

FEW COMMENTS ON THE CIVIL AVIATION ACCIDENT AND INCIDENT INVESTIGATION PROCEDURES IN THE EUROPEAN UNION WITH RESPECT TO THE DISCIPLINE VIOLATION BY THE AVIATION STAFF

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Every proceeding carried out by state authorities is conducted along particular procedural principles. A similar rule applies in examination of air occurrences in European Union. The objective is that the findings do not diverge from actual circumstances accompanying an air occurrence. Whereas an authority in charge of investigation of an air occurrence should take the decision based on the principle of material truth and in an objective way.

K e y w o r d s: air occurrences, aviation staff discipline, principles of air occurrence investigation.

1 INTRODUCTION

The explanation of air occurrences circumstances posing threat to the civil aviation safety has always been of interest to a number of entities: air carriers, aviation staff, passengers, people accidentally harmed in air incidents, as well as the public. In the process of arriving at the circumstances of an air occurrence, for the civil aviation safety, the sources of the risk seem to have been equally important. Objectively, these used to be and still are generated by a number of factors: technical, organisational, meteorological phenomena, or terrorist attacks. Occasionally risk in aviation is caused by a human factor, more precisely, lack of discipline among aviation staff. Analysis results of air occurrences explicitly state that c.a. 70 – 75% of all air incidents were caused by faults on the part of the cabin or ground crew. [5]

In the majority of cases, if an air occurrence happens, an investigation procedure is automatically launched with an aim to specify air accident or incident circumstances and causes and determine precautions to prevent the like occurrences in the future. This issue became regulated in the EU legal system by way of a Resolution of the European Parliament and Council (EU) No. 996/2010 from 20th October 2010 on the investigation and prevention of accidents and incidents in civil aviation¹. Based on this fact, it was possible to adopt the following problem for the discussion and solution: Whether investigation of civil aviation accidents and incidents, as defined by the EU normative act, bases on the legislative principles which organize an entire investigation and guarantee objective truth is discovered or rather not? Due to that it was necessary to determine the following issues in order to answer the stated question: What does the general notion “legislative principle” entail? What general principles shape the course of an investigation in civil aviation occurrences? And which principles is the quality of evidence proceedings is affected?

At this point it must be noted that due to editorial restrictions, the above quoted resolution was chosen for the basis in this discussion, whereas procedures specified in Amendment No. 13, entitled: Investigation of aircraft

accidents and incidents, amendment to the Convention on international civil aviation from Chicago, 7th December 1944 - Chicago Convention – was deliberately omitted.

2 THE NOTION OF “LEGISLATIVE PRINCIPLES”

Considering dictionary definition according to the *Polish Language Dictionary*, the term “principle” means: „Standard mode of conduct recognized by someone as a binding one; or basis on which something else is grounded, or law managing certain processes”. [6] Whereas, “principle”, in the theory of law, is viewed as criteria concerning what appears to be an order. For example, L. Bielecki’s stand is that the term „legislative principles” means „Standing orders to optimize, which demand to aim at obtaining a desired state of things, state which is realistically and legally possible”. [1] On the other hand, E. Ura, expressed the following view: „legislative principles” are „Rules for grounded conduct in current legal regulations which contain an order to act so as to attain an objective delineated by the legislator”. [8]

Even superficial analysis demonstrated that investigation procedure in civil aviation accidents and incidents bases on procedural principles approved of by the theory of law. At this point, it must be clearly pointed that EU legislator in resolution on investigation of accidents and incidents provides no recommendation which would “*expressis verbis*” show the principles discussed. This is however permissible in case of proceedings pending before state authorities. As L. Morawski arguments „Some of the legal principles are directly formulated in law texts, other, and on the contrary have to be inferred from those texts by way of reasoning. However, the legislator does not always clearly specify which of the enacted regulations have the status of a principle and which are simple legal standards. [6] Accepting the author’s point of view a theses was proposed saying that the investigation procedure of civil aviation accidents and incidents must abide by certain principles which, though not articulated in a direct way, contain orders determining the course of an investigation along a precisely defined procedure. Subsequent findings act as arguments in support of the above thesis.

¹ Law Journal UE.L.2010.295.35.

