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'I/A' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
No. prev. doc.:	11550/21 + ADD1
Subject:	EU position at ICAO High level conference on COVID-19 <ul style="list-style-type: none">• Co-sponsorship of Working paper on Safer skies initiative at HLCC

Delegations will find in the Annex the working paper on Safer skies initiative proposed for co-sponsorship by the EU.



International Civil Aviation
Organization

WORKING PAPER

HLCC 2021-WP/xxxx

SAF/xx

.././21

HIGH-LEVEL CONFERENCE ON COVID-19 (HLCC 2021) SAFETY STREAM

Montréal, Canada, 12 to 22 October 2021

Agenda Item 5: Other issues to be considered by the Safety stream

Enhancing the credibility of, and confidence in, aircraft accident and incident investigations in conflict of interest scenarios

(Presented by Canada, Cameroon, Equatorial Guinea, Malaysia and Slovenia on behalf of the European Union¹ and its Member States and the other Member States of the European Civil Aviation Conference²)

EXECUTIVE SUMMARY

Annex 13 works well under most circumstances. This paper highlights however, as exemplified by recent events, that the current investigation framework established under Annex 13 – Aircraft Accident and Incident Investigation is not well suited to those situations where it is acknowledged, or there are reasonable grounds to believe, that activities conducted by, or on behalf of, the State of Occurrence (the State responsible for conducting the investigation, as per Article 26 of the Convention on International Civil Aviation) caused the downing of a civilian aircraft. Such a situation – referred to hereafter as a conflict of interest scenario – may be exceptional in nature or occurrence, but can create an inherent conflict of interest, which is not

¹ Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden

² Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, Republic of Moldova, Monaco, Montenegro, North Macedonia, Norway, San Marino, Serbia, Switzerland, Turkey, Ukraine and the United Kingdom

fully addressed in Annex 13, and which may diminish confidence in the investigation and its findings. It is desirable that Annex 13 is adapted to better cater for those exceptional circumstances - where a conflict of interest, either real or perceived, is present - without undermining its effectiveness in routine circumstances where it has proven to be effective. .

Action: The Conference is invited to:

a) Request ICAO prioritize the efforts underway to review and adapt Annex 13 to better manage conflict of interest scenarios and ensure that this work is conducted with an appropriately expansive scope that considers the obligation to conduct a safety investigation in such circumstances, what measures could be taken to ensure the independence and effectiveness of the investigation; and achieve the timely publication of a credible Final Report that can be used to enhance safety and prevent recurrence.

b) Request ICAO to include these key questions in the remit for the AIGP WG to consider as part of its review into Annex 13:

1. consider what options there might be to enhance the credibility of accident investigations in conflict of interest scenarios, including whether there should be a requirement that States explicitly consider, in accordance with established procedures, delegating investigation responsibilities, or, inviting the presence of a neutral third party observer with appropriate rights and privileges;
2. In a conflict of interest scenario, is it practicable and desirable to afford States who have had many citizens injured or killed a greater role in the investigation and how this could be done while ensuring the continued effectiveness of the overall system?

1. INTRODUCTION

1.1 Confidence in the integrity, objectivity and comprehensiveness of the investigation and its findings is required for aircraft accident investigations conducted under Annex 13 to successfully fulfil their sole purpose of preventing future accidents and incidents.

1.2 Annex 13 has been generally successful in tempering and neutralizing outside influences stemming from judicial, political and economic interests thanks in part to years of refinements to reinforce the independence of aircraft accident investigations. This system has been carefully developed and refined since the ICAO's inception to enhance the likelihood that accident investigations are conducted in an impartial, transparent and thorough manner.

1.3 Annex 13 works well under most circumstances. However, there are concerns that Annex 13 does not directly address the conduct of investigations in situations where it is acknowledged, or there are reasonable grounds to believe, that activities conducted by, or on behalf of, the State of Occurrence caused the loss of a civilian aircraft (hereafter referred to as a *conflict of interest scenario*). Whilst these may not be frequent, where they do arise, they can be extremely high profile and significant events. For States that ignore conflict of interest concerns inherent in these situations, and/or manage the investigation in a manner that might undermine the impartiality of the investigation and its findings, the credibility of the resulting investigation and acceptance of its findings may be questioned.

2. DISCUSSION

2.1 The Annex 13 framework must work robustly across a range of different scenarios. Conflict of interest scenarios, whilst rare, can lead to concerns over the credibility of the resulting investigation – undermining confidence in its results and, as a result, the robustness of ICAO's system for accident investigations. Where such doubts arise, there may be unanswered questions concerning some of the factors that contributed to the accident, and whether all potential mitigations that might prevent a reoccurrence have been truly identified, with knock-on implications for the credibility of the system as well as for the States and families affected by such an incident.

2.2 By enabling States to better manage conflict of interest scenarios, we could help foster and maintain the credibility of the investigation and resulting Final Report. One option may be to delegate all or part of the investigation to a relevant competent authority.

2.3 As the global aviation community, we must first and foremost learn from past tragedies and take steps to ensure they never happen again. To that end, this paper proposes that the accident investigation framework articulated in Annex 13 and its supporting documents should be reviewed to consider if there are opportunities for changes that would help enable States to better manage conflict of interest scenarios. This would help ensure future investigations conducted under a similar context can better mitigate such conflicts of interest, and make findings and issue recommendations that improve the safety of civil aviation and prevent future tragedies.

PRIORITIZING AND EXPANDING THE SCOPE OF RELATED EFFORTS

2.4 This paper acknowledges that a considerable amount of detailed work is planned and underway to review Annex 13 across a range of important areas. We welcome this work, and want to underline the importance of it to enhance future accident investigation and aviation safety outcomes.

