

This is an English informal translation of the original document prepared by the Eurocontrol Just Culture Task Force.

Instruction with regard to criminal investigation and prosecution of civil aviation occurrences

Legal character: Instructions within the meaning of Article 130.6 of the Judiciary Organisation Act

From: Board of Prosecutors General

To: Heads of the departments of the Public Prosecution Service

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Lapsed: Instruction with regard to criminal investigation and prosecution in case of reporting of civil aviation occurrences (2006A015)

Relevant Public Prosecutor's Office policy rules: Directive on criminal proceedings in aviation legislation (2018R011)

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

Annex(es): –

SUMMARY

This instruction contains rules for the criminal investigation and prosecution of criminal offences in the event of a civil aviation occurrence.

1. BACKGROUND

EU Regulation 376/2014 is applicable with effect from 15 November 2015.¹ The purpose of this Regulation is to improve aviation safety by ensuring that relevant safety information relating to civil aviation is reported, collected, stored, protected, exchanged, disseminated and analysed. The Regulation replaces Directive 2003/42/EC on occurrence reporting in civil aviation. The Regulation largely has direct effect and has been further implemented in national laws and regulations. The new regulation has been incorporated in this instruction. Specifically, this means that, unlike in the past, the instruction applies to the entire aviation sector, is based on a broader reporting obligation (which now also includes accidents and serious incidents), and thereby brings the level of protection in line with this obligation and further increases it by also protecting voluntary reports made in accordance with the Regulation. The opportunity has been taken to clarify the conditions for indemnity under criminal law. In essence, however, this has not changed the prosecution policy of the Public Prosecution Service.

¹ Regulation (EU) No 376/2014 of the European Parliament and of the Council of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation, amending Regulation (EU) No 996/2010 of the European Parliament and of the Council and repealing Directive 2003/42/EC of the European Parliament and of the Council and Commission Regulations (EC) No 1321/2007 and (EC) No 1330/2007, OJEC 2014 L, 122/18.

2. LEGAL FRAMEWORK

2.1 Purpose: Occurrence reporting

The Regulation seeks to ensure that front-line aviation professionals and other persons working or involved in aviation report occurrences which pose a significant risk to aviation safety, so that appropriate safety measures can be taken on the basis of the information collected. A "just culture" is prescribed, which encourages individuals to report occurrences without exempting them from their normal responsibilities.² The purpose of the Regulation is to increase the willingness to report by requiring Member States, amongst others, to exempt, reporters of and persons mentioned in occurrence reports from civil or administrative sanctions, under certain conditions.

The Regulation defines an occurrence as "any safety-related event which endangers or which, if not corrected or addressed, could endanger an aircraft, its occupants or any other person and includes in particular an accident or serious incident".³

The Regulation stipulates an obligation for certain categories of natural persons to report an occurrence, and provides that non-designated persons may voluntarily report details of occurrences and other safety-related information not covered by the mandatory reporting requirement.

2.2 Indemnity

The Regulation provides that Member States will not institute civil or administrative proceedings in respect of unpremeditated or inadvertent infringements of the law which come to their attention only because they have been reported mandatorily or voluntarily in accordance with the Regulation. This protection does not apply where there has been "wilful misconduct" or "a manifest, severe and serious disregard of an obvious risk and profound failure of professional responsibility to take such care as is evidently required in the circumstances, causing foreseeable damage to a person or property, or which seriously compromises the level of aviation safety", hereinafter referred to in short as intent or gross negligence.

2.3 Reporting point

The Regulation requires Member States and sector organisations to set up systems in which the mandatory or voluntary civil aviation occurrence reports are collected and recorded by means of these systems. On the basis of Article 7.1.1 of the

² Pursuant to Article 2.12 of the Regulation, a "just culture" is "a culture in which front-line operators or other persons are not punished for actions, omissions or decisions taken by them that are commensurate with their experience and training, but in which gross negligence, wilful violations and destructive acts are not tolerated".

³ Article 4.1 of the Regulation lays down the type of occurrences for which reporting is mandatory. The occurrences are further classified in Commission Implementing Regulation (EU) 2015/1018 of 29 June 2015 laying down a list classifying occurrences in civil aviation to be mandatorily reported according to Regulation (EU) No 376/2014 of the European Parliament and of the Council, divided into categories, OJEC L 163.

Aviation Act and the associated 2019 Civil Aviation Occurrence Reporting Order,⁴ the *Analyse Bureau Luchtvaartvoorvalen* (ABL) [Aviation Occurrence Analysis Bureau] of the *Inspectie Leefomgeving en Transport* (ILT) of the Ministry of Infrastructure and Water Management is designated as the reporting point for direct reports to the government and data on reports to aviation organisations.

3. CRIMINAL INVESTIGATION

3.1 Cooperation agreements

Having regard to Articles 15 and 16 of the Regulation, agreements have been reached with the ILT with a view to striking a fair balance between the need for proper administration of justice on the one hand and the necessary permanent availability of safety information on the other.⁵ These agreements deal with the forwarding of information from occurrence reports. What this in short entails is that the ABL forwards to the Public Prosecution Service occurrence reports from which a suspicion of intent or gross negligence can be derived, and regular consultations are held between the ABL and the national coordinating public prosecutor for aviation for the purpose of applying the selection criteria. The forwarding of a report by the ABL to the Public Prosecution Service ranks as an opinion on the suspicion of intent or gross negligence.

