

INSTRUCTION FOR INVESTIGATION AND PROSECUTION IN CIVIL AVIATION OCCURRENCES

Legal nature:	Instruction within the meaning of art. 130 lid 6 Judicial Organization Act (Wet RO)
From:	Board of Prosecutors General
To:	Heads of the departments of the Public Prosecution Office (OM)
Registration number:	2020A001
Date entry into force:	01-03-2020
Expired:	Instruction investigation and prosecution in case of reporting
Relevant policy rules OM: (2018R011)	occurrences in civil aviation (2006A015)
Legal provisions:	Directive on criminal procure for aviation legislation
Attachments):	artt. 1.1, 7.1, 11.25 Aviation Act (Wet luchtvaart)
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SUMMARY

This instruction contains rules with regard to the investigation and prosecution of criminal offences in the event of an occurrence in civil aviation.

1. BACKGROUND

EU Regulation 376/2014 applies since November 15, 2015.¹ The objective 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 has largely direct effect and for the remainder has been implemented in national laws and regulations. The new regulation is incorporated in this instruction. In practice, this means that the instruction, unlike in the past, applies to the entire aviation sector, is based on a broader reporting obligation (which now also includes accidents and serious occurrences), and brings the level of protection in line with this obligation and further increases it by providing also protection to voluntary reporting made under the regulation. The opportunity has been taken to clarify the conditions for criminal exception. In essence, however, the prosecution policy of the Public Prosecutor Office has not changed.

2. LEGAL FRAMEWORK

2.1 Purpose: occurrence reporting

The regulation aims to ensure that front-line aviation professionals and other persons employed or involved in aviation report occurrences with a significant aviation safety risk, so that appropriate safety action can be taken on the basis of the information collected. A 'just culture' is prescribed which encourages individuals to do so without absolving them of their normal responsibilities.² The regulation aims to increase the willingness to report by, among other things, imposing obligations to the Member States to exempt reporters of occurrences and the persons mentioned in the occurrence reports, under certain conditions, from civil or administrative sanctions.

¹ Regulation (EU) No 376/2014 of the European Parliament and 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, PbEGU 2014 L 122/18.

² A just culture means, according to art. 2 paragraph 12 of the regulation, "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".

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 which includes in particular an accident or a serious incident”.³

The regulation imposes an obligation to report an occurrence for certain categories of individuals and provides that non-designated persons can voluntarily report details of occurrences and other safety-related information that are not covered by the reporting obligation.

2.2 Exemption

The regulation stipulates that Member States shall refrain from instituting 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 as mandatory or voluntary in accordance with the regulation. This protection does not apply in cases of “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 for the sake of brevity referred to as intent or gross negligence.

1.3 Reporting point

The regulation imposes an obligation to Member States and sector organisations to set up systems in which the mandatory and voluntary occurrence reports in civil aviation are collected and stored through these systems. Based on art. 7.1 paragraph 1 of the Aviation Act (Wet luchtvaart) and the related Regulation on reporting occurrences in civil aviation 2019 (Regeling melden voorvallen in de burgerluchtvaart 2019)⁴, the Analysis Bureau Aviation Occurrences (Analyse Bureau Luchtvaartvoorvallen, ABL) of the Human Environment and Transport Inspectorate (Inspectie Leefomgeving en Transport, ILT) of the Ministry of Infrastructure and Water Management (Ministerie van Infrastructuur en Waterstaat) has been designated as the reporting point for direct reports to the government and data on reports to aviation organisations.

3. INVESTIGATION

3.1 Cooperation agreements

Having regard to art. 15 and 16 of the regulation agreements have been made with the ILT with a view to the correct balance between the need for proper administration of justice on the one hand and the necessary continued availability of safety information on the other hand.⁵ These agreements relate to making available information derived from occurrence reports. In short, it means that the ABL will transfer occurrence reports from which a suspicion of intent or gross negligence can be derived, to the Public Prosecutor Office and that regular coordination meetings take place between the ABL and the national aviation prosecutor for the application of the selection criteria. The transmission of a report by the ABL to the Public Prosecutor Office counts as a recommendation with regard to the suspected intent or gross negligence.

With this arrangement an exception is made to the obligation for civil servants to provide the public prosecutor, upon request, with all information concerning criminal offences of which they are in charge of the investigation, but have come to know in the course of their service (art. 162 paragraph 2 Criminal Procedure Code, Wetboek van Strafvordering).

