



OPEN REPORTING IN CIVIL AVIATION

ASSESSMENT OF THE EESC'S PROSPECTIVE
ROLE IN DESIGNING A 'EUROPEAN
JUST CULTURE CHARTER'



European Economic and Social Committee

Open reporting in civil aviation - Assessment of the EESC's perspective in designing a "European Just Culture Charter"

"This study was carried out by Roderick D. van Dam following a call for tenders launched by the European Economic and Social Committee. The information and views set out in this study are those of the author and do not necessarily reflect the official opinion of the European Economic and Social Committee. The European Economic and Social Committee does not guarantee the accuracy of the data included in this study. Neither the European Economic and Social Committee nor any person acting on the Committee's behalf may be held responsible for the use which may be made of the information contained therein."

Executive summary

Recent years have seen a growing concern on the part of aviation safety professionals about the interaction between flight safety and, in particular, safety incident reporting and the national criminal judiciary. This has led to a growing fear of litigation and the threat of criminal sanctions against individuals and organisations that are seen as partly or fully responsible for an accident or incident in which they were involved. This study addresses the implementation of the Just Culture concept for Aviation across EU states at both the state and corporate level and the possibilities for establishing an EESC Just Culture Charter as an instrument for addressing the present divide between the protection of aviation incident reporting and the administration of justice.

Rather than trying to exclude or bypass the judiciary, focus has now shifted towards initiating a dialogue between the national authorities concerned. A better understanding of the consequences of a judicial inquiry must be the starting point. Just Culture represents the fundamental recognition that both the aviation safety drive and the administration of justice will benefit from a carefully-established equilibrium, moving away from fears of criminalisation. It is based on the understanding that controllers and pilots can make mistakes and that the line between an "honest mistake" and intentional or reckless behaviour can only be drawn by a member of the judiciary.

Just Culture has been enacted in the EU legal order, and both Eurocontrol and the EU recently endorsed a "Model for a national aviation prosecution policy" that limits prosecution to the equivalents under national criminal law of "gross negligence" and "wilful misconduct". Interviews with representatives of organisations of stakeholders and other aviation interest groups, the national judiciary and European organisations have provided a further insight into the conditions for the creation of an EESC Just Culture Charter and its potential strengths and weaknesses.

In particular, most of the parties felt that the charter should set out clearly the political, corporate and judiciary commitments and policies for creating a Just Culture based on the expectations and demands of the charter's signatories and relevant EESC stakeholders; and that these should be included in a 'living' document with clear provisions on updating and reporting on future developments. Furthermore, a common issue was the need to reconcile the descriptions of unacceptable behaviour at corporate level with the applicable criminal norms used by the national judicial authorities in order to avoid conflicts. In addition, it must pave the way for a periodical assessment of how these commitments are being met through the means available.

The study contains, as requested, a SWOT analysis for the EESC JC concept for further discussion and also addresses the format and content of a JCC document. An attachment sets out an outline for a possible EESC Just Culture Charter document and the different parts thereof that contain the key elements for a realistic and efficient instrument that would provide a comprehensive picture of applicable law and applicable policies and commitments that are signed off by their respective owners for their duration. The findings confirm that a number of issues and conditions related to an open reporting system for aviation cannot be adequately resolved through formal legislation and that a focused and accessible Just Culture Charter could, under certain conditions, provide a comprehensive repository for all relevant legislation, corporate and judiciary commitments or policies relevant to the establishment of an open safety culture in aviation.

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I. Introduction

- 1.1 The "divide" between international safety rules and national criminal law and - to a lesser extent - public information legislation, is one of the causes of the difficulties encountered in the aviation safety domain. It is in this context that the concept of "Just Culture" has been introduced for aviation safety, in particular for air traffic management (ATM) and air transport. Just Culture aims at ensuring adequate reporting of incidents by front line operators by establishing a balance between the interests of safety and those of the administration of justice. At (national) corporate level, the application of the Just Culture concept plays an equally important role in incident reporting by pilots and controllers and the application of company rules, contract- and labour law.
- 1.2 In two opinions produced in 2010 and 2011, related to, respectively, the proposal for a regulation of the European Parliament and of the Council on investigation and prevention of accidents and incidents in civil aviation and the Single European Sky II, the EESC addressed the issue of the relation between safety and the administration of justice and the importance of building "a sound safety culture combining open reporting and 'Just Culture' as the basis for safety performance".
- 1.3 The EESC stressed the importance of developing an EU Charter on Just Culture and welcomed the "Charter for Just Culture" agreed by the European Civil Aviation Social Partners on 31 March 2009. In its opinion on SES II, the EESC reiterated the importance of a "Just Culture" and the need for more action to ensure that all Member States amend their national criminal law systems with a view to ensuring a Just Culture. The EESC again stressed the importance of developing an EU charter on "Just Culture".
- 1.4 This study aims to provide an assessment and gain an understanding of the current application of a Just Culture across EU States at both the state and organisational levels. A realistic understanding of the task that lies ahead, to attain a common application of Just Culture Europe-wide, will permit an EESC Just Culture Charter, if adopted, to set reasonable and attainable objectives for those states/organisations that are currently in the process of adopting a Just Culture.

