

## **THE SAFETY INVESTIGATION AND THE INVESTIGATION OF THE JUDICIAL AUTHORITIES: AN INSUPPRESSIBLE *CONTRADICTION IN ADIECTO?***

*Really modest speech about the difficulty to balance the needs of prevention and those of justice, in the field of aeronautical investigations (in my opinion, as I will now try to explain, an impossible reconciliation of the two antagonists).*

### **1. The importance of the article 12 of the EU Regulation n. 996/10**

Today it is not possible for anyone to really question the general application, the immediate mandatory application in all its elements, and the direct applicability in each Member State of the norms contained in a EU Regulation.

Nor would it be profitable to deny the impact that in the field, which is the object of this analysis, has already been exercised by the Italian *Circolari Ministeriali* which in (2008, 2010, and 2013) followed the safety recommendations issued by the ANSV.

A direction of the investigation activities that would not take into account the necessary coordination with the investigators of the Italian safety investigation authority (ANSV, which means: prof Bruno Franchi), that would not dispose for the autopsy on the corpse of the deceased people, that would not permit the conservation and extension of the control chain upon on all of the real evidence of the air disaster (that are normally immediately subjected to seizure during the course of the investigations) that is, again, in favour of the technicians of the National Permanent Investigative Authority, would in fact be the result of an intolerable blind and backward attitude (and also, very probably, immediately relevant for disciplinary purposes, pursuant to article 124 of the Italian penal Code of Procedure).

Indeed, it is undoubtable that in order to face the primary legislation, nowadays, it is disciplined that the investigators in charge of the safety investigation can access the site where the accident has taken place, collect evidence, examine the data contained in the flight recorders and the outcome of the death-damage assessment as well as to convene and hear witnesses (see art. 11 UE reg. 996/10).

As far as the event itself is concerned, even if it is possible that in Italy also a *serious incident* can, in abstract terms, give rise to a criminal proceeding (*sub* art. 428, 449 c.p., and *sub* artt. 1123 e 1124 cod. nav.), in practical terms this situation would not cause major problems, neither of coordination nor of overlapping between the different investigations.

Differently, it is undeniable that on the crime scene of any air disaster (*accident* ex art. 2 UE reg 996), from the first inspection and the most prompt investigation activities directly coordinated by the Public Prosecutor, it is easy to imagine how other disasters can easily follow the first. Of course we are talking about different kinds of disasters but these would have heavy and unavoidable repercussions both on the quality of the criminal investigation and of the safety investigation, and also on the relationship between the Procura della Repubblica (Prosecutor's office) that has jurisdiction on the case and the Italian Safety Investigation Authority (ANSV).

Moreover, article 12 of the EU regulation explicitly imposes that the investigator in charge of the safety investigation be informed of the existence of any *possible* (we can almost say, in a friendly polemic) parallel investigation, with the optional power (*again*, be it clear is meant as a friendly provocation) of the Judicial Authority to appoint an officer who would “accompany” the findings and the flight recorders (it is hoped, in order to become acquainted with the findings).

In the event of destructive investigations (i.e. in the everyday judiciary language of the Public Prosecutor, “non-repeatable”) then, we are before the real paradox:

The “**prior agreement**” of the Judicial Authorities is necessary, in theory, but after a maximum of a two week waiting period the safety investigator could proceed on his own initiative with the analysis and destroy the evidence. In light of this, the “*no obstacles*” of the Judicial Authorities operates, technically, almost as a silent assent or, even worse, as a possible opinion.

It seems therefore that the mandatory conducting of a criminal prosecution, at least in Italy, represents only an ancillary, protracted process, which is merely possible and, I am sorry to say, subordinated to the safety investigation and to its investigative needs.

## 2. The protection of the *sensitive informations*

In the same direction, i.e. on the protection of the so defined *sensitive information* (always, for its aim and object, in the “safety field”) moves article 14 of the EU Regulation 996/10:

Of primary and exclusive interest is the fact that evidence of primary importance like witness statements, documents and expert opinions be used for the safety investigations, and that, moreover, all the recordings and transcriptions of communication between the people involved in the use of the aircraft cannot acquire an evidential qualification other than that of the “*improvement of air safety*”.

