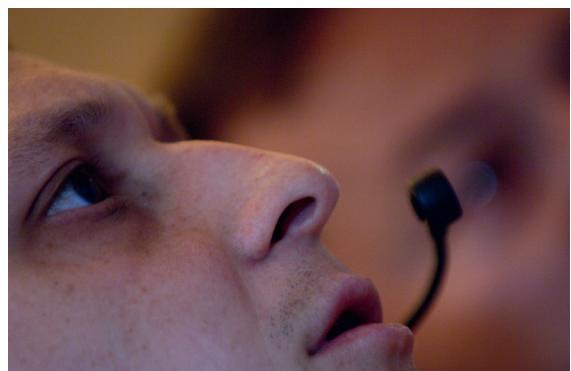
## BACKGROUND

The need to strengthen on-going efforts to further improve the safety of the European skies is a priority for EUROCONTROL, in particular with respect to incident reporting and data sharing, an area where progress is still slow. One of the main elements towards progress has been identified as the possible role and involvement of national justice authorities and the recognition and perhaps reconciliation of the responsibilities and interests of both the judiciary and safety authorities.

This has resulted a few years ago in the introduction by EUROCONTROL of the concept of "Just Culture" in the aviation domain. In addressing the legal issues relating to safety reporting, it was found that a number of laws and regulations were in place that would support the establishment of a Just Culture. It also became apparent that the issue was not necessarily the need for more legislative actions but rather the way in which those responsible for implementation and enforcement of applicable legislation would be able to take into consideration Just Culture principles in the exercise of their responsibilities.

In 2009, the Just Culture Task Force (JCTF, see the **Annex** for its Terms of Reference) was established in EUROCONTROL, with the objective to promote debate and discussion on the legal issues that relate to safety and justice, to foster and support dialogue between safety and judicial experts and to develop relevant guidance material and policies in order to support the implementation and dissemination of Just Culture. Under the chairmanship of the EUROCONTROL Legal Service, the Task Force is composed of representatives from the Civil Aviation Authorities, Air Navigation Service Providers and Accident Investigators of the

member States, the European Commission and the European Aviation Safety Agency, a number of international air transport and air traffic control organisations (IATA, ERA, ECA and IFATCA) Accident Investigation Boards and of National Prosecutors. The meetings are also attended by observers from the US National transport Safety Board and from ICAO.



# INTRODUCTION

The EUROCONTROL Provisional Council discussed at its meeting on 10 May 2012 a proposal for a "Model Policy regarding criminal investigation and prosecution of civil aviation incidents and accidents", which has been developed by the EUROCONTROL Just Culture Task Force (JCTF).

The proposal for a Model Aviation Prosecution Policy (MAPP) follows an ongoing successful practice in a number of EUROCONTROL member States such as the Netherlands, the UK and France. The work in the Just Culture Task Force greatly profited from their active support and from States, the EU, International organisations and of many other participants.

The MAPP also establishes a direct link with some of the key objectives of the new EU Regulation No. 996/2010 on the investigation and prevention of accidents and incidents in civil aviation.

The unanimous endorsement of the MAPP by the representatives of all the 39 EUROCONTROL member States and of the EU, the full text of which is presented in this document, confirms that the availability of a model for a national aviation prosecution policy is seen as a very effective means to propagate Just Culture at the national level without in any way interfering with the responsibilities of the national judicial authorities. It provides an answer to the growing need to strengthen on-going efforts to further improve the safety of the European skies which remains a priority for EUROCONTROL, in particular with respect to incident reporting and data sharing: two processes that are vital for maintain safety levels in Europe.

The model provides the National authorities with guidance material and a template that may be used at national level. The MAPP is not a mandatory or prescriptive document; it is a tool based on widely accepted Just Culture principles. States can adapt and integrate it national level in order to put in place effective and realistic arrangements that address the relation between aviation safety and criminal investigation.

The MAPP concept fully respects the sovereign administration of justice function as it remains the prerogative of national governments and prosecutors to adopt and implement an Aviation Prosecution Policy. The proliferation of an Aviation Prosecution Policy will be an important element of the establishment of a Just Culture for aviation and key to the balanced involvement and support of judicial authorities.