II. Just Culture in aviation

- 2.1 Ever since the investigation of aviation accidents was undertaken in a systematic manner with the specific aim of using the findings of each accident investigation for the prevention of other accidents, the problem of the use of these findings for other purposes than accident prevention has been manifest.
- 2.2 Improving aviation safety depends, to a large extent, on the feedback of knowledge generated by a system of accident/incident data collection and analysis. Such a system serves the industry, as well as its regulators, by allowing it to adapt and improve equipment and procedures. A high-quality output from the system very much depends on the existence of systematic records, traceability and active participation and reporting from all the aviation actors involved in safety areas. In the US and Europe, for example, well-developed accident prevention processes are in place, including mandatory and voluntary incident reporting systems and independent accident investigation.
- 2.3 From relatively early days, the International Civil Aviation Organization (ICAO), in setting international rules and recommendations for improving safety, has been confronted by the need to protect aviation safety interests from those parties that want access to investigation results and other safety data with the goal of what ICAO calls "apportioning blame or liability." Therefore, ICAO rules, in the interest of an uncompromised safety investigation process, are often seen as advocating protection against the interests of what is often referred to as "the administration of justice."
- 2.4 The administration of justice, in particular in the criminal law domain, constitutes one of the pillars of state sovereign functions; they are usually firmly embedded at constitutional level. Both the Convention on International Civil Aviation (hereafter the Chicago Convention) and the EUROCONTROL Convention explicitly confirm the complete and exclusive sovereignty of a state over its territorial airspace. That certainly includes the administration of justice. States are of course free to choose to delegate or pool certain sovereign functions, as is the case with European Union membership, but criminal jurisdiction, with only a few exceptions, generally remains firmly embedded at sovereign state level; the EU does not have competence in this domain at present.
- 2.5 The worries of aviation professionals and front-line operators, such as pilots and air traffic controllers, about the so-called "criminalisation" of aviation accidents or incidents illustrates the delicate relationship between the propagation of aviation safety and the administration of justice in the aviation domain. These are two distinct worlds that seldom meet. One is by nature international, dynamic and very sensitive to safety; the other is by nature national, resistant to progressive change and very sensitive to the rule of law. No wonder that their interaction, or perhaps the lack of it, generates difficult and often passionate discussions.
- 2.6 Accidents and serious incidents very often occur as the result of a series of events that, in an eerie and inevitable way, lead to disastrous results. When mistakes are involved they can often be labelled as "honest" mistakes that would not qualify as criminal behaviour. Controllers and pilots are professionals who are ready to recognise that nobody can claim criminal immunity in any civilised country. But it is equally true that a small, but highly visible, number of cases raise questions on the relevance and motives of some criminal prosecution and court cases.
- 2.7 And therein lies the root of the issue: Who will determine whether a mistake was made by a qualified professional acting in a responsible manner or whether this was a clear case of gross negligence, wilful misconduct or criminal intent, to use just a few of many legal terms for criminally reproachable behaviour. That cannot be the task of a chief pilot or a control room supervisor. Such a decision can only be made by a professional in the judiciary: a prosecutor and ultimately a court of law.

2.8 Terms such as "gross negligence", "wilful misconduct" and "criminal behaviour" that are used to indicate forms of criminally-relevant behaviour in policy documents, the description of the Just Culture concept or in non-criminal legislative texts of International or European law can obviously only be regarded as generic and colloquial descriptions of behaviour that can ultimately be deemed to be criminal under the applicable criminal national legislation of a state that has the jurisdiction to criminally adjudicate persons or entities.

2.9 The problem arises when faced with the consequences. If forms of behaviour related to aviation could be qualified as punishable criminal behaviour, it would be the responsibility of the criminal authorities that hold jurisdiction to determine and adjudicate such behaviour. The administration of criminal law is a complex and delicate process that should remain the exclusive domain of a prosecutor and ultimately a court of law.

2.10 The key is what happens next: A qualified criminal investigator or prosecutor must assess whether, under the applicable criminal law, the actions leading to the accident/incident warrant further steps (investigations, indictment). A number of high-profile accidents and serious incidents did result in criminal investigations and proceedings and have raised strong concerns from the ATC and air transport community about the criminalisation of aviation. However, that is not all. Events have shown that further complications could arise as a result of public and media pressures that generally accompany any crash or serious incident with the associated "search" for a guilty party.

2.11 The discussion concerning the criminalisation of aviation incidents and accidents reveals concerns about the perceived intrusion by the judiciary in the all-important efforts to enhance safety in aviation. It also shows a tendency to use "criminalisation" as the epitome of misdirected and unwarranted activities by the authorities and to argue that the safety domain should therefore be protected from any action by the prosecution.

2.12 The problem is that invoking real or alleged criminalisation of aviation incidents or accidents as a justification for fully protective legislative action does not really work. All the regional and global rules and standards related to the protection of safety data and investigative processes in aviation create an exception for the actions of a sovereign state in exercising the administration of justice. What is needed now is the establishment of equilibrium between two equally relevant goals: aviation safety and the administration of justice.

2.13 Rather than trying to exclude or bypass the judiciary, focus has now shifted towards initiating a dialogue between the national authorities concerned. A better understanding of the consequences of a judicial inquiry must be the starting point. In most states, national criminal legislation provides prosecutors with a level of discretion as to how to apply those laws; a clearer appreciation of the associated safety consequences may actually influence the application of those laws.

2.14 This is where the Just Culture initiative, as developed for aviation by EUROCONTROL, enters the equation:

"A Culture where front line operators 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"

Although it may sound rather negative, the strength of the Just Culture concept is the understanding that there is realistically no other way forward. Formal legislation fully protecting pilots or controllers or sidelining criminal prosecution is not an option as demonstrated by virtually all existing national, regional and international legislation.