The law hereby examined covers the substance of the related article 13 of the ICAO Convention (provision 5.12) of Chicago, and also in the first paragraph (in the annex this was said in a sole proposition) it repeats the fundamental concept of the possibility of an exceptional discovery of flight communication (FDR, CVR, *etc.*) upon the positive outcome of a cost-benefit analysis between the advantages deriving from the disclosure (as numerator) and its negative impact on the safety investigation (as denominator).

Unfortunately article 111 c.3 of the Italian Constitution (it goes without saying, as imposed by the European Convention on Human Rights) requires that the suspected person be made aware of the grounds of the allegations against him and be made able to prepare his defence.

To summarise, currently, also after a very fast and superficial analysis of the multiple problems related to the transposition of community legislation in the aeronautical safety investigations field, it is very easy to imagine a plethora of ruinous situations in which the Public Prosecutor could potentially immediately come across with consequent and irreparable harm to a criminal investigation activated following a civil air disaster.

If we simply consider, without any claim to exhaustiveness, the potential harm deriving from the lack of an opportunity to guarantee a valid adversarial procedure in a technical appraisal pursuant to article 360 of the Italian penal code of procedural law, or from the failure to access the data contained in the “cockpit voice recorder”, to the high possibility of suborning witnesses, to the risks deriving from early examinations and sudden requests for clarifications from the safety investigator of the ANSV.

It is useless then to underline the profound, irremediable and irreparable as well as the incompatibility of any gathering of information effected for any purpose of prevention with reference to the guarantees against self-incrimination from which derives the model for the examination of the person informed of the facts set out by article 63 a subsequent of the Italian Code of penal Procedure.

### 3. The balance between “prevention” and “punishment”

Well then, in this situation, even after the adoption of the framework agreement as of article 12 paragraph 3 Reg. UE 996/10, I believe, as anticipated, that it is absolutely useless, not profitable nor far-sighted, to stress the tension between the national civil aviation authority and the judiciary system (intended, of course, at an institutional level, as the prosecutor office) and persevere in the highlighting the potential conflicts and the numerous asymmetries of the system.

In this sense, I think it is, after all, not profitable to recall and underline that the same Community regulation, in the prevision of any potential conflict, provides expressed safeguard clauses for the operativeness of the related systems that are constituted by the national law : see, specifically the opening words of paragraph 2 of article 11, in the area of secrecy, and the expression “**without prejudice to national law**” contained in the first paragraph of article 12, with reference to the non-repeatable technical verifications.

Rather, I would like to simply and exclusively attempt a final effort at a synthesis, “philosophical” I would say, that reflects, at the same time, the merits and the limitations of both profiles, which are inherently irreconcilable, of the two different types of investigation (criminal, and for safety purposes).

At a closer look, it comes down to following the footsteps of the already examined considerando n. 23 of the community regulation, which says that:

**“an accident raises a number of different public interests, such as the prevention of future accidents and the proper administration of justice. These interests go beyond the individual interests of the parties involved and beyond the specific event. The right balance among all the interests is necessary to guarantee the overall public interest”.**

So, let’s define and categorise these interests whose balance is crucial for public interest.

On the one hand we have the necessities of the “good administration of the system of justice”, with its already described and already known characteristics.

The prosecution is **compulsory**, and, we can say that the basic concept is an immanent representation of the State (where the Public prosecutor first and the Judge later, represent the interest of the State) which is **aimed to allocate responsibilities to individuals** and (in Italy, since 2001) entities.

This is done in **absolute secrecy** first (during the preliminary investigations where the manager of the case is the public prosecutor), and with the **discovery of the documents as a guarantee for the accused person** later, pursuant to precise timings conditioned by – among other things – decisions taken by the latter at his/her sole discretion.

Subsequently, the match between the State and the accused person follows its own rules, whose underlying logic is, in the end, the **punishment**.

The penalties applied at the end of the encounter are necessarily interdictory or, involving however, in a broad sense, a *capitis deminutio*.

In short, the good administration of justice complies with the rules of a model characterised, more or less, by a **pure deontology**.

and, I think we can rely upon the *following* definition of this concept: **“deontology” is the “typical scope of the deontological ethics, namely of the moral principles that prescribe the unconditional respect of certain principles and duties, regardless the consideration of their consequences”**.

Historically, a typical example of a deontological ethic is the Kantian ethic, which is translated in models which prescribe the duty to seek out a moral good upstream of the human action.

