



European Cockpit Association  
'Piloting Safety'



INTERNATIONAL FEDERATION OF AIR  
TRAFFIC CONTROLLERS' ASSOCIATIONS

## AMENDMENTS TO THE COMMISSION PROPOSAL FOR A REGULATION ON INVESTIGATION AND PREVENTION OF ACCIDENTS AND INCIDENTS IN CIVIL AVIATION

Note: This list of suggested amendments is a shortened version of the one provided on 1<sup>st</sup> February 2010. Further to the General Approach reached by the Transport Council on 11<sup>th</sup> March and taking into account some elements of the draft report of Mrs de Veyrac, **the below amendments constitute the main changes needed to guarantee the**

- **independence of the safety investigation from judicial proceedings and**
- **protection of sensitive safety data**

### **Proposed ECA/IFATCA Amendment 1** (6 in our previous submission)

#### **Proposal for a Regulation Article 2 – paragraph 4**

##### *Text proposed by the Commission*

'causes' means actions, omissions, events, conditions, or a combination thereof, which led to the accident or incident; the identification of **causes** does not imply the assignment of fault or the determination of administrative, civil or criminal liability;

##### *Amendment*

'**factors**' means actions, omissions, events, conditions, or a combination thereof, which led to the accident or incident; the identification of **factors** does not imply the assignment of fault or the determination of administrative, civil or criminal liability;

##### *Justification*

*The use of the term "causes" risks creating problems when dealing with the justice authorities, as 'causes' could presume the apportioning of blame and/or liability. ICAO has recognized the need for a separation of 'judicial' and 'safety' terminology.*

*The ideal term would be "contributing factors", but the proposed Regulation does not use this term, nor does it contain a definition for it. Unless a definition of contributing factor is provided for, the term 'causes' should be replaced by 'factors'.*

*Note: This implies replacing the term 'causes' by 'factors' in the rest of the proposal for a Regulation (recitals 10 and 12 and Articles 9.2(e) and 13.3.*

**Proposed ECA/IFATCA Amendment 2** (7 in our previous submission)**Proposal for a Regulation**  
**Article 2– paragraph 16 (new)***Text proposed by the Commission**Amendment*

***‘Preliminary Report’ means the communication used for the prompt dissemination of data obtained during the early stages of the investigation.***

*Justification*

*The event of an accident creates legitimate expectations in the public and in the victims to obtain information about the event. In line with ICAO Annex 13, preliminary reports constitute a widely-accepted instrument for the Investigators to communicate before the publication of the final report, with contrasted information and in a controlled way without endangering the safety investigation. This definition is directly taken from ICAO Annex 13 chapter1, and is necessary in relation to the proposed amendment 11 (see below).*

**Proposed ECA/IFATCA Amendment 3** (8 in our previous submission)**Proposal for a Regulation**  
**Article 2– paragraph 17 (new)***Text proposed by the Commission**Amendment*

***‘Inappropriate use of safety information’: the use of information gathered from safety data collection and processing systems for purposes different from the purposes for which it was collected, namely, use of the information for disciplinary, civil, administrative and criminal proceedings against operational personnel, and/or disclosure of the information to the public.***

*Justification*

*The protection of safety information from inappropriate use is essential to ensure its continued availability, since the use of safety information for other than safety-related purposes may inhibit the future availability of such information, with an adverse effect on safety. This definition is directly taken from ICAO Annex 13 Attachment E.1.1.5c) , and is necessary in relation to the proposed amendment 5 (see below).*

**Proposed ECA/IFATCA Amendment 4** (9 in our previous submission)**Proposal for a Regulation**  
**Article 4 – paragraph 4***Text proposed by the Commission*

Safety investigations referred to in paragraph 1 and 3 shall in no case be concerned with apportioning blame or liability. They shall be **separate from and without prejudice** to any judicial or administrative proceedings to apportion blame or liability.

*Amendment*

Safety investigations referred to in paragraph 1 and 3 shall in no case be concerned with apportioning blame or liability. They shall be **independent of** any judicial or administrative proceedings to apportion blame or liability.

*Justification*

*The establishment of separate processes does not guarantee the independence of one process from the other. The safety investigation shall be independent as it should not receive instructions from any other instance.*

**Proposed ECA/IFATCA Amendment 5** (13 in our previous submission)**Proposal for a Regulation**  
**Article 13– paragraph 3– subparagraph (a)***Text proposed by the Commission*

To ensure proper coordination of inquiries into the causes of accidents and incidents, the safety investigation authority shall cooperate with other authorities in particular through advance arrangements with the judicial, civil aviation, search and rescue and other authorities likely to be involved in the investigation.