- 2.15 Just Culture represents the fundamental recognition that both the aviation safety drive and the administration of justice will profit from a carefully-established equilibrium, moving away from fears of criminalisation. It is based on the understanding that controllers and pilots can make mistakes and that the line between an "honest mistake" and intentional or reckless behaviour can only be drawn by a member of the judiciary.
- 2.16 That may be easier said than done, of course. But the time has come to seriously query the added value of endless and generally unsuccessful efforts at international level to fully protect controllers and pilots against judicial actions by creating standards, regulations and laws that are supposed to shield them against judicial interference.
- 2.17 A balanced safety and judicial environment would provide a realistic expectation for a controller or a pilot, that the chances that he/she would be invited to be part of a prosecutorial investigation, let alone, a formal prosecution, are minimal, and should thereby create a sound and sustainable basis for continued incident reporting and accident investigation.

Improving aviation safety depends to a large extent on the feedback of knowledge generated by a system of accident/incident data collection and analysis. Incident reporting by pilots and controllers is vital for maintaining adequate safety levels in spite of a forecast twofold increase in air traffic worldwide. Reporting levels may suffer when reporters fear punishment for their 'honest mistakes'. Nobody should be immune from criminal prosecution. The administration of criminal law is a complex and delicate process that remains the exclusive domain of sovereign States. Only a prosecutor and ultimately a court of law should determine whether someone made an honest mistake or should be criminally liable. Just Culture represents the fundamental recognition that both the aviation safety drive and the administration of justice will profit from a carefully-established equilibrium, moving away from fears of criminalisation.

III. Just Culture in international organisations and states

- 3.1 In the ICAO, the discussions and findings of the 36th Assembly, the Accident Investigation Divisional meeting in 2008 and the recommendations of the ICAO High-Level Safety Conference in March 2010 resulted in resolutions A3 7-2 and A3 7-3 of the 37th General Assembly, held in September-October 2010, on the sharing of safety information and the protection of safety data. Both resolutions, using the description of the Just Culture concept, instructed the ICAO Council to strike a balance between the need for the protection of safety information and the need for the proper administration of justice.
- 3.2 The ICAO Assembly furthermore noted the need to take into account the necessary interaction between safety and judicial authorities in the context of an open reporting culture. The ICAO Safety and Information Protection Task Force (SIPTF) was created, *inter alia*, as a result of these conclusions which have, to a great extent, inspired its findings and recommendations.
- 3.3 Considerable progress has already been made in this domain through safety management and related practices and the new Annex 19 will certainly also play an important role in this area. It is important to note that these developments will also require the recognition and perhaps harmonisation of corporate Just Culture with the criminal law requirements and policies at state level.
- 3.4 The EU has not only formally enacted Just Culture as part of EU law by the introduction of Performance Regulation (EU) No 691/2010, but it has also recently introduced elements of it in Commission Regulation (EU) No 996/2010, governing air accident and incident investigation that also addresses the need to achieve a balance between the objectives of the judiciary to determine whether criminality was involved, and the need for the aviation industry to be able to run a real-time self-diagnostic system without unnecessary interference from justice.
- 3.5 EU Regulation 996/2010 stipulates that its purpose is dual: to regulate both "the investigation and prevention of accidents and incidents". It says: "An accident raises a number of different public interests such as the prevention of future accidents and the proper administration of justice. Those interests go beyond the individual interests of the parties involved and beyond the specific event. The right balance among all interests is necessary to guarantee the overall public interest."
- 3.6 At national state level, as discussed in the preceding paragraphs, another party that is highly relevant for the development and introduction of JC would be the national judiciary and in particular the Prosecutor's Offices of the European Member States. They form an essential condition for a focused and effective balance between the two key functions addressed by the Just Culture Concept.
- 3.7 At its 37th Session, on 10 May 2012, the members of the EUROCONTROL Provisional Council, 39 states and the EU, unanimously endorsed a "Model Policy regarding criminal investigation and prosecution of civil aviation incidents and accidents" that was developed by the EUROCONTROL Just Culture Task Force (JCTF) and based on existing Dutch and UK practice. This event introduces the possibility for states to implement a policy at national level which fully respects the sovereign administration of justice by a state in aviation cases, while at the same time recognising that prosecution should only be enacted in cases of gross negligence or wilful misconduct.
- 3.8 It should be noted that 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 in establishing a Just Culture for aviation, and key to the balanced involvement and support of judicial authorities.
- 3.9 The Model Policy 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.

3.10 In a similar vein, the proposals by the European Commission for a Regulation on Occurrence Reporting in Aviation, currently under discussion, will provide further rules and obligations for states and corporate entities involved in occurrence reporting while respecting state responsibilities related to the administration of justice in the aviation domain.

The 37th Assembly of the ICAO introduced a description of Just Culture in 2010 that is still under discussion. Just Culture has been enacted in the EU legal order by Commission Regulation No 691/2010 and Regulation 996/2010 of the European Parliament and of the Council. Both EUROCONTROL and the EU have unanimously endorsed a "Model for a national aviation prosecution policy" that limits prosecution to the equivalents under national law of "gross negligence" and "wilful misconduct". A proposal for a draft regulation on "Occurrence reporting in civil aviation" is currently under discussion in the Council and the European Parliament.

