



FIRST MEETING EUROPEAN AVIATION SYSTEM PLANNING GROUP (EASPG/1)

(Paris, France, 2 – 6 December 2019)

Agenda Item X: 3.5 (insert where appropriate)

Effects on criminalisation of incidents in the context of Safety Culture

(Presented by IFATCA and IFALPA)

SUMMARY

The principles of free flow of safety information in aviation is compromised by recent events in Switzerland where three cases are causing grave concern to IFATCA, IFALPA and the operational community in Europe. ICAO Annex 19 principles are not being applied, and IFATCA and IFALPA call upon the State Regulators to take the necessary measures to change national laws to protect the ICAO Safety Culture concept and principles.

1. Introduction

In Switzerland three cases where Air Traffic Controllers (ATCOs) have been involved in incidents have led to court cases where ATCOs have been charged with ‘disruption of public traffic’. One case has been treated by the Federal court already and the ATCO involved was fined and convicted. Further court verdicts against ATCOs are expected in 2019 and 2020.

Singling out individuals and punishing them will not improve safety as identified by ICAO, the European Union (IR EU 376/2014), EASA, FAA and Eurocontrol and Flight Safety Foundation (Assembly 40, WP/428) to mention a few. The public has an obligation to make sure that laws are being adhered to and therefore the principles of free flow of information in aviation occasionally collide with the needs of the public. This is the case in Switzerland.

2. The Situation in Switzerland

Below is a short description of the three ongoing cases against ATCOs in Switzerland:

Incident in 2011	Incident in 2013	Incident in 2012
Simultaneous take-off runs on crossing runways	SMI in upper airspace with misleading calls and call sign misinterpretation	Approximation between a VFR and an airliner EASPG/1 – WP/IP/##
At Zurich Airport there are two intersecting runways. RWY 28/10 and RWY 16/34. In this specific case two aircraft received almost simultaneous take-off clearances, one on each (intersecting) runway. Shortly after the take-off run was initiated one of the pilots (departing from RWY 28) aborted the take-off. Half a second later the controller cancelled the takeoff clearance for the same aircraft that had already aborted its takeoff run.	In a busy situation in Zurich Area Control – leading to lots of communication and crossed transmissions – a Ryanair Pilot asked for a higher flight level due to turbulence. The controller in charge issued a climb clearance to a different Ryanair flight on the same frequency. The first Ryanair flight made the readback which was not corrected. About 50 seconds later the Ryanair flight making the readback initiated the climb which led to an SMI (0.8NM/650ft) with a level flight above.	A light VFR aircraft made practice/familiarization touch and goes on all runways at Zurich airport. While on the righthand downwind for a touch and go on runway 16 (already past the runway axis of the intersecting runway 28) the controller cleared a Saab 2000 on runway 28 for take-off. The VFR turned base and final before the runway threshold of runway 16 (abeam the aiming point). The controller ordered the VFR aircraft to make a tight right-hand orbit. Minimum separation according STSB report 250m/75ft.
<ul style="list-style-type: none"> • Court cases through two levels of jurisdiction since 2013 • ATCO charged with disruption of public traffic • Acquittal (local court) in December 2016 • Prosecutor appealed • Court hearing (high court) November 27th 2018 • ATCO found guilty (Zurich cantonal court) in December 2018 • ATCO filed a complaint at the federal court 	<ul style="list-style-type: none"> • ATCO and Pilot were fined by the Federal Prosecution Office in Spring 2017 • ATCO charged with disruption of public traffic • Pilot: Fine accepted • ATCO: Appealed within the 10-day timeframe laid down in Swiss Law • Court hearing (Federal Criminal Court) in April 2018 • ATCO found guilty (Federal Criminal Court) in June 2018 • Reception of written reasoning in October 2018 • ATCO filed a complaint at the federal court • ATCO found guilty (Federal Court) in July 2019 	<ul style="list-style-type: none"> • Investigation by prosecutor • Interrogation of concerned ATCO and Pilots • Prosecutor obtained expert opinion • Data confiscated from ANSP • ATCO charged with disruption of public traffic • Court hearing (local court) started September 5, 2018 • Continuation of court hearing (local court) January 23, 2019 • ATCO found guilty (local court) on March 28, 2019 • ATCO: Appealed within the 10-day timeframe laid down in Swiss Law
Next step: Waiting for the reply from the Federal Court (highest level of jurisdiction)	First valid verdict against an ATCO in Switzerland.	Next step: Waiting for the court hearing at the high court.