3 GENERAL PRINCIPLES DETERMINING THE COURSE OF CIVIL AVIATION OCCURRENCE INVESTIGATION

The principle of no apportioning blame or liability on the perpetrators of aviation occurrence in investigation. This principle of no apportioning blame on the perpetrators of air occurrences is strongly underlined in the resolution on investigation of civil aviation accidents and incidents. It is also supported by point 4 of the preamble to this resolution which clearly states that the sole objective of an investigation should be to prevent future accidents and incidents without apportioning blame or responsibility². An identical wording can be found in Art. 1 and 15, Par. 1 of the resolution. Whereas Art. 2 point 4 explains that determining causes does not entail apportioning blame or administrative, civil, or criminal responsibility. The way the cited provisions of the resolution are constructed show that authorities specified in the resolution, conduct as it were „Their own investigation on aviation occurrence that happened”. However, independently of such other procedures may be underway with an aim to apportion criminal, civil, or administrative responsibility to a perpetrator.

The objective truth principle. Category of fundamental principles, in respect to investigations in aviation occurrences, contains the objective truth principle. It stems from Art. 13 of the resolution which must be quoted “in extensor”. By virtue of the cited provision an authority conducting investigation of aviation occurrence is obliged to undertake all measures indispensable for an in-depth explanation of the actual state, namely: 1) To ensure safe examination of all evidence and take reasonable actions in order to protect such evidence; 2) To provide safe supervision of an aircraft and all objects contained therein and its remains over a period of time which may turn out to be required for carrying out appropriate investigation of aviation occurrence; 3) To protect evidence and keep it intact until examined by the inspectors.

The prime role of the objective truth principle in investigation, as underlined by the EU legislator, is also confirmed by Art. 11, Par. 2 of the resolution which discusses the status of aviation occurrence inspectors. In compliance with mentioned provision, person supervising an investigation has the following rights: 1) Immediate, unlimited, and free access to the accident or incident site, also aircraft, objects contained therein and its remains; 2) To immediate listing of items of evidence and controlled removal of its remains or parts for further investigation or analysis; 3) Immediate access to flight recorders, their contents, and any other related recordings and control over them; 4) To apply for a full post-mortem of people deceased and participate in such procedures as well as immediate access to the findings and results of analysed

samples; 5) To apply for medical examination of persons involved in aircraft maintenance or for tests of samples from such persons as well as immediate access to the results of such tests; 6) To summon and examine witnesses and request information and evidence crucial for the aviation occurrence investigation; 7) Free access to any significant information or documents held by any owner, type certificate holder, entity responsible for technical maintenance, training institution, operator or manufacturer of an aircraft, authorities responsible for civil aviation, and other subjects responsible for air traffic control or airport operations.

The named principle, in the context of the achievements of the theory of law, is connected with a basic principle present in every modern process: decision issued in a pending case must be based on a principle of an objective truth. In this respect investigation underway must be based on actually existing circumstances as opposed to based on presumptions or assumed from statements of participants of an occurrence.

Principle of ex officio. In accordance with Art. 5 of the resolution, every accident or serious civil aviation incident involving an aircraft are subjected to investigation in a member state on which territory it took place. The wording of this provision indicates that EU legislator based investigation in aviation-related cases on an “ex officio” principle. It also imposes an obligation on a member state to take any steps at any time in order to instigate investigation procedure in aviation occurrence as soon as it is known. Next step is to start collecting evidence, the basis for the future decision. However, it must be explained that in accordance with Art. 2 point 14 of the resolution the term „Investigation of an aviation occurrence” means a process conducted by an authority for investigation of aviation occurrences in order to prevent accidents and incidents, including collecting information and its analysis, drawing conclusions together with determining the cause of an occurrence and conducive circumstances. The named regulation providing for ex officio principle makes it impossible to withdraw from an investigation of an ensuing aviation occurrence which poses threat to the safety of civil aviation.

