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REPORT

from:	Council General Secretariat
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Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on occurrence reporting in civil aviation amending Regulation (EU) No 996/2010 and repealing Directive No 2003/42/EC, Commission Regulation (EC) No 1321/2007 and Commission Regulation (EC) No 1330/2007

1. Introduction

On 19 December 2012, the Commission transmitted to the Council and to the European Parliament the above-mentioned proposal. The purpose of this proposal is to improve the system of rules on occurrence reporting established under Directive 2003/42/EC and its implementing rules, Commission Regulation (EC) No 1321/2007 and Commission Regulation (EC) No 1330/2007, on the basis of experience acquired during the implementation of the above-mentioned instruments.

At a general level, it is considered that the current aviation safety system is primarily reactive and overly reliant on detailed air accident investigations. The main objective of the proposal is to move towards a more proactive system that attempts to foresee and prevent accidents based primarily on the collection and analysis of data. The legal basis of the proposal is Article 100(2) of the Treaty on the Functioning of the European Union.

2. Content of the proposal

The proposal contains the following key elements:

- better collection of information on occurrences, as the proposal aims to ensure that all occurrences which endanger or would endanger aviation safety are reported. This will be achieved through a mandatory occurrence reporting system complemented by the establishment of a voluntary reporting system for those occurrences not captured by the mandatory system;
- clarification of the flow of information by introducing reporting requirements for organisations, which collect occurrence reports from individuals as part of their safety management process. The organisations will then transmit them to Member States competent authorities, or to EASA when relevant. All occurrences will eventually be aggregated into the European Central Repository (ERC);
- improved quality and completeness of data through a consistent and uniform integration of data into databases;
- better exchange of information by strengthening the existing rules;
- better protection against inappropriate use of safety information and better protection of the reporter to ensure the continued availability of information;

- improved information analysis both at national and at EU level. New analysis and follow-up requirements at national level will be complemented by the analysis done at EU level. A common risk classification scheme will be developed, to support the task of classification of occurrences at national level;
- improved transparency towards the general public by the publication of annual safety reviews, while respecting the necessary confidentiality of certain information.

3. Work within Council bodies

The Commission presented its proposal to the Aviation Working Party on 10 January 2013 and the Impact Assessment was presented on 14 January 2013, followed by an exchange of views. The examination of the Commission proposal continued on 28 January, 18 and 25 February.

4. General comments

All Member States broadly welcomed the Commission proposal, albeit with some caveats. Some of them expressed concerns about issues such as the potential cost and burden on administrations and industry, in particular on small and medium enterprises, deadlines for the implementation of the Regulation, the protection of employees who report occurrences and the list of types of occurrences that are obligatory to report.

5. Comments on specific issues

a) Collection of occurrences

According to Chapter 8 of Annex 13 to the Chicago Convention, Member States already have the obligation to establish mandatory occurrence reporting systems (MORS). Annex 13 also recommends that states have a voluntary occurrence reporting system (VORS) to facilitate the collection of information that may not be captured by a mandatory incident reporting system. 23 EU Member States have already established VORS.

However, several delegations are of the opinion that a clear delimitation between the two systems is necessary. These delegations argue that the list of types of occurrences to be reported under MORS should be exhaustive and closed, and complemented by a VORS which would capture the occurrences unreported under the mandatory system. Most delegations consider that for legislative certainty it would be preferable to have a complete list of incidents under mandatory reporting, all the more as failure to report such occurrences could lead to criminal proceedings. On the other hand, this option would create the risk that an unknown number of occurrences may end up unreported under the voluntary system.

Other delegations prefer an open list of occurrences to be reported under MORS. In this case the list will be an enumeration of examples of types of occurrences which have to be mandatorily reported. The argument for such an option is that it would be extremely difficult to draw up an exhaustive list because it is not possible to foresee all possible types of incidents. However, in this situation the list would have to be coupled with a clear set of criteria for the selection of occurrences to be mandatorily reported.

In order to better benefit from the expertise of specialists, the Presidency has proposed to set up an ad-hoc group of Member States' experts who will examine the content of the annexes and who will make recommendations to the Aviation Working Party. The Presidency's proposal has been accepted by the delegations and the above-mentioned issues will be re-examined once the ad-hoc experts group has finished its work.

b) Potential administrative burden

The current Directive imposes the obligation to report directly to Member States on individuals. However, most occurrence reports are sent to the Member States' authorities by organisations. In order to address this situation, the proposal introduces reporting requirements to organisations, which will be required to establish a voluntary occurrence reporting system. Moreover, organisations are also required to analyse the reported occurrences in order to identify possible safety hazards and take, if necessary, appropriate action. A great number of delegations have expressed concerns about the potential administrative burden created by these requirements, especially as regards small and medium enterprises, as the number of voluntary reports which would have to be recorded, transmitted to Member States' authorities and analysed is significantly higher than the mandatory ones. They consider that the text should be clarified so that the analysis and, if deemed applicable, the follow-up action would reflect the scale of the notified occurrence.

