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## **Ministry of Justice**

### **Instructions with regard to criminal investigation and prosecution in the event of the reporting of occurrences in civil aviation**

*Category: criminal investigation and prosecution*

*Legal status: instructions pursuant to Article 130.4 of the Wet RO [Judiciary (Organisation) Act]*

*Issuer: College van procureurs-generaal [College of Principal Public Prosecutors]*

*Addressees: Heads of Public Prosecutor's Offices*

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*Legal provisions: Articles 1.1, 7.1, 7.2, 11.25 of the Aviation Act*

*Evaluation: two years after entry into force*

*Annexe(s): -*

## **Background**

On 13 June 2003, Directive 2003/42/EC [of the European Parliament and of the Council] on occurrence reporting in civil aviation<sup>1</sup> entered into force. The aim of the Directive is to contribute to improving air traffic safety by ensuring that all safety-relevant information is reported, collated, stored, protected and disseminated. The reason for this is that experience has shown that before an incident occurs, there are often already incidents or a number of other shortcomings which point to the existence of safety risks. Consequently, if the safety of civil aviation is to be improved, more needs to be known about such incidents, in order to enable corrective measures to be taken. Inter alia, the Directive requires the Member States to set up mandatory incident reporting systems for a number of natural persons and corporate bodies. The aim of the Directive is to promote a willingness to report incidents by requiring Member States to grant those who report civil aviation incidents immunity, subject to certain conditions, from sanctions under administrative law.

The EC Directive in question was implemented by the Law of 2 November 2006 amending the Aviation Act in implementation of Directive 2003/42/EC on occurrence reporting in civil aviation.<sup>2</sup> A general administrative regulation designates natural persons or corporate entities who are required to

report occurrences. Furthermore, a regulation of the Minister for Transport, Public Works and Water Management lays down more detailed rules relating to the reporting of incidents.

In line with Directive 2003/42/EC, the Aviation Act<sup>3</sup> defines the term incident as follows:

*an operational interruption, defect, fault or other irregular circumstance that has or may have influenced flight safety and that has not resulted in an accident<sup>4</sup> or serious incident<sup>5</sup> as defined in Article 3(a) and (k) of Directive 94/56/EC of the Council of the European Communities of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents (OJ L 319).*

Article 7.1.1 of the Aviation Act stipulates that occurrences are to be reported to the Minister for Transport, Public Works and Water Management.

Article 11.23 of the Aviation Act provides for the protection of reporters against sanctions under administrative law:

The State shall not institute any proceedings under civil law nor shall any administrative body impose any administrative sanction, notwithstanding the provisions of the present Chapter, in the event of any unintentionally or inadvertently committed infringement of any legal provision, on the basis of facts which come to their attention only as a result of a report as referred to in Article 7.1.

Paragraph 1 above shall not apply in the event of gross negligence in connection with the occurrence. The protection arrangements provided for in Directive 2003/42/EC, as implemented in the Aviation Act, do not waive criminal proceedings. In order to ensure a willingness to report incidents, however, it would be desirable also to make provision for protection, subject to certain conditions, against criminal sanctions for those reporting occurrences in civil aviation.

## **Summary**

These instructions set out provisions with regard to criminal investigation and prosecution of criminal offences in connection with the reporting of civil aviation incidents.

## **Criminal investigation**

Article 7.1.1 of the Aviation Act stipulates that occurrences are to be reported to the Minister for Transport, Public Works and Water Management. The *Inspectie Verkeer en Waterstaat* [Transport, Public Works and Water Management Inspectorate] (hereinafter referred to as the IVW) will act as the reporting point. It must be assumed that the official concerned, pursuant to Article 162 of the Code of Criminal Procedure, has an obligation to report criminal offences and, if required, an obligation vis-à-vis the Public Prosecutor's Office (OM) to report punishable acts in general.

It has been agreed with the Director/Senior Inspector of the IVW that the IVW will be responsible for forwarding to the OM any reports which meet the criteria set out below. For the purposes of testing the criteria, there will be regular consultation between the IVW and the national coordinating public prosecutor for aviation. The forwarding of a report by the IVW to the OM constitutes an opinion regarding the suspected existence of wilful intent or gross negligence. It does not expressly refer to any obligation to prosecute. In any event, the OM may not consider prosecution to be expedient. Furthermore, it may emerge from more detailed criminal investigation that the incident involved no wilful intent or gross negligence.