Proceedings in writing principle. The following confirm that the proceedings in writing principle is present in investigation procedures concerning aviation occurrences: „An initial report must include an announcement to be used for an immediate dissemination of information acquired in the first stage of an investigation (Art. 2 point 12); „Every investigation of an aviation occurrence closes with a report in such a form which is most appropriate for type and gravity of an accident or serious incident” (Art. 16 par. 1); „Before final report announcement, an authority for aviation occurrence investigation requests ...” (Art. 16 par. 4); „Aviation occurrence investigation authority is obliged to pass a copy of the final report and recommendations on safety issues as soon as possible” (Art. 16 Par. 8). The quoted fragments confirm the proceedings in writing

² It is characteristic that a similar meaning is found in point 3, sub point 1 Chapter 3 of Amendment No. 13 entitled „Investigation of accidents and incidents of aircrafts”, to the Convention on international civil aviation signed in Chicago on December 7, 1944 – Chicago Convention.

principle apply in case of investigation procedure concerning an aviation occurrence. They also prove that an authority in charge of investigation is bound by the proceedings in writing principle from the beginning to the close of the proceedings as far as recording of the investigation outcomes is concerned, also must use this form of communication with various entities at different stages of the pending investigation.

Fast track principle. The following two provisions of the regulation are representative of the fast track principle in investigation procedures of aviation occurrences. Firstly, point 2 in the preamble to the regulation states that prompt conduct of investigation in civil aviation occurrences raises aviation safety and helps prevent accidents and incidents. Secondly, Art. 16 point 6 according to which aviation occurrences' investigation authority is obliged to announce publicly final report as quickly as possible and, if possible, within 12 months since an accident or serious incident. Admittedly, EU legislator in Art. 16 Par. 6 provided a 12 month deadline, however, it must be clarified that it is not final. Authority investigating an aviation occurrence is obliged to carry out investigation in the shortest possible time because it is not empowered to delay investigation in any way till the 12 month deadline elapses.

Active participation in investigation of aviation occurrences principle. In accordance with the provision Art. 8 of the resolution, authorities for investigation of aviation occurrences are obliged to apply to EASA and national civil aviation authorities of member states to appoint, under their respective powers a „representative“, who will participate as an “advisor” to the person supervising aviation occurrence investigation being conducted on the territory of one of the member states or another place under the control of „Person supervising an investigation” and at his discretion. Moreover, to appoint an advisor to support „authorized representative” or „authorized representatives” from member states in any investigation of aviation occurrences carried out in a third state, if an authority for the investigation of aviation occurrences was requested to delegate for that purpose. As it stems from Art. 8 of the resolution, active participation principle has a specific character as it is limited. On the one hand, it obligates an authority conducting investigation and, on the other hand, it entitles EASA and national civil aviation authorities to participate in pending investigation concerning aviation occurrence. Active participation in aviation occurrence investigation principle is fully expanded in Art. 8 Par. 2 of the resolution which bestowed a number of rights upon its participants. By virtue of the quoted provision, active participation principle is expressed in the right of its participants to: 1) Arrive at accident site and investigate remains; 2) Suggest the scope of interrogation and information required from a witness; 3) Obtain copies of all documents in use and appropriate content information; 4) Participate in reading of flight recording equipment, except for recordings of voice or image from the cockpit; 5) Participate in investigation activities away from an

accident site such as analysis of parts, tests, simulations, technical presentations and progress meetings except for meetings deciding on the causes and formulation of safety recommendations.

4 PRINCIPLES AFFECTING THE QUALITY OF EVIDENCE TAKING PROCEEDINGS

Principle of free appraisal of evidence. In accordance with Art. 4 Par. 2 of the resolution, authority for investigation of aviation occurrences should be functionally independent from authorities responsible for airworthiness, certification, air operations, technical servicing, licensing, air traffic control, or airports' functional aspects. Nobody should exert influence on objectivity of an investigating authority. The quoted procedural provision shows that principle of free appraisal of evidence is applicable to a pending investigation. In relation to the above, authority for investigation of aviation occurrences is banned from establishing other appraisal rules for a pending investigation of aviation accident or incident. The principle of free appraisal of evidence is emphasized in Art. 4 Par. 3 of the resolution which informs that an authority, while investigating air occurrences, can neither approach unauthorized persons for instructions, nor accept such, and possesses unrestricted powers to conduct investigation of an air occurrence. Art 4 Par. 3 of the resolution supplements quoted provision in such a way that it entrusts investigating authority with additional duties of collecting and analysing information related to air safety on condition such duties do not affect its impartiality.