This arrangement exempt public servants from the obligation to provide the public prosecutor, if requested, with all information relating to criminal offences with the investigation of which they are not entrusted but which have come to their knowledge in the exercise of their duties (Article 162.2 of the Code of Criminal Procedure).

3.2 Use of reports in the event of suspicion of intent or gross negligence

If a report is forwarded to the Public Prosecution Service because, in the opinion of the ABL, there is a suspicion of intent or gross negligence, the report can be used as steering information. On the basis (inter alia) of the report forwarded, the public prosecutor assesses whether or not a (more detailed) investigation is carried out. That decision must also take into account the fact that the report itself may not be later used as evidence in the criminal case against the reporter.⁶

⁴ Order No IENW/BSK-2019/104331 of the Minister for Infrastructure and Water Management of 27 June 2019 laying down the 2019 Order relating to the reporting of civil aviation occurrences, [Government Gazette 2019, 35918](#).

⁵ Article 15.2 requires Member States not to make available or use information on occurrences "in order to attribute blame or liability" nor "for any purpose other than the maintenance or improvement of aviation safety". The cases of intent or gross negligence described in Article 16.10 are exceptions to this rule. In this regard, cooperation arrangements have been concluded in accordance with Article 15.4.

⁶ This limitation can be derived from the European Court of Human Rights judgment in the Saunders case (ECHR 17.12.96, ECLI:NL:XX:1996:ZB6862, NJ 1997, 699, in particular § 68-71). According to the Court, Article 6 of the ECHR, specifically the underlying principle of *nemo tenetur* [privilege against self-incrimination], requires that statements which a citizen was compelled to make (in this case on the basis of the reporting obligation pursuant to the Regulation) may not be used in criminal proceedings against him/her. It is irrelevant in this

4. PROSECUTION

4.1 General policy on prosecution in the case of aviation occurrences

In principle, prosecution is brought only in the event of accidents, serious incidents (near accidents), serious endangerment and systematic infringements of the law, when they are caused by intent or gross negligence.⁷

In the case of non-systematic infringements of the law, a settlement may be offered in accordance with the Directive on criminal proceedings in aviation legislation.⁸ Where the conditions for such a settlement – payment of a settlement sum to prevent prosecution – are not met, prosecution may still be brought in respect of offences which were committed unpremeditatedly or inadvertently. This in practice happens only in general aviation (recreational aviation and minor commercial air transport), not in major commercial air transport.⁹

4.2 Protection in the event of prosecution following the reporting of an occurrence

In cases in which the Public Prosecution Service is aware of a criminal offence committed unpremeditatedly or inadvertently solely because a report has been submitted mandatorily or voluntarily pursuant to the Regulation, no settlement may be offered to prevent prosecution in respect of that offence. In such cases, prosecutions may be brought only if there is intent or gross negligence.¹⁰

If the Public Prosecution Service learns of a criminal offence not only as a result of the reporting of an occurrence but also, for example, from findings from a regular check, a declaration or an anonymous tip, the general prosecution policy described in 4.1 will continue to apply, and therefore a settlement may also be offered in respect of an offence referred to in the Directive on criminal proceedings in aviation legislation.

regard whether or not the report is self-incriminating. The reporting obligation itself is not contrary to the *nemo tenetur* principle, since the right to remain silent is connected to a criminal charge. This is not the case at the time of the report, and the reporter, who at that stage is not (yet) a suspect, does not enjoy any privilege. The limitation therefore lies only in the subsequent use of the report for the purpose of the furnishing of evidence in a criminal case against the reporter.

⁷ Nevertheless, in cases where no (further) prosecution is brought due to lack of evidence of intent or gross negligence, suspicion of intent or gross negligence could have existed during the investigation prior to the prosecution decision.

⁸ A settlement may also be offered in the event of an offence not included in the Directive. In such cases, an association may be sought with one or more offences of comparable severity which are included in the Directive in order to determine the level of the settlement.

⁹ This was already true at the time of the lapsed instruction, as Minister Hirsch Ballin explained to the House (*Parliamentary Papers 2009/10, 29 977, No J.*, p. 5).

¹⁰ See Article 16.10 of the Regulation.

If a prosecution is brought (inter alia) on the grounds of a report submitted mandatorily pursuant to the Regulation, the limitation applies, as stated above, that the report itself may not be used as evidence in a criminal case against the reporter. The report may, however, be used as steering information and as evidence in criminal proceedings against parties other than the reporter.

4.3 Coordination of the settlement of criminal proceedings

The national coordinating public prosecutor for aviation of the North Holland Public Prosecution Service assesses all aviation cases and provides them – if necessary – with a settlement opinion for the local public prosecutor.

TRANSITIONAL PROVISIONS

The policy rules in these instructions apply from the date of entry into force.

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