What can we say, instead, of the model which lies on the other side of the field, that is the spirit that animates and presides the so called **safety investigation**?

Here the underlying logic is in blatant opposition.

Here, ultimate aim is, expressly, **“prevention”** (considerando 23), the objective is the so-called **“just culture”**.

A concept –the latter – already formalised by the ICAO and transposed identically both by the Community secondary legislation (specifically, in the European Commission Regulation no. 691/10) and by Eurocontrol (the European Organisation for the Safety of Air Navigation) in the precise terms indicated below:

“a culture in which the front-line workers or others are not punished for actions, omissions or decisions adopted by themselves that are proportional to their experience and training, but in which gross negligence, willful misconduct and any intentional infringement are not tolerated”.

Very simply, according to the just culture dictates, hence, **in a logic of pure prevention**, the possibility of a criminalization of a human error (where criminalisation must be interpreted in a broader way, i.e. as indicating the investigation, the trial and the penalty) is accepted and provided for, only if and to the extent that it remains confined to the cases of **gross negligence** or **willful misconduct**.

Differently, the claim to allocate blame and liability on different grounds (i.e. behaviours that are intrinsically and, in any case, never more than negligent) in order to consequently inflict punishments or penalties or, however, to draw consequences that are detrimental to the *status* of the people held liable, would inevitably conflict with the necessity that the investigation on the reasons of an air disaster be exclusively aimed at “creating safety” for the future.

In other words, to “prevent” other mistakes, new dangerous behaviours and further disasters

What are, then, the internal rules of this paradigm of investigation?

Well, precisely those deriving from The EU Regulation no. 996/2010 and transposed today, by virtue of the principle of supremacy of EU law, in our criminal procedural system as a foreign body:

Firstly, an **unconditional access to all the evidence** is recognised to the investigator, who is obliged to use the evidence only for prevention purposes aimed, ultimately, at improving air safety.

There is no secret then, in this investigation, for the safety of the inquisitor and there is as well no protection for the people involved (and of the declaring person, in particular, as stated above).

This is due to the fact that no process and, ultimately, no infliction of penalty, will follow from the investigation activities.

There will only be, at the end of a *root cause analysis* performed on the basis of the data acquired, the development of new models of conduct (a deontic logic, therefore, without this involving any kind of “judgment”), models that may be alternative to those vitiated by the failures or by the mistakes that have led to the disaster.

Underlying logic, in one word, the general **prevention**.

Hence, we can conclude that the public interest represented by the “prevention of future accidents” fully responds to the postulates of the so-called “**consequentialism**”, i.e. the typical subject of the teleological ethics, “i.e. *the moral science which evaluates and prescribes the actions in light of their results*”.

Undisputable champion of the consequentialist paradigm, I remind myself, is **utilitarianism** (from Epicurus, Bentham and Stuart Mill and, more recently, with very interesting implications in the field of the Philosophy of law, to Hare) in any and all of its possible versions, but always attributable to and referable to valiant attempts to transform ethics in a positive science of the human conduct regardless of any claim to the universalization of the moral judgment and taking into account, vice-versa and exclusively, the consequences and the final effects in the system.

This is not to say that there is no concept of rule, of “norm” in the conceptual world of the consequentialist ethic and, in particular, in utilitarianism: “an action is good or bad if it complies with the rule” but, “a rule is good or bad, respectively, if it contributes or not to the common good” (HARSANYI, the famous utilitarian and economist);

now, in order to conclude our analysis:

from the **principle of liability** (criminal investigation) to the **principle of precaution** (safety investigation: see, at the level of EU primary legislation, article 191 par. 2 TFUE) **from the deontologism to the consequentialism**, from the police authorities delegated by the Public Prosecutor, to the inspectors in charge of the safety investigation sent by the national safety investigation authority.

In short, as promised, an irreconcilable contradiction, an impossible conciliation of the opposed views, a cultural disruption with very deep ideological and philosophical roots.

And so, in the meantime (and even after the right implementation of the preliminary arrangement: *see annex*) we have no choice but to proceed in compliance with the principle of sincere cooperation (always) keeping in mind the unforgettable Albert Einstein’s motto: “we are all ignorant, but not all ignorant of the same things”.

Giovanni Battista Ferro, Italian Public Prosecutor