The exemplified principle of free appraisal of evidence shows that the EU legislator secured substantial guarantee the material truth in a pending investigation is discovered. The principle of free appraisal of evidence in aviation occurrences acts as a guarantee here. Consequently, an authority, basing on the principle of free appraisal of evidence in investigation, appraises credibility of particular pieces of evidence and formulates conclusions in accordance with its own belief and unhindered by any rules or opinions of third parties.

Principle of open proceedings. The principle of open proceedings is one of the fundamental principles in a pending aviation occurrence investigation. The following can be quoted to support this statement: „Submission of reports on results from investigations of safety-related incidents together with analysis as well as their dissemination have fundamental role in improvement of aviation safety” (Point 3 in preamble); „Initial report must be drawn up for publication in a form of an announcement for immediate dissemination of information gathered at the first stage of investigation” (Point 12 of preamble); „If final report cannot be issued, a temporary announcement must be publicised, at least on every anniversary of an accident or serious incident” (Art. 16 par. 6). Contents of the quoted procedural provisions confirm that the principle of open proceedings in aviation

investigations has a more outside character geared towards the public as its objective is creating trust in the reliability of civil aviation. From the material point of view, outside openness mainly concerns the findings in a civil aviation accident or incident investigation.

Principle of proximity. The following confirm that proximity principle is observed in investigation procedures in aviation occurrences - Art. 11 of the resolution empowers investigation inspector, at an initial stage of investigation in aviation occurrences, to protect evidence in aviation occurrences in the following way: 1) Immediate, unrestricted and free access to the accident or incident site as well as to an aircraft, objects contained therein and its remains; 2) Guarantee immediate listing of items of evidence and controlled removal of remains or its parts for further inspection or analysis; 3) Immediate access to flight recorders, their contents, and any other related recordings and hold control over them. On the other hand, during pending investigation, authority supervising investigation is entitled to: 1) Request full post-mortem of people deceased thereof, participate in post-mortem procedures and have immediate access to the outcomes of such tests or results of sample tests; 2) Request medical examination of people involved in aircraft maintenance or medical tests of samples collected from them, also immediate access to the results of such tests; 3) Summon and examine witnesses and request information or evidence which is crucial for the investigation of an aviation occurrence; 4) Free access to any important information or documents held by their owners, type certificate holder, entity in charge of technical maintenance, training company, operator or aircraft manufacturer, authorities responsible for civil aviation, EASA and subjects responsible for air traffic control, or airport operations.

Theory of law provides that principle of proximity is a directive for the deciding authority to come maximally close to the facts of an occurrence.[3] It means that according to the proximity principle, investigating authority should become acquainted with the most extensive possible evidence in a direct way. At the same time, the proximity principle requires an authority in charge of the proceedings to define the circumstances of an aviation occurrence to ground its findings on original evidence.

Evidence concentration principle. Under the theory of law, principle of evidence concentration translates into a need for concentration of means of proceedings around the subject of the proceedings and evidence taking proceedings without any delay.[3] To prove that this principle is present in aviation occurrences investigation procedures is Art. 2 of the resolution under which permanent national authority, designated as a body supervising aviation occurrences, should have the possibility to carry out a full investigation of an aviation occurrence. Complementary to this provision is Point 2 of the preamble to the resolution, which states that quick investigation of aviation occurrences in civil aviation improves aviation safety and helps prevent future

accidents and incidents. The core of the evidence concentration principle is thus focusing actions of an authority, investigating an aviation occurrence, around the main objective of such proceedings and completing it in the shortest possible time.

Burden of proof. Provision point 14 of the preamble to the resolution orders the following „Investigation of accidents and incidents should be conducted by an independent authority for aviation occurrences investigation or under its supervision”. Whereas point 15 of the preamble points to the following „Authorities for investigation of aviation occurrences play a key role in the process of aviation occurrence investigation. Their efforts have fundamental input into defining the causes of an accident or incident”. Under the cited provision, the responsibility for gathering factual material and evidence in a pending case rests on an independent authority investigating aviation occurrence. Such interpretation of the powers of the authority together with grounding investigation of an aviation occurrence on the material truth principle must obviously lead to activation of that authority. On the other hand, and in compliance with Art. 2 point 14 of the resolution, investigation of an aviation occurrence conducted by an authority for investigation of aviation occurrences should encompass collecting and analysing of information, and drawing conclusions, together with defining the cause or causes of an occurrence or circumstances conducive to its happening.