³ Art. 4 paragraph 1 of the regulation regulates the type of occurrences which must be reported. The occurrences are further classified in Commission Implementing Regulation (EU) 2015/2018 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, OJ L 163.4

⁴ Regulation van de Minister of Infrastructure and Water Management, of 27 June 2019, no IENW/BSK-2019/104331, establishing the Regulation on reporting occurrences in civil aviation 2019, Stcrt. 2019, 35918.

⁵ Art. 15 paragraph 2 requires Member States not to make available or use information on occurrences "in order to attribute blame or liability" or "for any purpose other than the maintenance or improvement of aviation safety". Cases of intent or gross negligence as described in paragraph 16.10 are an exception to this rule. In this context - In view of this - in accordance with art. 15 paragraph 4 - cooperation agreements have been made.

3.2 Use of a report in case of suspected intent or gross negligence

If a report has been transferred to the Public Prosecutor Office because, according to the ABL, there is a suspicion of intent or gross negligence, this message can be used as steering information. The prosecutor assesses (partly) on the basis of the transferred report whether or not (further) investigation is being initiated. In making that decision, it must be taken into account that the report itself may not later be used as evidence in the criminal case against the reporter.⁶

4. PROSECUTION

4.1 General prosecution policy for aviation occurrences

In principle, prosecution is only initiated in the event of accidents, serious incidents (near-accidents), serious danger and systematic infringements of the law, if these are caused by intent or gross negligence.⁷

For non-systematic infringements of the law, a transaction proposal can be made in accordance with the Directive on the criminal procure for aviation legislation (Richtlijn voor strafvordering luchtvaartwetgeving).⁸ If the condition imposed on this transaction proposal - payment of a transaction amount to prevent prosecution - is not met, it is still possible to prosecute these offences that are committed unintentionally or negligently. In practice, this only plays a role in general aviation (recreational and 'small' commercial activities), not in commercial air transport.⁹

4.2 Protection in the case of prosecution following an occurrence report

In cases where the prosecutor is aware of a criminal offence that is committed unintentionally or negligently solely because it has been mandatory or voluntary reported under the regulation, no transaction proposal will be made to prevent prosecution of that offence. In those cases, prosecution is only initiated if there is intent or gross negligence.¹⁰

If the prosecutor has not only been informed of a criminal offence by the occurrence report, but also, for example, by findings during a regular check, a report or an anonymous tip, the general prosecution policy described under 4.1 will continue to apply and a transaction proposal can therefore also be made for an offence referred to in the Directive on the criminal procure for aviation legislation.

If (partly) on the basis of a mandatory report under the regulation prosecution is initiated, the limitation applies - as already discussed above - that the report itself cannot be used as evidence in a criminal case against the reporter. However, the report may be used as steering information and as evidence in criminal cases against others than the reporter.

⁶ This limitation can be derived from the Saunders judgment of the European Court of Human Rights (ECtHR 17-12-1996, ECLI:NL:XX:1996:ZB6862, NJ 1997, 699, in particular § 68-71). According to the Court, art. 6 ECHR, in particular the underlying nemo tenetur principle, that statements that a citizen was forced to make (in this case under the reporting obligation of the regulation) are not used in criminal proceedings against him. It does not matter whether or not the report is self-incriminating. The reporting obligation itself does not conflict with the nemo tenetur principle, as the right to remain silent is linked to a criminal charge. This is not the case at the time of the report and the reporter, who is not a suspect at that moment (yet), has no right of non-disclosure. The limitation therefore only lies in the later use of the report for the purpose of providing evidence in a criminal case against the reporter.

⁷ This does not alter the fact that, in cases where in the end no (further) prosecution is initiated due to lack of evidence for intent or gross negligence, suspicion of intent or gross negligence could have existed during the investigation prior to the prosecution decision.

⁸ A transaction proposal can also be made for an infringement of the law that is not listed in the directive. In order to determine the amount of the transaction proposal in such case a connection is sought with one or more infringements that are included in the directive and are similar in severity.

⁹ This already applied at the time of the expired instruction, as minister Hirsch Ballin also explained in the First Chamber of Parliament (*Kamerstukken I 2009/10, 29 977, nr. J., p. 5*).

¹⁰ See art. 16 paragraph 10 of the regulation.

4.3 Coordination of criminal proceedings

The national coordinating public prosecutor for aviation of the department of the Noord-Holland assesses all aviation cases and provides them - if necessary - with a settlement recommendation for the local public prosecutor.

TRANSITIONAL LAW

The policy rules in this instruction apply from the date of entry into force.