

The challenges of harmonizing the protection of sensitive safety data across borders in both civil and military investigations

Olivier Ferrante, BEA France

ISASI San Diego, 21 August 2017

Outline

- Introduction (previous MASI meetings raised the issue of working with judicial authorities and protecting sensitive safety data)
- Civil aviation experience in improving relations between safety investigations and judicial inquiries:
 - At International level
 - The new ICAO Annex 13 requirements
 - At European level
 - Recent Improvements thanks to AA
 - Situation in France
 - Case study (Germanwings accident)
- Discussion

Introduction (ISASI 2016 & ESASI 2017)



Brigadier Gen Caitucoli: ***“Lessons learned on the way to conduct a multinational safety investigation from the Hellenic Air Force F-16D Mishap case”***
(Jan 26, 2015)



Brigadier Gen Caitucoli: ***“Judicial authorities abroad: Procedural aspects of Merlin IV accident in Malta”*** (Oct 24, 2016)



Next ESASI: Riga/Jurmala 23-24 May 2018

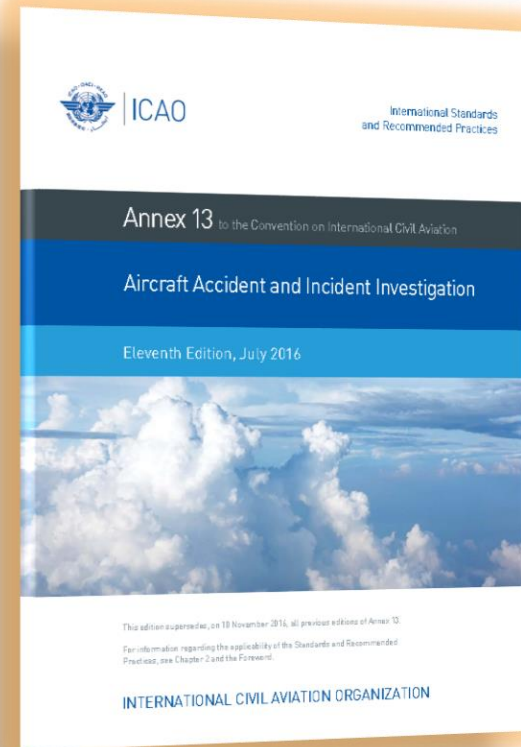
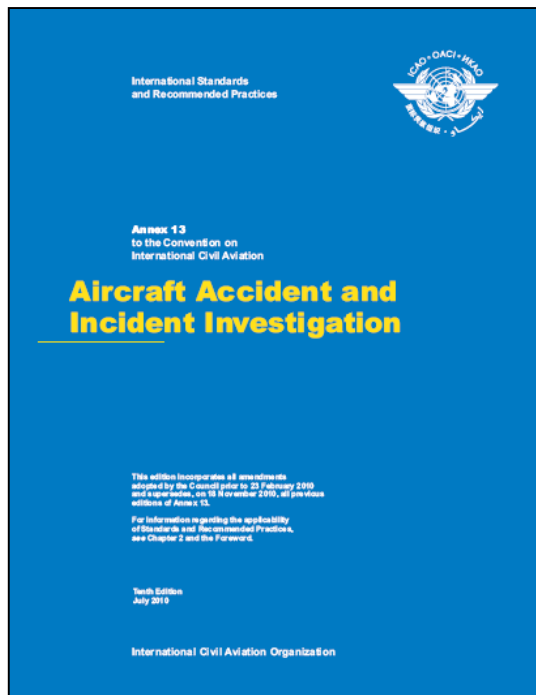
- **22 May 2018 Afternoon:
Military Investigation
Meeting**
- 23-24 May 2018
ESASI Seminar