Moreover, the above-mentioned delegations consider it necessary to clarify for which categories of aircraft the mandatory system would apply. Some delegations argue that MORS should be used only for commercial civil aviation. They consider that, taking into account its specific activity, general aviation should not have the same obligations as commercial civil aviation. Others consider that the level of regulation of general aviation that is proposed would be appropriate and explain that removing the mandatory reporting requirement for general aviation would eliminate a significant source of safety information. They propose to maintain the same reporting obligations for general aviation but, at the same time, impose less extensive requirements for general aviation and smaller organisations.

c) *‘Just Culture’ and the definition of ‘gross negligence’*

The feedback and the lessons learned from accidents and from reported occurrences constitute an essential dimension of the civil aviation system. In order to create a more proactive and evidence-based safety system, capable of drawing maximum benefit from the available safety information, including civil aviation occurrences, the Commission proposal establishes a non-punitive environment facilitating the spontaneous reporting of the occurrences based on the principle of ‘Just Culture’.

Some Member States have a safety system allowing for total impunity, namely that the reporter of occurrences is always protected against sanctions or legal proceedings in accordance with the principle of privilege against self-incrimination, without any conditions. Other Member States support a highly protected voluntary reporting system, focused on protecting human error in order to encourage reporting without fear of self-incrimination, and a less protected mandatory reporting system. A third approach has been suggested by one delegation, namely to allow access to non-disidentified reports only to safety investigation authorities, safety analysts within the national competent authorities, and to safety analysts or data experts within industry organisations. This delegation argues that this way the occurrence reports will be available only for the necessary designated experts, without the need to protect all individuals involved in occurrences. In such a situation the reports will only be used for safety purposes and will not hamper any legal proceedings if judicial authorities get information about the occurrence from sources other than the occurrence reports.

The Commission's proposal does not introduce total impunity but, in order to preserve a high degree of reporting and address the fear of self-incrimination, individuals who report occurrences will not be prosecuted by judicial authorities except in a case of ‘gross negligence’.

For this purpose, Member States will have the obligation to put in place advance administrative arrangements between the judicial authorities and the safety authorities who must seek to balance between the two public interests at stake, i.e. justice and aviation safety. Regulation 996/2010 on the investigation of accidents and incidents in civil aviation has already introduced the obligation of such advance arrangements between the safety investigation authorities and other authorities (e.g. judicial, search and rescue) likely to be involved in the investigation of an accident.

However, some Member States have stated that due to the particular nature of each national judicial system, they have encountered some difficulties in establishing these advance arrangements and they have asked to have their legal nature clarified.

Moreover, delegations have different views on the level of protection against punitive action. As already mentioned, some Member States would prefer total impunity in order to encourage reporting and thus have a better chance to improve aviation safety, others consider that in situations of gross negligence and wilful wrongdoing punitive action is necessary. On the other hand, several delegations consider that the notion of intent or wilfulness should not be included in the definition of 'gross negligence'. They consider that in a situation of wilful wrongdoing the reporter should not be protected against punitive action.

So far, the term 'gross negligence' has not been defined in EU legislation. EU Member States have their own definitions in their national law and therefore several delegations would prefer not to include this definition in the Regulation. They have argued that since the definition already exists in the national law of Member States, it is better not to try to define it at EU level because Member States have different interpretations for it. Deleting the definition from the proposal would avoid any possible conflicts between the Regulation and national legislation. Other delegations consider that the definition is essential in order to ensure the uniform application of the Regulation. They emphasise that this definition, together with Articles 15 (Protection and appropriate use of information) and 16 (Protection of the information source) constitute the core elements of the proposal.

d) *Delegated acts*

The proposal gives the Commission the possibility to adopt delegated acts for the updating of the annexes to the Regulation, to define the common European risk classification scheme, to update the measures concerning the integration of data into the European Central Repository and extend or restrict the dissemination of information contained in the ECR. Several delegations consider that the above-mentioned issues constitute an essential part of the legislative act and that Member States should be involved in any such modifications and, therefore, cannot accept the Commission proposal on this issue.

6. Conclusions

Coreper and Council are invited to take note that this discussion is still ongoing and that a number of issues need to be further clarified. Therefore, the competent Council preparatory bodies should be invited to pursue the examination of the proposal in order to achieve significant progress and reach an agreement on it at the next TTE Council in June.