IV. Just Culture at corporate level

- 4.1 The provision of Air Traffic Services has traditionally been a part of the public domain. Under the aegis of Article 28 of the Chicago Convention, states accepted and exercised their sovereign responsibility for ATS provision and related functions over their sovereign territory. The services were organised by and embedded in the relevant civil service entities such as Ministries of Transport, Civil Aviation Authorities that formed part of the public function. The ATC function was often exercised in close liaison with, or even under the control of, the relevant defence or military authorities.
- 4.2 As a result of the introduction of the Single European Sky, the institutional future of ATM in Europe is currently under full discussion. The actual ATM developments raise numerous legal and institutional issues, fuelled in particular by the interaction between the role of the new players, such as supranational and intergovernmental organisations, Air Navigation Service (ANS) providers, airlines' organisations, and the traditional sovereign functions and responsibilities of the EU states and non-EU states that have committed to implementing the SES "acquis" into their national law.
- 4.3 The European ATM system will have to reconcile the aforementioned institutional changes with the demands of the corporatised or privatised ANS providers that will increasingly exercise their functions in specially designated functional blocks of airspace (FABs) that no longer depend on the delineation of their airspace by sovereign states. The system needs to absorb and allow the creation of private consortia of service providers that will operate in an increasingly competitive environment.
- 4.4 The vast majority of EU Member States have now corporatised and, in a number of cases, fully privatised their Air Navigation Service functions. What used to be activities performed by a directorate or another dedicated entity of a national Civil Aviation Authority or Ministry of Transport, have now, through appropriate new legislative mandates, become activities of dedicated entities established in most cases under national corporate or private law with employees who no longer have the status of civil servants, as they are employed under a national labour/corporate law regime. In most cases the corporate statutes envisaged shares or other means of control solely or for the most part in the hands of the state, but the financial and operational responsibilities for running an ANSP essentially became the responsibility of the CEO or institutions created by the corporate constitution.
- 4.5 This development, which is now more or less completed, was not restricted to the EU Member States. Of the 39 EUROCONTROL member states, only one or two are still exercising their responsibilities to provide, *inter alia*, ATM functions over their national airspace as a national departmental or CAA entity. A typical spin-off of this "privatisation wave" in ATM is CANSO, originally started as an organisation for commercial ANSPs and affiliates, which has been changed in the meantime to cater for all ANSPs at global level.
- 4.6 In the context of the application of Just Culture principles, the corporate activities related to incident reporting will include the handling of incident reports and mistakes by controllers and other ATM front line employees. Although in theory perhaps no difference should be made between civil servants and private employees, in practice, in a corporate environment with different rules regarding efficiency, obtaining performance-based goals and disciplinary or other sanctions a "corporate culture" exists that is very relevant for the application of Just Culture.
- 4.7 A similar process also took place in the air transport sector that was regulated and liberalised under the EU legislative system well before ATM in a gradual process that started in the mid- seventies. As a result, partly because of the European air transport liberalisation and the corporatisation of ANSPs and partly because of the implementation of a number of SES principles, the phenomenon of private stakeholders and their interests and their role and impact, in some cases through co-governance, in intergovernmental organisations such as EUROCONTROL has greatly increased.

4.8 In conjunction with the traditional EU social partners such as the ETF (and the different air transport interest organisations such as - but not limited to - IATA, EAA and ERA, CANSO and the European Cockpit Association (ECA) which is related to the International Federation of Airline Pilots' Associations (IFALPA), as well as IFATCA (International Federation of Air Traffic Controllers' Associations) the resulting input from non-governmental stakeholders in the JC debate amounts to about 10 partners. This number of course also includes another important player: the ACI (Airports Council International).

4.9 Stakeholders' expectations from an efficient Just Culture are, not surprisingly, directly related to their respective activities and interests. A good example is the "European Civil Aviation Social Partners' Charter for Continuous Improvement in Aviation Safety" that was established in March 2009. The Charter, consisting of two pages, was accompanied by a four-page "Company Guidelines on Just Culture", but the creators (ACI, AEA, CANSO, ECA, ERA and ETF) could only reach agreement on the Charter itself and the attached company guidelines do not form part of the commitment and are for information and guidance only. The IFATCA, which took part in the drafting, withdrew at the end of the process.

4.10 The above-mentioned Charter focuses on the need to protect safety data reporting in view of the fear of punishment by the reporter and the importance of improving safety over punishment of those who had no harmful intention. A number of its views and conclusions remain valid and could form part of the basis of an eventual JCC Charter.

Almost all EU and EUROCONTROL Member States have now corporatised and, in a number of cases, fully privatised their Air Navigation Service functions. Before that, since the mid-seventies, a similar process took place in the European Air Transport sector. As a result, an important group of European stakeholders, consisting of air transport, air traffic management and airport interest groups, pilots and air traffic controllers' organisations and EU transport sector social partners form an indispensable group of non-governmental stakeholders in the Just Culture domain. Most of them created a "Charter for Continuous Improvement in Aviation Safety", elements of which could contribute to a possible EESC Just Culture Charter.

V. Just Culture charter: concept, views and expectations

Concept

5.1 Just Culture is built around the recognition that the interests of safety should be balanced against those of the administration of justice. Full protection against criminal investigation for those involved in an occurrence that could be qualified as a (serious) incident or accident is not possible. That would be in conflict with the principle that nobody is above the law.

5.2 A study on the feasibility of an initiative to establish a Just Culture Charter must therefore address the effectiveness of the charter format and concept for attaining such a balance. That would also include the expectations of the different stakeholders and the representatives of the national judiciary and the possibilities and limitations of other legal instruments to implement and protect safety reporting.