The general endorsement by the Provisional Council of this Model for a national Aviation Prosecution Policy signifies an important and constructive step forward both at European and at the global level that will send a strong signal to both the European and global initiatives for enhancing aviation safety while respecting the administration of justice.

# THE DEVELOPMENT, STATUS AND OBJECTIVES OF THE MODEL AVIATION PROSECUTION POLICY

## Development

The concept of the MAPP is based on comparable current practice in the Netherlands and the UK. The Dutch Ministry of Justice issued in December 2006 “Instructions with regard to criminal investigation and prosecution in the event of reporting of occurrences in civil aviation”. These instructions recognise that in order to ensure a willingness to report incidents, it would be desirable to make provision for the protection, subject to certain conditions, against criminal sanctions for those reporting occurrences in civil aviation.

In the UK, the Code for Crown Prosecutors issued by the Crown Prosecution Service provides guidance on the general principles to be applied when making decisions about prosecutions which include the need to balance prosecution actions against general public interests such as aviation safety. In a similar vein, the UK CAA has issued guidelines regarding the “Conduct of Prosecutions by the CAA as a Prosecutor”.

The MAPP also reflects the objectives of the recent EU Regulation No. 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation. This Regulation, when addressing coordination of investigations, requires States to ensure that there are, *inter alia*, advance arrangements between safety investigation authorities and judicial authorities.

## Status

It should be emphasised that the modalities of administration of justice in the different States is a sovereign prerogative of each individual State. National criminal law and procedures differ between States in Europe and clearly no policy could represent a “one-size-fits-all” approach. This is why the MAPP is presented as guidance material which provides a model i.e. a template that may be used and adapted at national level. The Model Policy is clearly not intended to be mandatory – it is a tool which States can adopt or integrate at national level, taking into account the specificities of their legal system, to foster the introduction of Just Culture and to ensure appropriate arrangements between their safety and judicial authorities.

# MAIN FEATURES OF THE MODEL AVIATION PROSECUTION POLICY

As set out in article 1.1 of the Model Policy, its main objective is *"to provide directions regarding the criminal investigation and prosecution of potential criminal offences resulting from aviation accidents or that come to the attention of prosecutors through the reporting of civil aviation incidents."* It is worded in such a way that it can be supplemented or adapted to reflect national specificities.

The policy in itself is a concise document. It addresses the criminal investigation and prosecution processes related to civil aviation accidents and incidents which have been reported under mandatory or voluntary reporting schemes. It provides guidance material with respect to the coordination between safety investigation bodies and judicial authorities (in line with EU regulation No 996/2010), and to the protection of incident reports filed under mandatory and voluntary occurrence reporting schemes, accident and incident reports under ICAO Annex 13 and witness declarations received in the context of safety investigations in the sense that those cannot be used by a prosecutor as evidence in criminal proceedings.

One of the most important elements of the MAPP guidance is the recognition that nothing should prevent criminal prosecutions in the event of intentional wrongdoing or gross negligence. However, it also recognised that no prosecution should be brought against individuals for actions, omissions or decisions that reflect the conduct of a reasonable person even when those actions, omissions or decisions may have caused an unpremeditated or inadvertent infringement of the applicable law.



## WAY FORWARD

Just Culture has been on the agenda for many years and it has become apparent that a key part of its successful implementation relies on an active and open coordination between the safety and judicial authorities.

There seems to be overall agreement on this principle, at least from those involved in the safety side and from those involved in the administration of justice which have dealt with aviation related accidents and incidents. The recent legislative developments at EU level, such as the EU Regulation No 996/2010 referred to above as well as the Commission Regulation laying down a performance scheme No. 691/2010, which introduces the notion of Just Culture Key Performance Indicators, will create obligations on States to ensure that they have in place a sound and effective framework supporting the concept of Just Culture.

The ICAO Safety of Information Protection Task Force (which was established after, among other things, joint European initiatives at the last ICAO Assembly and in which EUROCONTROL is represented), has also recognised the importance of guidance for States for creating prosecution policies in the aviation domain and is expected to include recommendations to that effect in its final report which is due in November 2012.