*Amendment*

To ensure proper coordination of inquiries into the causes of accidents and incidents, the safety investigation authority shall cooperate with other authorities in particular through advance arrangements with the judicial, civil aviation, search and rescue and other authorities likely to be involved in the investigation. **The advance arrangements shall cover among others the following subjects:**

- a) **access to the site of the accident**
- b) **preservation of and access to evidence**
- c) **initial and ongoing debriefings of the status of each process**
- d) **exchange of information**
- e) **prevention of the inappropriate use of safety information**
- f) **resolution of conflicts**

*Justification*

*It is important that all authorities likely to be involved in an accident know from the moment when an accident or a serious incident happen what their role and the role of the other authorities is. The listed elements shall necessarily be addressed in order to guarantee proper coordination and avoid conflicts arising. Those are, by experience, the areas where problems could have avoided should advance arrangements had been in place.*

## Proposed ECA/IFATCA Amendment 6 (14 in our previous submission)

### Proposal for a Regulation Article 15– paragraph 2

#### *Text proposed by the Commission*

Without prejudice to Directive 95/46/EC, the following records shall not be made available or used for purposes other than safety investigation, or other purposes aiming at the improvement of aviation safety:

- (a) all communications between persons having been involved in the operation of the aircraft;
- (b) recordings and transcriptions of recordings from air traffic control units;
- (c) covering letters for the transmission of safety recommendations from the safety investigation authority to the addressee, if so requested by the safety investigation authority issuing the recommendation;
- (d) occurrence reports filed under Directive 2003/42/EC of the European Parliament and of the Council;

**However, the competent authority for the administration of justice in a Member State may decide that the benefits of the disclosure of the records referred to in paragraphs 1 and 2 for any other purposes permitted by law outweighs the adverse domestic and international impact that such action may have on that or any future investigation and on the management of civil aviation safety and that there is an overriding public interest in their disclosure.**

#### *Justification*

*This paragraph shows the conflict of laws between the need to ensure aviation safety and to administer justice. Both interests extend beyond the interest of the parties: The public interest in the administration of justice includes the availability and reliability of evidence before court while the public interest in aviation safety includes the protection of data and sources as a way to collect and analyse as much evidence as possible to prevent future accidents.*

*The judicial authority has a vested interest and cannot alone resolve this conflict. There should be clear parameters to help judicial authorities to decide when the society considers that one interest should be placed above the other. These parameters are proposed in a new paragraph 4 to Art. 15 (see below).*

#### *Amendment*

Without prejudice to Directive 95/46/EC, the following records shall not be made available or used for purposes other than safety investigation, or other purposes aiming at the improvement of aviation safety:

- (a) all communications between persons having been involved in the operation of the aircraft;
- (b) recordings and transcriptions of recordings from air traffic control units;
- (c) covering letters for the transmission of safety recommendations from the safety investigation authority to the addressee, if so requested by the safety investigation authority issuing the recommendation;
- (d) occurrence reports filed under Directive 2003/42/EC of the European Parliament and of the Council;

**Note:** Amendment 40 of the rapporteur definitely goes into the right direction. The above ECA/IFATCA proposal provides an even more clear-cut separation between safety and judicial investigations, providing a strong guarantee that sensitive safety data is protected, except in cases defined in the new paragraph 4 (below).

## **Proposed ECA/IFATCA Amendment 7** (15 in our previous submission)

### **Proposal for a Regulation** **Article 15– paragraph 4 (new)**

*Text proposed by the Commission*

*Amendment*

*Notwithstanding paragraphs 1 and 2, safety data referred to in these paragraphs may be used as evidence and be demanded for inspection or be seized, if it concerns a criminal investigation into a hostage-taking, murder or an offence with the intention of frightening the population or part of the population of a country, or forcing a government or an international organisation to do, omit or tolerate something, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.*

### *Justification*

*The aim of the safety investigation – namely the identification of the factors that contributed to an occurrence – relies on the collection of data and testimonies of involved parties both obtained in confidence. If the accident investigator cannot ensure that testimonies or data will not be used in an administrative or judicial procedure, parties involved will not speak in confidence nor they will consent to the processing of their personal data, thus preventing the possible repetition of the occurrence. On the other side, the judge has a legitimate interest in delivering justice*

*This paragraph shows the conflict of laws between the need to ensure aviation safety and to administer justice. Both interest extend beyond the interest of the parties: The public interest in the administration of justice includes the availability and reliability of evidence before court while the public interest in aviation safety includes the protection of data and sources as a way to collect and analyse as much evidence as possible to prevent future accidents.*