5.3 The rationale for choosing the charter format for addressing Just Culture would be derived in no small part from the political and legal relevance of a charter and the provisions contained therein. The term "charter", taken alone, has no universal legal meaning. Not unlike the definition of contract in private law, the status of a charter is determined by the intentions of its drafters, signatories, and the commitments or obligations it describes. Additionally, the process of acceptance and the resulting consequences for contracting parties may also be determinative.

5.4 Within the common law tradition (though not limited strictly to these jurisdictions), a charter is an instrument whereby the sovereign (historically) or government of the state enshrines rights, powers, and liberties for its citizens. Similarly, charters can also grant authority from the state to corporations by describing the rights, liabilities and responsibilities within a system of self-government. At present, both in European and international legal orders, a wide array of charters exists that vary greatly according to subject, scope and legal standing. Alongside the ever-present Charter of the United Nations, the Charter of Fundamental Rights of the European Union, the ICAO Charter on the Rights and Obligations of States Relating to GNSS Services, and the Advertising Self-Regulations Charter, are all illustrative examples of this divergence; with each addressing a specific topic (EU rights, satellite services, advertising) and pertaining to different actors (EU institutions, ICAO member states, the advertising industry).

5.5 Some of these instruments effectively have the legal status of a full-blown instrument of international legislation with all associated rights and obligations, while at the other end of the spectrum, a charter may have the status of a document containing a number of guiding principles or common values with no explicit commitments or expectations for the parties or signatories.

5.6 The effective establishment and implementation of Just Culture in the aviation domain by means of a Charter will depend on several factors such as the detail and ambition of its contents, the support and commitment it receives from stakeholders and other relevant parties and the possibilities of ensuring continued political ownership and content management after its establishment. It should also be noted that a Just Culture Charter would necessarily interact with other instruments that address JC-related issues.

Views and expectations

5.7 In the discussions with the stakeholders and other parties, there was general support for the EESC initiative. A number of the interviewees indicated that their views and positions were not necessarily final and could further evolve, *inter alia*, in view of related legislative processes and their participation or involvement in deciding to establish the JCC.

5.8 A frequently-expressed view among stakeholders and other parties was that an EESC JC Charter should offer more than just another document describing the views and positions of the parties involved in a non-committal manner. It should contain clear and transparent commitments, signed off by the owners/stakeholders and would be a living document with clear provisions on updating and reporting on relevant developments.

5.9 There was also recognition of the desirability of providing a clear description and, where necessary, a common interpretation of the JC concept. The JC Charter should be built where possible on the precedent set by the March 2009 'Industry Charter' (and the associated company guidelines where appropriate). The EESC JC Charter should also reflect the current tendency to move away from a "non-punitive" approach and recognise the principle that nobody should *a priori* be immune from criminal prosecution, but that actions, omissions or decisions taken by them that are commensurate with their experience and training should not be prosecuted.

5.10 The following relevant elements and issues were further identified:

- In order to facilitate the interpretation of established policies and commitments at national as well as at corporate level, the Charter should provide an adequate description of actions, inaction or other behaviour that is deemed unacceptable in a corporate environment as well as in the context of the administration of justice. The need to reconcile the criminal norms with those applicable under corporate or other applicable civil law was also identified.
- The JC Charter should provide a comprehensive overview of both applicable law as well as registered commitments, policies and positions from stakeholders, authorities and other organisations; it was suggested that the JC Charter could be managed by a sufficiently independent and experienced entity, perhaps under the political supervision of an established European institution.
- The study should ideally make an assessment and gain an understanding of the application of a Just Culture across EU states at both the state and corporate levels. This is important in understanding realistically what task lies ahead in achieving a common application of Just Culture Europe-wide. It will also permit the Charter, if adopted, to provide examples of reasonable and attainable objectives for states/organisations that are currently not adopting a Just Culture.
- The Charter should make it clear that whilst Just Culture gives protection to the individual for an error/omission in terms of sanction, it cannot interfere with an assessment of the competency of the individual to undertake the role. Any Just Culture must run alongside a performance management programme.
- Support for an added value charter based on a JC concept that is generally accepted by stakeholders. It should be a living document with a built-in concern for updating the different elements; in particular regarding applicable legal norms and suitable commitments. It should be based on common expectations related to a realistic and practical document with the necessary political support.
- Need for providing unambiguous rules for operators and service providers, in particular smaller ones that could be invoked in the event of misuse of powers. Need for reconciling the demand for clear and agreed descriptions of unacceptable behaviour at corporate level with the

need for essentially using the same rule for the judicial authorities and in particular the state prosecutors.

- Applicability of a Just Culture: Most people interpret Just Culture being applied to the individual that made the mistake. Should the charter and the study look at the application of JC beyond those people who made the error? For example, management activities, regulator activity or indeed labour organisations. This also raises the issue of corporate criminal liability - the so- called "corporate manslaughter" concept.
- National prosecutors should be open to dialogue based on the mutual recognition that both safety and administration of justice will profit from a better understanding of the tasks and responsibilities associated with both domains. Availability of neutral high-level air transport and ATM expertise would certainly be helpful.
- The colloquial use of criminal law concepts such as "gross negligence" and "wilful misconduct" cannot replace the specific description of these forms of criminally reproachable behaviour in the applicable national criminal and procedural criminal law. Prosecutorial and possible court actions can only be based on criminal acts defined under national law. It is recognised that effectively the vast majority of these nationally-defined acts may well describe the same type of behaviour. The existence of a basically "level playing field" for criminally reproachable behaviour could form the basis for national prosecution policies or commitments for aviation.
- Important to address the role and functions of the national prosecution offices in the context of enhancing aviation safety by recognising their role and responsibilities related to aviation incident reporting. There are already examples of national aviation prosecution policies that fully recognise the sovereign function of the criminal judiciary.