The MAPP concept fully respects the sovereign administration of justice function as it remains the prerogative of national governments and prosecutors to adopt and implement an Aviation Prosecution Policy. The proliferation of an Aviation Prosecution Policy will be an important element of the establishment of a Just Culture for aviation and key to the balanced involvement and support of judicial authorities.

The Just Culture Task Force will continue to actively promote an extended dialogue with States, International Organisations and other parties, aimed at the implementation of the MAPP at national level in order to contribute to an efficient and stable balance between the interests of safety and justice in the aviation domain in Europe and beyond.

# JUST CULTURE TASK FORCE

## Objectives and tasks

The Just Culture Task Force will:

- Promote debate and discussion on the legal issues that relate to safety and justice, in particular Just Culture;
- Foster and support dialogue between safety and judicial experts;
- Develop guidance material and policies in order to support the implementation and dissemination of Just Culture;
- Develop proposals for consideration by relevant bodies (Permanent Commission, European Commission / Ministries of Justice);
- Any other tasks considered necessary to meet the above objectives.

## Reporting

The Task Force will report to the EUROCONTROL Director General.

## Practical arrangements

The members of the Just Culture Task Force will be the representatives of, *inter alia*, States (Justice and Transport Ministries, Prosecutors office), ANSPs, professional associations, aviation trade professional associations, EASA, the European Commission and EUROCONTROL Agency, who have an interest in furthering the objectives of the Task Force.

The Agency will chair the meeting of the Task Force and provide secretarial support.

Meetings will be convened as necessary.

*Terms of reference approved on 23 June 2009.*

# AIDE MEMOIRE

The EUROCONTROL Provisional Council discussed at its meeting on 10 May 2012 a proposal for a "*Model Policy regarding criminal investigation and prosecution of civil aviation incidents and accidents*", which has been developed by the EUROCONTROL Just Culture Task Force (JCTF).

The introduction of the Model Policy follows an ongoing successful practice in a number of EUROCONTROL member States such as the Netherlands, the UK and France. The work in the Just Culture Task Force greatly profited from their active support and of **many** other participants **from States and International Organisations**. The Model Policy also establishes a direct link with some of the key objectives of the new EU Regulation No. 996/2010 on the investigation and prevention of accidents and incidents in civil aviation.

The unanimous endorsement by the representatives of all the 39 EUROCONTROL member States and of the EU confirms that the availability of a model for a national aviation prosecution policy is seen a very effective means to propagate Just Culture at the national level without in any way interfering with the responsibilities of the national judicial authorities.

It provides an answer to the growing need to strengthen on-going efforts to further improve the safety of the European skies which remains a priority for EUROCONTROL, in particular with respect to incident reporting and data sharing: two processes that are vital for maintain safety levels in Europe.

The Model Policy provides the National authorities with guidance material and a template that may be used at national level. The Model Policy is not a mandatory or prescriptive document; it is a tool based on widely accepted Just Culture principles. States can adapt and integrate it national level in order to put in place effective and realistic arrangements that address the relation between aviation safety and criminal investigation.

One of the most important provisions of the Model Policy is the recognition and confirmation that nothing should prevent criminal prosecutions in the event of intentional wrongdoing or gross negligence. However, it also recognises that no prosecution should be brought against individuals for actions, omissions or decisions that reflect the conduct of a reasonable person even when those actions, omissions or decisions may have caused an unpremeditated or inadvertent infringement of the applicable law.

In doing so, the model policy concept fully respects the sovereign administration of justice function as it remains the prerogative of national governments and prosecutors to adopt and implement an Aviation Prosecution Policy. The proliferation of an Aviation Prosecution Policy will be an important element of the establishment of a Just Culture for aviation and key to the balanced involvement and support of judicial authorities.

The general endorsement by the Provisional Council of this Model for a national Aviation Prosecution Policy signifies an important and constructive step forward both at European and at the global level that will send a strong signal to both the European and global initiatives for enhancing aviation safety while respecting the administration of justice.







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