*The judicial authority has a vested interest and cannot alone resolve this conflict. This amendment proposes clear parameters to help judicial authorities to decide when the society considers that one interest should be placed above the other.*

**Proposed ECA/IFATCA Amendment 8** (16 in our previous submission)**Proposal for a Regulation**  
**Article 15– paragraph 5 (New)***Text proposed by the Commission**Amendment*

*When safety data is used as evidence in criminal proceedings following paragraph 4, only the data strictly necessary for the criminal proceedings shall be disclosed, the rest being preserved by the investigation authority to the maximum extent possible.*

*Justification*

*Safety data is protected by the fundamental rights to due process and privacy. If information is used following paragraph 4, not all the information is to be disclosed. The Authorities must make sure that only the information needed is disclosed, the rest being preserved in order to safeguard the fundamental rights of the persons involved.*

**Proposed ECA/IFATCA Amendment 9** (17 in our previous submission)**Proposal for a Regulation**  
**Article 15 – paragraph 6 (New)***Text proposed by the Commission**Amendment*

*When safety data is used as evidence in criminal proceedings following paragraph 5, the information provided by a person in the framework of the safety investigation cannot be used against that person.*

*Justification*

*Article 6 of the European Convention of Human Rights recognises the right to a fair trial. The Court of Human Rights recognised in its Judgement Saunders vs. the UK (case 43/1994/490/572) that information obtained under coercion cannot be used against that person in a criminal proceeding (right against self-incrimination). However, refusal to give information is punishable under the proposed Article 2. It is therefore crucial to stipulate that information given to the accident investigation cannot be used against the person providing that information.*

## Proposed ECA/IFATCA Amendment 10 (19 in our previous submission)

### Proposal for a Regulation Article 16– paragraph 2

#### *Text proposed by the Commission*

The flight data recorder recordings shall not be made available or used for purposes other than safety investigation, except when such records are:

- (a) used for airworthiness or maintenance purposes only; **or**
- (b) de-identified; **or**
- (c) disclosed under secure procedures.

#### *Amendment*

The flight data recorder recordings shall not be made available or used for purposes other than safety investigation, except when such records are:

- (a) used for airworthiness or maintenance purposes only; **and**
- (b) de-identified; **and**
- (c) disclosed under secure procedures.

#### *Justification*

*The conditions for disclosure shall be cumulative to prevent the improper use of safety information. Data should be disclosed only for airworthiness and maintenance purposes and must be de-identified and disclosed under secure procedures. Only in this manner it is guaranteed that the disclosed data will not be used for purposes other than improving safety.*

*The term “secure procedures” is not defined and is ambiguous. Protocols shall be developed among the categories of persons involved to determine what constitutes a secure procedure.*

*The information contained in the flight data recorder can be obtained by other means, and without unnecessary manipulations of the recorder which can entail a physical deterioration of the “black box” rendering it ineffective thereafter.*

**Note:** in this context, ECA/IFATCA strongly support the rapporteur’s amendments 42 and 43, related to Article 16.1.

## Proposed ECA/IFATCA Amendment 11 (20 in our previous submission)

### Proposal for a Regulation Article 18 – paragraph 3

#### *Text proposed by the Commission*

The head of the safety investigation authority is authorised to inform victims and their families or their associations or, make public any information on the factual observations and the proceedings of the safety investigation **and possibly preliminary conclusions and/or** recommendations, provided that it does not compromise the objectives of the investigation.

#### *Amendment*

The head of the safety investigation authority is authorised to inform victims and their families or their associations or, make public any information **on issues of immediate concern, such as the release of human remains and personal effects held as part of the investigation**, information on the factual observations and the proceedings of the safety investigation, **preliminary reports and safety recommendations**, provided that it does not compromise the objectives of the investigation.

### *Justification*

*Information is important for victims and for the citizens who look for logical explanations to the accident. On the other side, the investigation authority needs time to study all evidence and put together the right analysis and recommendations, before communicating to the public and/or to victims' families.*

*ICAO has established the use of 'preliminary reports' and 'safety recommendations' as the way for the investigation authority to communicate during the investigation. Using ICAO terminology has the advantage of providing reliable information to the victims and the general public instead of frustrating them with non-verified information (e.g. "preliminary conclusions and/or recommendations"). Spreading non-verified information can be misleading, create confusion and public unrest and have negative impact on the investigation.*

*Furthermore, ICAO terminology provides a clear legal framework for the safety investigation authority who would know precisely what information can be communicated without being subject to penalties for making public information capable of compromising the investigation.*

*\* \* \**

Final, 01/04/2010