There was general support for the initiative for a EESC Just Culture Charter. The JC Charter should contain clear and transparent commitments signed off by the owners/stakeholders and should be a living document with clear provisions on updating and reporting on relevant developments as well as managing the Charter documentation. Important to clearly indicate which (groups of) stakeholders should, as a minimum, be associated with the JCC and to establish "political ownership" of the JCC. Need to address the corporate level "equivalent" of sanctioning behaviour that cannot be tolerated at corporate or government level air transport or ANSP entities and to avoid different rules applied under e.g. civil labour or corporate law with those used in criminal judiciary processes. How to reconcile the demand for agreed descriptions of unacceptable behaviour at corporate level with applicable criminal norms for the judicial authorities.

VI. Just Culture charter: content, format, resources

6.1 Having addressed the key concepts and the rationale for having a charter focused on Just Culture above, focus will now turn to the specifics of such a document. By and large, it should amount to a transparent and accessible collection of applicable legislation, agreed descriptions and definitions, a number of signed-off or otherwise validated policies, commitments or other relevant statements in a format that reflects the intentions of the initiators, and subscribers to the document. These may be new or, as appropriate, may be based on existing precedents and content, within a sufficiently descriptive and logical template.

Annex I, attached to this document, provides a possible outline or model for further discussion and refinement.

6.2 The basic elements of the Just Culture Charter content can be described as follows:

1. From the outset, it is important that the charter has an institutional or political 'owner' and provides for a delegated hands-on management responsibility. Political or institutional ownership of the Charter is important for the purpose of maintaining its standing and ensuring that its contents are deemed authoritative at European and perhaps even international level. On a more practical level, a clear responsibility for the management of the Charter ensures that the necessary updates and modifications are carried out as required over time;
2. Secondly, the document should list all applicable international (ICAO-based), European and national legislations and regulations related to accident and incident investigation, collection and protection of safety data, occurrence reporting and safety management and other Just Culture-related rules and regulations - all duly updated;
3. Next, an agreed set of definitions, descriptions and formulated objectives that are relevant to Just Culture that are accepted by the signatories should be included;
4. Finally and perhaps most importantly, the charter should set out clearly the political, corporate, judiciary commitments for achieving a Just Culture, based on the expectations of the charter's signatories and relevant EESC stakeholders. In addition, it must pave the way for a periodical assessment of these commitments and their realisation using the means and resources available. (Where appropriate, the full content of individual commitments and policies will annexed to any Charter document)

6.3 With regards to format, a design based on existing precedents provides a useful point of departure, such as "The European Civil Aviation Social Partners' Charter for Continuous Improvement in Aviation Safety". In this layout, the charter is formulated according to an agreement-template that is split into several different sections. If the four-pillared structure provided above were to be maintained, the document could be divided into separate sections of preamble clauses, operative articles on applicable legislation, a list of agreed concepts/definitions, and the substantive commitments/deliverables of the charter's signatories.

6.4 In addition to these basic elements, some secondary provisions also warrant inclusion, such as clauses on the charter's upgrade or renewal, the management of monitoring or accompanying administration, and the possibility for third parties to sign up to the charter at a later stage. With a logical structure that demarcates each sub-section clearly while formulating concepts and obligations clearly, the overall length of the document would not need to exceed three pages. In this respect, finding agreement on a concise and readable overview of Just Culture specifics that is free of unnecessary content would be ideal.

6.5 The resources required for drafting and maintaining the charter as described above, *inter alia*, depend in large part on the services of a central coordinator and the related issues such as a dedicated website. These are obviously issues for future discussion when a decision has been taken on the future of a Just Culture Charter.

A Just Culture *Charter* document should consist of a transparent and accessible collection of applicable legislation, agreed descriptions and definitions, together with the policies or commitments that reflect the objectives of the initiators and subscribers in achieving a Just Culture. In addition, it is important that the charter has an institutional or political 'owner' and provides for a delegated hands-on management responsibility. For a first draft template of the charter, see Annex I.

VII.SWOT analysis

NOTE: This SWOT analysis, as presented here, is intended as a first example for further discussion and improvement by the appropriate EESC bodies

EESC JUST CULTURE CHARTER	
<p>STRENGTHS</p> <ul style="list-style-type: none"> • Transparent and flexible "living document" • Effective - no additional legal action required • Applicable at pan-European level • Addresses corporate and national level • Addresses criminalisation issues <ul style="list-style-type: none"> • Fully aligned with relevant EU legislation • JC enacted in EU Legal Order • Fully respects national judiciary function • Interaction with national judiciary 	<p>WEAKNESSES</p> <ul style="list-style-type: none"> • Commitments with limited enforcement possibilities • Common understanding of and commitment to JC concept required • Requires active proliferation and update • Need for continued political support and commitment at EESC level • JC is based on a mutually accepted balance of interests; no unilateral demands only • Interaction with national judiciary
<p>OPPORTUNITIES</p> <ul style="list-style-type: none"> • Timely European initiative <ul style="list-style-type: none"> • Directly applicable at national/regional/global/ICAO level • Global discussion in the ICAO through SIPTF has started • JC is currently an issue also at international level 	<p>THREATS</p> <ul style="list-style-type: none"> • Safety lobby - criminalisation • Just Culture is not yet universally accepted • Need for ongoing and unified European support at international level • Need to take advantage of current interest in and discussions on JC

7.1 A **SWOT** analysis as depicted above is a popular tool for addressing **Strengths**, **Weaknesses**, **Opportunities** and **Threats** for an organisation or project. It involves specifying the objective of the project and identifying the internal and external factors that are favourable and unfavourable to achieving that objective. Both upper quadrants address potential strengths and weaknesses related to the internal environment and address factors that tend to be in the present; both lower quadrants address potential opportunities and threats related to the external environment and address factors that tend to be in the future.