**[SEE ORIGINAL FOR DIAGRAM ]**

**Key:** melding voorval = reporting of incident  
procedure inspectie V&W = IVW procedure  
opzet of grove nalatigheid? = wilful intent or gross negligence?  
ja (vermoeden) = yes (suspected to be the case)  
doorgifte melding aan OM = report forwarded to the OM  
nee = no  
geen doorgifte melding aan OM = report not forwarded to the OM  
procedure OM = OM procedure

**Prosecution**

*General policy on prosecution in connection with aviation*

In principle, prosecutions are brought only in the event of accidents, serious incidents (near-accidents), serious endangerment and systematic infringements caused by wilful intent or gross negligence.

*Prosecution in connection with the reporting of an occurrence*

No prosecution will be brought against natural persons in connection with unintentionally or inadvertently committed infringements which come to the OM's attention only because they have been reported under the mandatory occurrence-reporting scheme pursuant to Article 7.1 of the Aviation Act.<sup>6</sup> Pursuant to Article 8.3 of Directive 2003/42/EC, criminal prosecutions may be brought in the event of wilful intent or gross negligence.<sup>7</sup> Likewise, in the event of wilful intent or gross negligence, a criminal prosecution may be brought if the occurrence comes to the OM's attention by other means, for example as a result of an anonymous tip. Furthermore, the reservation must be made as regards the policy on prosecution described above that the court having jurisdiction for the matter, in connection with a complaint on the basis of Article 12 of the Code of Criminal Procedure, is entitled to

order that a prosecution be brought.

If by reason of the foregoing a prosecution can be brought, the restriction will apply that the report itself cannot be used as evidence in criminal proceedings against the reporter.<sup>8</sup> In such cases, however, the report can be used as guidance information and as evidence in criminal proceedings against parties other than the reporter.

#### *Coordination of criminal proceedings*

The national coordinating public prosecutor for aviation at the Haarlem Public Prosecutor's Office, Schiphol branch, will assess all aviation cases and provide the local Public Prosecutor's Office with an advice on how to proceed further.

#### **Transitional provisions**

The policy rules in these instructions will have force from the date of entry into effect.

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<sup>1</sup> OJ 2003 L 167/23.

<sup>2</sup> *Stb.* [Bulletin of Acts and Decrees] 2006, 576.

<sup>3</sup> Article 1.1.1.v.

<sup>4</sup> '[A]ccident' means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, in which:

1. a person is fatally or seriously injured as a result of:

- being in the aircraft, or
- direct contact with any part of the aircraft, including parts which have become detached from the aircraft, or
- direct exposure to jet blast,

except when the injuries are from natural causes, self-inflicted or inflicted by other persons, or when the injuries are to stowaways hiding outside the areas normally available to the passengers and crew; or

2. the aircraft sustains damage or structural failure which:

- adversely affects the structural strength, performance or flight characteristics of the aircraft, and
- would normally require major repair or replacement of the affected component,

except for engine failure or damage, when the damage is limited to the engine, its cowlings or accessories; or for damage limited to propellers, wing tips, antennas, tyres, brakes, fairings, small dents or puncture holes in the aircraft skin;

3. the aircraft is missing or is completely inaccessible.

<sup>5</sup> '[S]erious incident' means an incident involving circumstances indicating that an accident nearly occurred.

<sup>6</sup> This relates only to occurrences as defined above. Criminal proceedings are therefore possible in the event of

an accident or serious incident.

<sup>7</sup> In the case of infringements, in the event of the finding of the fact, responsibility is assumed. Consequently, an extra condition is applied here for prosecution of infringements, namely presence of the aggravating factor wilful intent or gross negligence. In the case of criminal offences, the Public Prosecutor's Office can always bring criminal proceedings, since wilful intent or gross negligence (culpability) are by definition a constituent part thereof.

<sup>8</sup> This restriction can be derived from the European Court of Human Rights Saunders judgment (*NJ* [Dutch Law Reports] 1997, 699, in particular § 68-71). According to the Court, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, specifically the principle of *nemo tenetur* or the right not to incriminate oneself which forms the basis for that article, requires that statements which a person was obliged to make (such as on the basis of the reporting obligation as provided for in Article 7.1 of the Aviation Act) may not be used against him/her in criminal proceedings. In such cases, it is irrelevant whether or not the statements are self-incriminating. The reporting obligation is not per se at variance with the principle of *nemo tenetur*, since the right to silence is linked to a criminal charge. At the time of submitting the report, there is no question of any such charge, and the reporter, who at that stage is not (yet) accused of anything, has no right of silence. The restriction thus relates solely to the later use of the report for the purposes of furnishing of evidence in criminal proceedings against the reporter.