<http://www.esasi.eu>

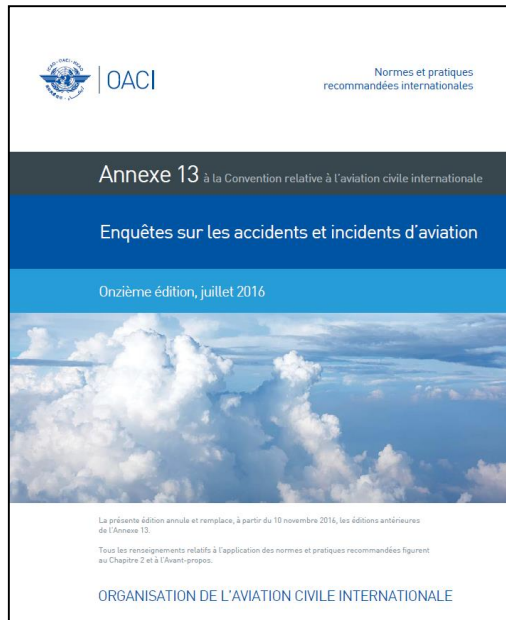
ICAO – Annex 13

Annex 13 was amended in July 2016 -> Major changes



Amendement 15 To Annex 13

- Applicable since November 2016



- Definition of « *accident investigation authority* »



- Provisions on the protection of accident and incident investigation records:

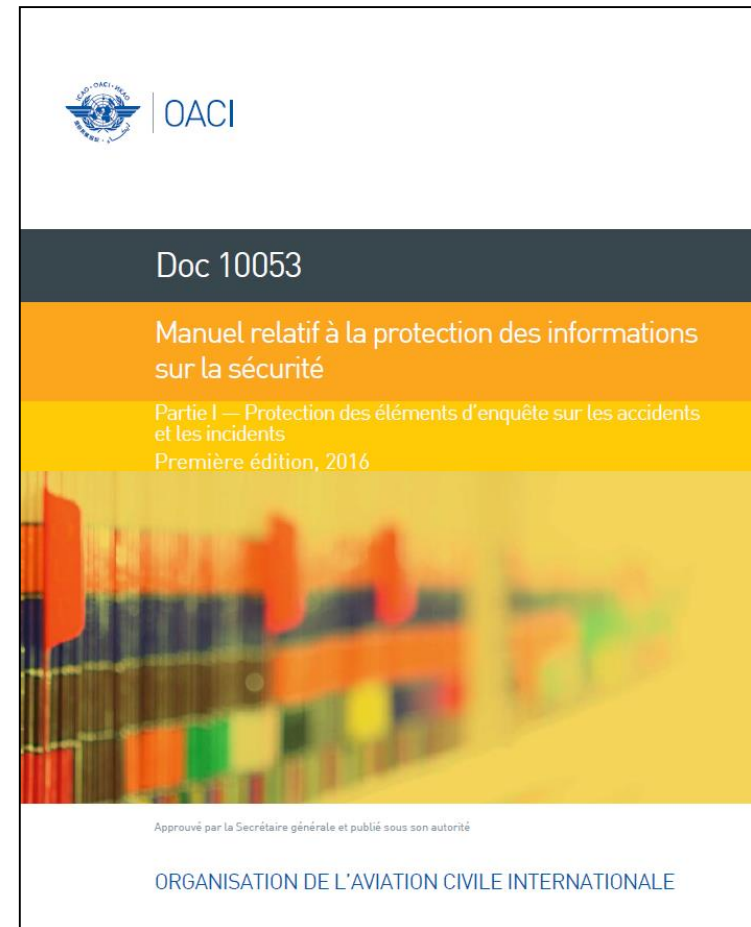
- §5.12
- Appendice 2 (~~Attachment~~ E)
- ...