The contents of the cited provisions point to elements which are characteristic for the burden of proof. Namely, an authority in charge of an investigation of aviation occurrence is obliged to strive after material truth in aviation occurrences on the grounds of all factual circumstances which are crucial for an ensuing aviation occurrence and basing on the entire evidence collected in the case.

5 THE ISSUE OF EFFECTIVENESS OF EU REGULATIONS CONCERNING SAFETY

Anyhow, it seems that the selected general principles which shape the procedure of investigation of aviation occurrences and principles which influence the quality of the proceedings in aviation occurrence cases and contained within EU normative act should not raise any doubts, however, the following question appears: How effective are they in respect to their addressees compared to the national legal order? That's it, the effectiveness of the discussed legislative principles can be considered only and exclusively against the position of a given state in the European Union. Generally speaking, EU norms are valid for EU members only. They do not refer to non-member states. They belong to so called secondary EU common law created by the EU authorities on the grounds of authorization given in the prime law with an aim to enable execution of treaty tasks of the

Communities³. Under Art. 249 of the Treaty establishing European Community, resolution of the European Parliament and Council (EU) No. 996/2010 from October 20, 2010 about investigation in accidents and incidents in civil aviation as well as prevention is a quasi-act of the European Community. It thus has a character of a normative act, abstract and general, binding in all its parts and effective directly in the EC member state. [2]

The fact of uniting member states by EU law has been reflected in the stand of the European Tribunal of Justice. The said Tribunal declared that „Community agreements constitute an integrating part of the community legal order”. This, in turn, obligates member states to apply community law because only and exclusively its enforcement means that the law is effective⁴. Consequently, the place of the resolution within the framework of the union regulations plays a fundamental role because it may successfully influence the unification of investigations in aviation occurrences conducted in member states and, at the same time, efficiently reflect on the quality of the pending proceedings.

6 CONCLUSION

Summarizing the above discussed provisions of the Resolution of European Parliament and Council (UE) No. 996/2010 from October 20, 2010 on investigation of aviation accidents and incidents in civil aviation and prevention, reference must be made to a problem brought to light in the introduction to this article. Namely, whether investigation in aviation occurrences normalized by an EU norm in the form of a resolution is based on legislative principles which organize an entire investigation and guarantee reaching the objective truth? The analysis of the resolution on investigation of accidents and incidents allowed for the following conclusions:

1. The initial findings were confirmed which reveal that legislative principles were expressed in a direct way in the resolution by the EU legislator. However, a more in-depth analysis of particular legal wordings contained in the resolution gave rise to a positive assumption of their existence.

2. Next conclusion concerns the positioning of the legislative principles. On the grounds of the established findings it appeared that the normative principles were located by the legislator in various places of the resolution: in the phrases in the preamble and the text of the resolution. From the point of view of the law, it is meaningless. The legal force of all principles is equal irrespective of their location. Consequently, principles

contained in the preamble must be considered together with coexisting provisions of the resolution.

3. From the point of view of the established findings, the discussed principles show a clear legislative connection of every investigation of aviation occurrence with a model presented in the discussed resolution. On the other hand, their orientation refers to a quick, impartial, and objective course of investigation of an aviation occurrence. In this way, legislative principles exert a significant impact on the quality of an aviation occurrence investigation as they bind both authorities conducting an investigation as well as other participants of such proceedings. Finally, it may be concluded that the question stated at the beginning arrived at a positive answer.

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³ Art. 249 Treaty establishing European Community provides for the following secondary law acts: resolutions, directives, decisions, recommendations and opinions.

⁴ Resolution of European Tribunal of Justice: ETS 1974, case 181/73 – Haegeman – p. 444, nb. 2/6; ETS 1976 case 87/75 – Bresciani – p. 129, nb. 19. see also art. 87 par 1, act from April 2, 1997. Constitution of the Republic of Poland (*Law Journal* 1997, No. 78, item 483).