1. Will Safety Culture principles be accepted by law makers and the public?

The three cases above have triggered many reactions that have led to different initiatives and discussions. The process that is ongoing could be seen as a prototype for arranging the relationship between safety and justice in Switzerland and can have impact beyond the borders of Switzerland. Different initiatives have been launched, but the most important are two initiatives to change the law in Switzerland. Here is a short description of the two initiatives:

- On Monday, September 16, 2019, a National Councilor filed a parliamentary initiative in close coordination with the Transport and Telecommunications Committees aiming to change the Swiss penal law, the aviation law and the respective regulation. By means of a parliamentary initiative, he proposed the draft of a new enactment or the terms of such an enactment. A committee of the National Council or Council of States is then given responsibility for the legislative work.

- Additionally, earlier in the year an initiative from a Member of Parliament filed a motion that has successfully passed the second chamber of Parliament in week 37, 2019. Motion 18.3700 intends to task the Federal Council to limit the jurisdiction of accidents and serious incidents in aviation to the sole responsibility of the Attorney General of Switzerland (the Federal Prosecutor). Today, ATCOs potentially have to answer to any district court. Limiting this to one set of prosecutors will allow to build up solid ATM understanding in that instance, which would not be possible to do for dozens of cantons.

While the process of changing the law is ongoing, IFATCA and IFALPA are concerned about how the operational community is reacting to the situation. The situation for the individual ATCOs involved is of course of great concern, but also for all other operational personnel. Insecurity and self-examination are part of their daily life in Air Traffic Control. IFATCA and IFALPA's concern is that the situation has a negative impact on safety and therefore we call for a solution to the situation as soon as possible.

That solution would be to press States regulators to change the law to protect the Safety Culture concept as defined in ICAO Annex 19 chapter 5, that says,

5.3 Safety data and safety information protection

5.3.1 States shall accord protection to safety data captured by, and safety information derived from, voluntary safety reporting systems and related sources in accordance with Appendix 3.

Note. — Sources include individuals and organizations.

5.3.2 Recommendation. — States should extend the protection referred to in 5.3.1 to safety data captured by, and safety information derived from, mandatory safety reporting system and related sources.

Note 1. — A reporting environment where employees and operational personnel may trust that their actions or omissions that are commensurate with their training and experience will not be punished is fundamental to safety reporting.

For IFATCA and IFALPA note 1 is very clear. It is crucial that operational personnel will not be punished for reporting incidents in good faith and where they have acted in line with their training and experience to secure the flow of safety information and ultimately to improve safety. This is further confirmed in Annex 13, 3.1. that concerns the objective of investigations,

3.1 The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.

Although *Safety Culture cannot exist in a vacuum and Safety Culture has to co-exist with the law*, punishing operational personnel for being involved in accidents and incidents will not help improve safety for several reasons. Here a short list of issues that describe why punishing operational personnel does not work:

- Systems are not inherently safe. Systems are made safe by the people that operate them.
- Accidents do not happen because individual people make errors. Accidents happen because entire systems break down.
- It does not prevent accidents from happening again.
- It creates fear of reporting and communicating about safety

Punishing people will create an environment where operators are afraid. Operators will stop reporting safety problems they see and experience. This will stop the flow of communication. Actually, this is what makes systems unsafe instead of enhancing safety.

Accordingly, the following draft EANPG Conclusion is proposed:

Why	To protect the Safety Culture concepts and principles of ICAO
What	<ol style="list-style-type: none"> 1. That all Contracting States be urged to examine their existing laws and regulations, and adjust as necessary, or enact laws and regulations to effectively protect safety information – including safety investigation reports - from being disclosed and/or used in disciplinary, civil, administrative or criminal proceedings; 2. That Contracting States be encouraged to follow Just Culture principles before initiating investigations or pursuing criminal prosecutions in the wake of aviation accidents; 3. That all Contracting States remind accident investigation authorities to assert strong control over accident and incident investigations, invite international cooperation in investigations, conduct investigations deliberately and avoid a “rush to judgment,” ensure the free flow of critical safety information, and swiftly address any acts or omissions in violation of aviation standards.
Who	ICAO Regional Director, Europe and North Atlantic
When	1 January 2020

Draft EASPG1 Statement/_ easpg1wp##/x – criminalisation of incidents

That the ICAO Regional Director, Europe and North Atlantic, on behalf of EASPG, take the necessary actions to urge member States Regulators in Europe to address the issue of criminalisation of Air Traffic Control personnel reporting incidents and protect the Safety (Just) Culture concept defined in ICAO Annex 19.

3. Action by the Meeting

3.1 The EASPG is invited to:

- a) note the information presented;
- b) endorse the draft EASPG Conclusion in paragraph 2.10.

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