Doc 10053



- Manual on Protection of Safety Information
- Part I – Protection of Accident and Incident Investigation Records
- First Edition, 2016



Annex 13, § 5.12

- « *Non-disclosure of the records* » replaced with « *Protection of accident and incident investigation records* »

~~Non-disclosure of records~~ *Protection of accident and incident investigation records*

5.12 The State conducting the investigation of an accident or incident shall not make the following records available for purposes other than accident or incident investigation, unless the appropriate authority for the administration of justice in competent authority designated by that State determines, in accordance with national laws and subject to Appendix 2 and 5.12.5, that their disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or any future investigations:

Annex 13, § 5.12

- Records to protect

- ~~a)~~ cockpit voice recordings and airborne image recordings and any transcripts from such recordings;
- b) records in the custody or control of the accident investigation authority being:
 - ~~a~~1) all statements taken from persons by the accident investigation authority in the course of their investigation;
 - ~~b~~2) all communications between persons having been involved in the operation of the aircraft;
 - ~~c~~3) medical or private information regarding persons involved in the accident or incident;
 - ~~e~~4) recordings and ~~transcriptions~~ transcripts of recordings from air traffic control units;
 - ~~f)~~ ~~cockpit airborne image recordings and any part or transcripts from such recordings; and~~
 - ~~g~~5) analysis of and opinions expressed in the analysis of about information, including flight recorder information, made by the accident investigation authority and accredited representatives in relation to the accident or incident; and
- 6) the draft Final Report of an accident or incident investigation.

Overview of Amendment 15 (§ 5.12.4)

- Direct requests to the original sources

5.12.4 States shall ensure that requests for records in the custody or control of the accident investigation authority are directed to the original source of the information, where available.

What is the purpose of this Standard?

- Preserve the **independence** of the investigation
- Prevent or limit the potential for the investigation to become associated with **blame or liability** proceedings
- Prevent investigation from becoming a **convenient source** of information for other investigations

Overview of Amendment 15 (§ 5.12.5)

Non disclosure of CVR and AIR content to the public

5.12.5 States shall take measures to ensure that audio content of cockpit voice recordings as well as image and audio content of airborne image recordings are not disclosed to the public.

Why these records?

- Ambient workplace recordings
- Invasion of privacy
- Critical to investigation (highly sensitive)

Overview of Amendment 15 (§ 5.4)

Who is responsible to protect the accident and incident records listed in 5.12?

5.4 The accident investigation authority shall have independence in the conduct of the investigation and have unrestricted authority...:

a) ...;

b) the protection of certain accident and incident investigation records in accordance with 5.12;

...

Appendix 2 provides clarification for the protection of records listed in 5.12

- **Protection of CVRs and AIRs** and any transcripts shall apply from the time an accident or incident occurs and continue **after the publication of the Final Report**.
- Protection of other **records listed in 5.12 b)** shall apply from the time they come into the **custody or control** of the accident investigation authority and continue **after the publication of the Final report**