7.2 1st Upper left quadrant: **Strengths**

Form and format of the JCC are flexible, directly accessible and relatively easy to change and update; it is essentially a repository of the way in which different entities interact in the JC domain. It is partly descriptive (existing legislation and JC definition) and partly prescriptive (signed-off national policies and corporate commitments). It can be applied at the pan-European level insofar as it addresses the applicable law and existing national policies and corporate commitments in that area. The fact that the Just Culture definition is now part of the EU legal order greatly enhances the general acceptance of the JC concept. As the JCC by definition also addresses the national judiciary function, it will contribute - in particular through the introduction of national aviation prosecution policies - to alleviating fears of "criminalisation" in aviation.

7.3 2nd Upper right quadrant: **Weaknesses**

Commitments and policies are often unilateral commitments that can be changed by the owner of the process they address. While a policy or commitment that is publicly signed off by the owner of the process may generally create reliance and even a legitimate expectation for the duration, it does not have the force of a rule or a contract and it can be unilaterally changed or withdrawn. The Just Culture concept has now been generally introduced in Europe but not necessarily commonly understood and interpreted. Globally, the process is also ongoing but certainly not yet completed. The proliferation of JC therefore requires active support and an effective JCC will require political support and dedicated management. Interaction with the national judiciary has also been inserted in this quadrant as it denotes a sovereign and independent national function that may sometimes be difficult to approach. Finally JC in essence requires the two directly involved parties - aviation safety and the judiciary - to find a balance and that is often a delicate process.

7.4 3rd Lower left quadrant: **Opportunities**

A number of the strengths in the internal process retain their relevance in interacting in a global environment: the Charter model can be globally applied at different levels and the discussion in the ICAO has already started through the ICAO SIPTF. The notion of Just Culture is now under discussion in Europe, the ICAO and in parts of South America and Asia. That is a promising development for further proliferation.

7.5 4th lower right quadrant: **Threats**

In states and organisations that are not yet familiar with the JC principles there is still a strong "Safety Lobby" that essentially warns against "criminalisation" as the personification of misdirected and unwanted actions by the criminal judiciary. JC is believed to facilitate or condone such behaviour.

Finally, it is important to take advantage of the current general interest in Just Culture that may eventually diminish.

VIII. Concluding observations and findings

Concluding observations

- 8.1 At ICAO and European Union level all initiatives to establish formal legal boundaries between accident or incident reporting and the administration of justice, recognise the principle that nobody should be immune from criminal investigation and possible sanctions. Therefore, exceptions have consistently been introduced in relation to the sovereign national functions connected with the administration of Justice. That does not mean that legislation that seeks to protect occurrence data reporting is not possible. But it does provide an indication of the limits for protecting one activity without harming the other.
- 8.2 The Just Culture approach respects those limits and explores the - promising - solutions of educating both camps and building trust and understanding as regards exercising their tasks in recognition of their mutual responsibilities. There may be different ways and means in which Just Culture could be addressed and implemented. But there is no clear alternative to the adoption of a Just Culture.
- 8.3 Just Culture is a potentially complicated concept. It requires understanding of the different processes and commitments by both safety experts and the judiciary. Just Culture is not a "magic wand" for combating injustice or fear of misuse of the judiciary and corporate processes. It has been introduced to protect, as much as possible, the mundane but extremely important ongoing processes of incident or occurrence reporting: literally thousands of daily events that feed into the well-established system of using the reports for the improvement of safety and the prevention of incidents and accidents.
- 8.4 Just Culture is an ongoing daily routine, certainly not as spectacular and awesome as the aftermath of an accident, but absolutely vital for the continued effort to improve safety by learning from mistakes and other relevant occurrences. And let there be no mistake, Just Culture also implies that misuse of criminal processes or ignorance on the part of the judiciary is equally unacceptable. Focus has to remain on the pursuit of the practical goals identified by the Just Culture concept and on the generally-accepted deliveries such as the proliferation of a model aviation prosecution policy and the organisation of prosecutor expert courses.
- 8.5 The study also shows that the application of Just Culture at corporate level and at national level in relation to the function of the criminal judiciary requires further attention. The issue was raised by several stakeholder organisations and currently also plays an important role in the ongoing discussions on the proposal for a Regulation of the European Parliament and of the Council on occurrence reporting in civil aviation.
- 8.6 In view of the above, a possible EESC initiative for the establishment of a Just Culture Charter would be appropriate and timely. It would have to be further developed and this study contains a number of suggestions to that effect. It could also be building on elements of the 2009 "The European Civil Aviation Social Partners' Charter for Continuous Improvement in Aviation Safety."
- 8.7 The attached outline for a possible EESC Just Culture Charter provides a template of a Just Culture Charter document and the different parts thereof, containing the key elements for a realistic and efficient instrument providing a comprehensive picture of applicable law and policies and commitments that are signed off by their respective owners for their duration.