**Staatsblad [Bulletin of Acts and Decrees] of the Kingdom of the Netherlands**

Year 2006

**576**

**Law of 2 November 2006 amending the Aviation Act in implementation of Directive 2003/42/EC on occurrence reporting in civil aviation**

We, Beatrix, by the grace of God, Queen of the Netherlands, Princess of Orange-Nassau, etc.;

Hereby give notice as follows:

considering that it is necessary, in order to implement Directive 2003/42/EC of the European Parliament and of the Council of the European Union on occurrence reporting in civil aviation (OJ L 167), to amend the Aviation Act;

having heard the Council of State, and in joint consultation with Parliament, have approved and interpreted, as we hereby approve and interpret, the following Act:

**ARTICLE I**

The Aviation Act shall hereby be amended as follows:

A

1. At the end of Article 1.1.1.u, the full stop shall be replaced by a semicolon, and the following two sub-paragraphs shall be inserted:

v. occurrence: an operational interruption, defect, fault or other irregular circumstance that has or may have influenced flight safety and that has not resulted in an accident or serious incident as defined in Article 3(a) and (k) of Directive 94/56/EC of the Council of the European Communities of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents (OJ L 319);

w. dangerous goods occurrence: accident or incident involving dangerous goods as referred to in the Technical Instructions for the Safe Transport of Dangerous Goods by Air appended to Annex 18 to the Convention on International Civil Aviation (*Trb.* [Collection of Treaties and Conventions] 1973, 109).

2. The following paragraph shall be inserted in Article 1.1:

4. Any amendment to Article 3(a) and (k) of Directive 94/56/EC shall, for the purposes of application of Article 1.1.1.v above, apply as from the date on which the amending directive is to take effect.

B

In Article 6.60.1 and Article 6.61.1, the term "dangerous goods" shall in each case be inserted before the word "occurrences".

C

After Chapter 6, a new chapter shall be inserted as follows:

**CHAPTER 7. MISCELLANEOUS PROVISIONS WITH REGARD TO AVIATION**

**Article 7.1**

1. Occurrences shall be reported to the Minister for Transport, Public Works and Water Management.
2. A general administrative regulation shall designate natural persons or corporate entities who are required to report occurrences.
3. By regulation of the Minister for Transport and Public Works, more specific rules shall be laid down in connection with the reports referred to in paragraph 1 above, and rules may be laid down for the voluntary reporting of observed deficiencies in aviation which are not required to be reported but which are perceived by the reporter as an actual or potential hazard.

**Article 7.2**

1. Data obtained from any report as referred to in Article 7.1.1 or from a European Union Member State in connection with any similar report in that Member State shall not be made public.
2. Any entity entrusted with regulating civil aviation safety or with investigating civil aviation accidents and incidents within the European Community shall have access to data as referred to in paragraph 1 above.
3. When registering reports, names and addresses of individual persons shall not be recorded.

D

The following article shall be inserted after Article 10.9:

**Article 10.10**

Article 7.1.1 shall not apply to occurrences affecting solely military aviation.

E

Article 11.16 shall be amended as follows:

1. In paragraph 1, sub-paragraphs a and b shall be re-lettered b and c, and the following sub-paragraph shall be inserted:
  - a. Article 7.1.1;.
2. Paragraph 3 shall be amended as follows:

1. Sub-paragraphs a and b shall be re-lettered b and c, and the following sub-paragraph shall be inserted:

a. EUR 1,000 in the case of an infringement as referred to in sub-paragraph 1.a;.

2. In sub-paragraph b, "sub-paragraph 1.a" shall be replaced by "sub-paragraph 1.b".

3. In sub-paragraph c, "sub-paragraph 1.b" shall be replaced by "sub-paragraph 1.c".

F

Before Chapter 12, a new title shall be inserted as follows:

### **TITLE 11.3. EXCEPTIONS**

#### **Article 11.25**

1. In the event of any unintentional or inadvertently committed infringement of any legal provision, the State shall not institute legal action nor shall any administrative body impose any administrative sanction, where knowledge of such infringement is obtained by means of a report as referred to in Article 7.1.

2. Paragraph 1 above shall not apply in the event of gross negligence in connection with the occurrence.

#### **Article 11.26**

Data obtained in the course of any internal industrial safety investigation in connection with a safety management system certified by or pursuant to the Aviation Act may be requisitioned for the purposes of a criminal investigation in connection with a report as referred to in Article 7.1 only with the authorisation of the examining magistrate at the request of the public prosecutor.

### **ARTICLE II**

The present Act shall enter into force with effect from the day after the date of issue of the *Staatsblad* in which it is published.

We hereby order and command that the present Act be entered in the *Staatsblad*, and that all Ministries, authorities, colleges and civil servants concerned duly ensure its strict implementation.

Done at The Hague, 2 November 2006

Beatrix

K. M. H. Peijs



Minister for Transport, Public Works and Water Management

Issued this *twenty-eighth* day of November 2006

E. M. H. Hirsch Ballin

Minister for Justice