Protection of investigation records

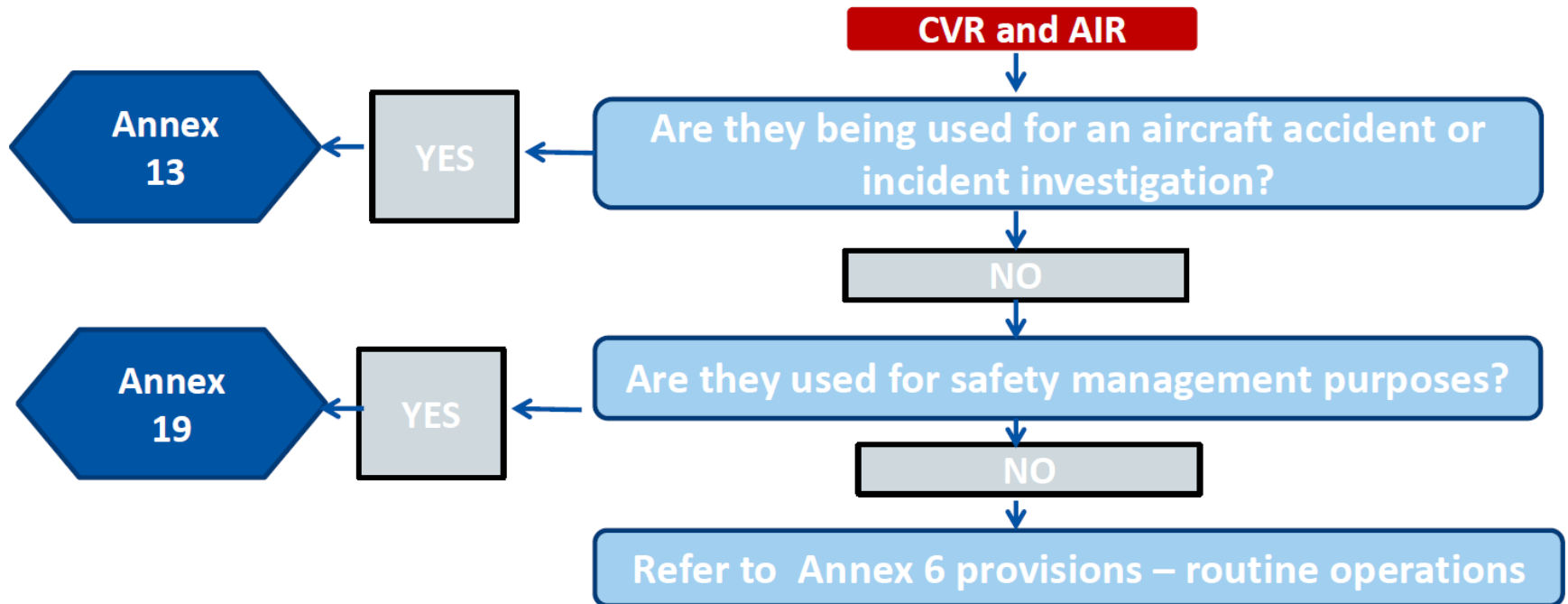
- Why?



ICAO Annexes and Protection

Primacy of Annex 13:

Interaction between Annexes 6, 13, and 19



Regulation (EU) No 996/2010 of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC

**Official Journal of the European Union n° L.295 of 12
November 2010 p. 35**

<http://europa.eu.int>



Relations between Safety Investigation and Judiciary Investigation

- Regulation (EU) No 996/2010 does not regulate the procedure of judiciary investigation
- Guaranty of immediate and unlimited access to and use of evidence by investigator-in-charge (art.12§1)
- Obligation of an open cooperation through the establishment of advance arrangements between safety investigation authorities and other authorities involved such as judiciary (art. 12§3)



Advance Arrangement (1/2)

Article 12 para 3

Member States shall ensure that safety investigation authorities, on the one hand, and other authorities likely to be involved in the activities related to the safety investigation, such as the judicial, civil aviation, search and rescue authorities, on the other hand, cooperate with each other through advance arrangements.

Those arrangements shall respect the independence of the safety investigation authority and allow the technical investigation to be conducted diligently and efficiently.

Advance Arrangement (2/2)

Among others, the advance arrangements shall cover the following subjects:

- (a) access to the site of the accident;*
- (b) preservation of and access to evidence;*
- (c) initial and ongoing debriefings of the status of each process;*
- (d) exchange of information;*
- (e) appropriate use of safety information;*
- (f) resolution of conflicts.*

Member States shall communicate to the Commission those arrangements, which shall transmit them to the chairman of the Network, the European Parliament and the Council for information

Germanwings accident

✓ 24 March 2015

✓ 150 fatalities



Published May 2015

Preliminary Report

Accident on **24 March 2015**
at **Prads-Haute-Bléone**
(**Alpes-de-Haute-Provence, France**)
to the **Airbus A320-211**
registered **D-AIPX**
operated by **Germanwings**

This is a courtesy translation into English by the BEA of the Preliminary Report on the Safety Investigation. As accurate as the translation may be, the original text in French is the work of reference.