Findings

- I. Some issues and conditions related to an open reporting system for aviation cannot be adequately resolved through formal legislation;
- II. The introduction of Just Culture provides for the establishment of a balanced recognition and application of safety and judiciary requirements/demands;
- III. A Just Culture Charter could be the instrument for providing a comprehensive repository for all relevant legislation, corporate and judiciary commitments or policies relevant to the establishment of an open safety culture in aviation;
- IV. A Just Culture Charter should at least comply with the following conditions:
 1. Clear ownership and management
 2. Comprehensive, accessible and regularly updated
 3. Listing of applicable law and of applicable policies and commitments that are signed off by their respective owners for their duration
 4. Provisions on amendment, extension and, where appropriate, implementation.
 5. Available through e-media

ATTACHMENT

**INFORMAL BLUEPRINT OF POSSIBLE PROVISIONS FOR A JUST CULTURE
CHARTER**

NB This document is for information and discussion purposes only

Part I Preamble

The signatories to this Just Culture Charter, representing

Considering that ...[the aim of Just Culture is to achieve a greaterbetween members, particularly for the purpose of safeguarding and realising];

Considering that[aviation safety depends to a larger extent on the feedback of knowledge generated by an incident reporting system for data collection and analysis];

Considering that. [the administration of justice represents a national constitutional function and that nobody should be immune from criminal prosecution];

Considering that . [trust between states, aviation and ATM stakeholders, social partners and the national judiciary is fundamental at all levels to ensure a strong reporting culture];

Having regard to [the work carried out within the EESC and in particular to the initiative taken to establish a Just Culture Charter];

Having regard to..... [the limits imposed in the aviation domain between mandatory legislation and the need to respect the administration of justice]

Noting the..... [Unanimous endorsement by Eurocontrol and the EU States of a model for a national aviation prosecution policy that fully respects the sovereignty and independence of a national prosecution office]

Noting the ..[positive experiences with the introduction of such an aviation prosecution policy by a number of national judiciaries in Europe]

Part II - General provisions

Article 1[Definitions/Descriptions]

For the purposes of this Charter:

b.

c.

Article 2 - Undertakings

[All signatories agree to progress the aims and provisions of this Charter with the urgency required via an initiative which is designed to contribute to prevent accidents and other incidents in the application of the principles of Just Culture.

Signatories shall, at the moment of signature, deposit a copy of their commitment, policies, or other duly formulated undertakings with the entity designated for the maintenance, administration and general management of this charter and related events or activities]

Article 3 - Applicable legislation

[This charter shall contain an overview of applicable legislation and other relevant texts related to for information purposes

Article 4 - Existing obligations

[Nothing in this Charter shall be construed as limiting or derogating from any of the rights and obligation related to.....].

Article 5 - Information

[The Parties undertake to see to it that the authorities, organisations and persons concerned are informed of the policies, commitments and undertakings established through this Charter].

Part III - Objectives and principles pursued

[Article 6. The Parties shall base their policies, commitments and practices on a common understanding following objectives and descriptions:

- Flying is one of Europe's safest forms of transport. Our common objective is to make it safer, even as traffic continues to grow. Any improvement in safety will reduce accidents and other incidents, save lives and reduce injuries.
- An important way to understand where safety weaknesses exist in the air transport system is through increasing the reporting of events that affected safety by the individuals involved in the event, and by ensuring widespread use of this information.
- Just Culture means 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.
- Just Culture represents the recognition that both the aviation safety drive and the administration of justice will benefit from the right balance, moving away from fears of criminalisation.
- Equally, at corporate level, pilots, controllers and other front-line operators should not be disciplined for honest mistakes.

Article 7 The Parties undertake to promote, by appropriate measures, mutual understanding and encouragement of.....to pursue the same objective.]

Part IV - Measures to promote the goals of the Charter and the communication between parties

[.....

Article 8 - Judicial authorities and other stakeholders

Article 9 - Administrative authorities and public services

Article 10 - Media]

Part V - Application and operation of the Charter

Periodical reports

[Article 11 Theshall present periodically to the Presidency of the EESC, a report onin accordance with this Charter and on the measures taken in application of those provisions which they have accepted. The first report shall be presented within the year following the signing of the Charter with respect to the parties concerned, the other reports at three-yearly intervals after the first report.

Article 12 The parties shall make their reports public.

Article 13 Examination of the reports]

Part VI - Final provisions

[Article 14 Signature

This Charter shall be open to signature by It shall be deposited with the President of the EESC.

Article 15 Entry into effect

1. This Charter shall become effective after the date on which.....have expressed their commitments in accordance with the provisions of Article..

2. In respect of any Party which subsequently expresses a commitment, the Charter shall become effective after the date of the signature of that party in accordance with the applicable provisions

3. Any Party may at any time denounce this Charter by means of a notification addressed to the

4. Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the

5. The shall notify the member states of the Council and any state which has acceded to this Charter of:

- a. any signature;
- b. any notification received
- c. any other act, notification or communication relating to this Charter.]

[Other provisions]

[In witness whereof the undersigned, being duly authorised thereto, have signed this Charter.

Done at]



European Economic and Social Committee

Rue Belliard/Belliardstraat 99
1040 Bruxelles/Brussel
BELGIQUE/BELGIË

Published by: "Visits and Publications" Unit
EESC-2013-87-EN

www.eesc.europa.eu

EN

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QE-02-13-501-EN-C
978-92-830-2207-7



doi:10.2864/33316