2.5 Recognizing that conflicts of interest may jeopardize the credibility of investigations, and recognizing that Annex 13 was not designed to account for conflict of interest scenarios, we support the work underway at ICAO to review and consider amendments to Annex 13 accordingly. We invite this Conference to request that ICAO prioritize efforts underway to review and consider how it could enhance the credibility of future investigations conducted under conflict of interest scenarios.

2.6 In order for ICAO to take advantage of this opportunity to enhance its existing accident investigation framework, it is important that this work not be constrained by too limited a scope. As such, we invite this Conference to request that ICAO ensure that work undertaken to review and amend Annex 13 to better manage conflict of interest scenarios considers all possible means to enhance transparency, encourage impartiality, and build confidence in the integrity of the investigation and Final Report.

2.7 In addition, we invite the Conference to request that ICAO consider the following possible questions as part of a wide ranging review, to enhance the existing accident investigation regime.

WHAT OPTIONS ARE THERE TO ENHANCE THE CREDIBILITY OF ACCIDENT INVESTIGATIONS IN CONFLICT OF INTEREST SCENARIOS? SHOULD THERE BE A REQUIREMENT TO CONSIDER DELEGATING THE CONDUCT OF THE INVESTIGATION?

2.8 Though Article 26 of the Convention confers the responsibility to institute an inquiry into the circumstances of an accident to the State of Occurrence, Annex 13 includes provisions that allow the State of Occurrence to delegate the whole or any part of the investigation to another State or a regional accident and incident investigation organisation (RAIO) by mutual arrangement and consent. We suggest that, if the delegation is to a neutral and respected third party, this may be an effective way to mitigate credibility concerns associated with a conflict of interest scenario.

Although Annex 13 provides the option to delegate, consideration should be given to whether adding provisions that recommend or require States consider it in the case of a conflict of interest scenario would improve the effectiveness and/or transparency of the investigation.

2.9 As stated in Annex 13, it would be essential for the State of Occurrence to use every means to facilitate the investigation e.g., by providing unhindered access to data, witnesses and the evidence located in the State of Occurrence.

2.10 Another idea is to invite a neutral third party to provide observers to ensure the investigation is conducted with the expected impartiality and rigour. For a third party to fulfil this function, the observer would require sufficient rights and privileges and these would need to be set out in the Annex as there is currently no specified role for an observer.

2.11 With the above in mind, we invite this Conference to request that ICAO review the procedures articulated in Annex 13, as part of a wide ranging review, to consider what options there might be to enhance the credibility of accident investigations in conflict of interest scenarios, including whether there should be a requirement that States explicitly consider, in accordance with established procedures, delegating investigation responsibilities, or, inviting the presence of a neutral third party observer with appropriate rights and privileges.

IS THERE A NEED TO ENHANCE THE RIGHTS AND PRIVILEGES OF STATES WITH CITIZENS INJURED OR KILLED IN AN AIRCRAFT ACCIDENT? IF SO, WHAT ARE THE BEST MECHANISMS TO ACHIEVE THIS?

2.12 States with injured or killed citizens have a strong interest in the investigation and an important role supporting the victims and their families in many different ways, including with information about the progress of the investigation. We strongly support the proposals for Annex 13 developed by the AIGP to improve the timely release of information.

2.13 At present, Annex 13 allows States with injured or killed citizens to appoint an ‘expert’ who is entitled to: visit the scene of the accident; have access to the relevant factual information approved for public release by the State conducting the investigation, and information on the progress of the investigation; and, receive a copy of the Final report. Where there are concerns over conflict of interest, or the rigour/veracity with which the investigation is being conducted, these rights and privileges may be seen as insufficient by those States that have suffered an extreme loss.

2.14 By contrast, under Annex 13, “Accredited Representatives” are afforded a far greater role in the investigation, given their potential input of relevant information or expertise to the investigation, and are therefore able to enhance the comprehensiveness and rigour of investigations by lending expertise, asking questions, and scrutinizing evidence and conclusions.

2.15 Without an enhanced accreditation from the State of Occurrence, States with injured or killed citizens can be marginalized, leaving these States with unanswered questions and a limited view and role in the investigation. While there may be a large number of different States affected by a large international commercial air transport accident, which may in turn create practical challenges if all are to actively participate in the investigation, it is also worth considering that conflict of interest scenarios are rare, and may merit the additional scrutiny to avoid questions with respect to the investigation’s integrity and thoroughness Annex 13 provides for those that on request provide information, facilities or experts to the State conducting the investigation to appoint an Accredited Representative and participate in the investigation on those matters.

2.16 With the above in mind, we invite this Conference to request that ICAO consider whether it is practicable and desirable to afford States with citizens injured or killed a greater role in investigations and how this can be done while ensuring the continued effectiveness of the overall system.

3. CONCLUSION

3.1 Annex 13 works well under most circumstances. However, there are high profile examples of major aircraft accident investigations conducted under conflict of interest scenarios that have raised concerns, namely that the current investigation framework established under Annex 13 is not well suited to situations where there is a perceived conflict of interest. By enabling States to better manage conflict of interest scenarios, this paper highlights that we could help foster and maintain the credibility of the investigation and resulting Final Report. It is important that where Annex 13 is adapted to better cater for those exceptional circumstances – where a conflict of interest, either real or perceived, is present – this is done without undermining its effectiveness in the more normal circumstances where it has proven to be effective.

3.2 By endorsing and prioritizing efforts to undertake a wide-ranging review and enhance the existing accident investigation regime, ICAO has an opportunity to respond productively and to learn from past difficulties and codify best practices. We look forward to working with fellow ICAO Member States to create a more appropriate framework for the credible conduct of accident investigations conducted under conflict of interest scenarios.

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