BEA

Bureau d'Enquêtes et d'Analyses
pour la sécurité de l'aviation civile
Ministère de l'Écologie, du Développement durable et de l'Énergie

High profile accident

✓ Less than 24 hours after the accident!



Germanwings accident

Two investigations, which involved three different actors :

- (1) the safety investigation of the BEA;
- (2) judicial / criminal investigation led by prosecutors and assisted by the gendarmerie unit



AA between the BEA and the Ministry of Justice



ACCORD PREALABLE RELATIF AUX ENQUETES DE SECURITE AERIENNE

PREAMBULE

L'article 12-3 du règlement n° 996/2010 du Parlement européen et du Conseil du 20 octobre 2010 sur les enquêtes et la prévention des accidents et des incidents dans l'aviation civile prévoit que l'autorité responsable des enquêtes de sécurité, d'une part, et les autres autorités susceptibles de participer aux activités liées à l'enquête de sécurité telles que les autorités judiciaires, de l'aviation civile, de recherche et de sauvetage, d'autre part, coopèrent entre elles sur la base d'accords préalables.

Cet accord respecte les principes ayant conduit à l'adoption du règlement n° 996/2010 à savoir :

- indépendance de l'enquête de sécurité
- libre accès de l'autorité chargée des enquêtes de sécurité à tous les éléments nécessaires à son enquête
- préservation des éléments de preuve
- respect des objectifs et de l'indépendance de l'enquête judiciaire
- recherche du juste équilibre entre la prévention de futurs accidents et la bonne administration de la justice afin de garantir l'intérêt public général

Ref R5

14 page document signed
on 16 September 2014

Fait à Paris, le 16 SEP. 2014
en deux exemplaires originaux.


Le Directeur du bureau d'enquêtes et d'analyses
pour la sécurité de l'aviation civile

Rémi JOUTY

Le Directeur des affaires criminelles
et des grâces

Robert GELLI

13 June 2016: Dispatch note from Minister of Justice


MINISTÈRE DE LA JUSTICE

Paris, le 13 JUIN 2016

DIRECTION
DES AFFAIRES CRIMINELLES ET DES GRÂCES
SOUS-DIRECTION DE LA JUSTICE PÉNALE GÉNÉRALE
Bureau de la politique pénale générale

Le garde des sceaux, ministre de la justice
à

POUR ATTRIBUTION

Mesdames et Messieurs les procureurs généraux près les cours d'appel
Monsieur le procureur de la République près le tribunal supérieur d'appel
Mesdames et Messieurs les procureurs de la République
près les tribunaux de grande instance
Madame la procureure de la République financier
près le tribunal de grande instance de Paris

POUR INFORMATION

Mesdames et Messieurs les premiers présidents des cours d'appel
Monsieur le président du tribunal supérieur d'appel
Mesdames et Messieurs les présidents des tribunaux de grande instance
Monsieur le membre national d'Eurojust pour la France

OBJET : Présentation de l'accord relatif aux enquêtes de sécurité aérienne entre le bureau d'enquêtes et d'analyses pour la sécurité de l'aviation civile (BEA) et la direction des affaires criminelles et des grâces

N/REF : 2014/0098/E13

PI : Glossaire ; accord préalable relatif aux enquêtes de sécurité aérienne du 16 septembre 2014 ; règlement (UE) n° 996/2010 du Parlement européen et du Conseil du 20 octobre 2010 sur les enquêtes et la prévention des accidents et des incidents dans l'aviation civile et abrogeant la directive 94/56/CE

1

On page 2:

- Conformément aux termes du règlement européen, la primauté est ainsi donnée à l'enquête de sécurité, tout en recherchant un équilibre entre la prévention de futurs accidents et la bonne administration de la justice.
- Pursuant to the terms of the European Regulation, priority is given to the safety investigation, and a balance is sought between the prevention of future accidents and the proper administration of justice.

Thank you for attention,

Questions?

Email: olivier.ferrante@bea.aero