



BRIEFING

Independence in Investigation of Transport Accidents

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1. Introduction

Independent transport accident investigations derive their value and significance to society from the fact that they are the *only* kind of investigation that set themselves the sole task of systematically establishing precisely the truth and the facts of what has taken place with the aim of learning to improve safety and helping to prevent recurrences. In doing so, they can also help to assure society that the occurrence of such events is being addressed.

In practice, however, there are many differences in how investigations for this purpose are conducted across Europe. This raises serious questions about the extent to which requirements for their independence from investigations of other kinds are met.

With the endorsement of ETSC's Main Council, the ETSC Board of Directors has agreed that promoting a set of principles for independence of transport accident investigation in Europe, principles under which the requirements for independent investigation could be met by the EU itself, by each Member State and by any other European country, should be an ongoing concern for ETSC, while work on this should not be at the expense of other ETSC policy priorities.

This initiative has been taken within ETSC without prompting or encouragement from any source of funding, but the Board recognises the importance of external funding to enable the ETSC Secretariat to devote effort to promoting the independence of transport accident investigation. The Board therefore issues this briefing, first to make known its concern by setting out proposed principles and indicating how work might be started on promoting them, and secondly to invite any sponsors who may wish to discuss funding such work to contact ETSC.

Sections 2-6 of the briefing are based closely upon the experience, expertise and writings of Professor Pieter van Vollenhoven, former chairman of the Dutch Safety Board and board member of ETSC. The remainder is the work of the Board with inputs from members of Main Council.

2. The origins and evolution of independent accident investigation

Independent accident investigations originated in the field of aviation. During and after the Second World War, aviation developed apace, and this was accompanied by numerous accidents.

When an accident occurred, aircraft manufacturers, airlines and pilots' organisations were naturally eager to know precisely what had happened, so as to learn lessons that could help to improve safety. Many felt that a criminal investigation was not the appropriate instrument to achieve this.

For this reason, a provision (article 26) was included in the aviation 'charter' – the 1944 Chicago Convention on International Civil Aviation, which sought to ensure that Contracting States implemented safety regulations in as uniform a manner as possible – that placed Contracting States under an obligation to conduct an investigation into every aviation accident. Under this provision, the State in which an accident had taken place was required to conduct an investigation, even if the aircraft involved originated from a different Contracting State.

The detailed rules with which these investigations would have to comply were not laid down until later, on 11 April 1951, with the adoption of Annex 13. Annex 13 contains Standards and Recommended Practices (SARPS). The Standards were seen as essential norms for safety investigations, while Recommended Practices are merely recommendations. In contrast to the Chicago Convention, the SARPS are not binding under international law, but may acquire binding force if they are transposed into national legislation. The obligation to transpose the SARPS into national legislation was initially confined to the highest feasible level for each State.

The philosophy underlying article 26 of the Chicago Convention with the accompanying Annex 13 was later applied to the member states of the European Union. Directive

94/56/EC of 21 November 1994 forms the basis for investigations into accidents and incidents in civil aviation within the European Union. From 21 November 1994, all Member States were required to comply with the provisions of this Directive.

Although the Directive was analogous to the Chicago Convention and Annex 13, it was, unlike Annex 13, binding on all EU Member States.

The Chicago Convention and Annex 13 certainly proved to be a source of inspiration for Europe: the current EU Regulation 996/2010 on the investigation of accidents and incidents in civil aviation can only be viewed as an implementation of Annex 13.

Since the subject of safety had traditionally been highly compartmentalised and fragmented – it was only much later that an integrated approach to safety issues was developed – every sector wanted to have its own separate, independent investigation body. Combining investigations of aviation accidents with those of shipping, road or pipeline accidents had not been considered appropriate.

In a way that was ahead of its time, the US Congress became in 1966 the first national assembly in the world to decide to pool investigative resources in the transport sector within a single body. With this unprecedented decision, it established the National Transportation Safety Board (NTSB). The NTSB was initially set up as a branch of the Department of Transportation (DoT). In 1974, however, in a restructuring operation, the NTSB acquired the status of an independent agency. Experience gained with investigations had clearly shown that the NTSB's independence should be seen as a prerequisite for its functioning without any appearance of bias. The rationale underlying the NTSB's complete independence was expressed as follows by the US Congress:

“Proper conduct of the responsibilities assigned to this Board requires vigorous investigation of accidents involving transportation modes regulated by other agencies of Government; demands continual review, appraisal and assessment of the operating practices and regulations of all such agencies; and calls for the making of conclusions and recommendations that may be critical of or adverse to any such agency or its approval. No Federal Agency can properly perform such functions unless it is totally separate and

independent from any other department, bureau, commission, or agency of the United States.”

In 1966 the NTSB started conducting investigations into aviation accidents. Its mandate was later expanded to include investigations into shipping, highway, rail and pipeline accidents. The NTSB took the position that, whatever the sector, any accident could be investigated using the same approach, and that concentrating resources in a single body responsible for investigating safety matters would give that body far more authority than dividing investigations up among a cluster of separate investigation bodies.

Developments in the United States, in relation both to aviation and to the establishment of the NTSB, initiated an international trend. The recognition of the need for independent investigations has led to the advent of separate investigation bodies, aiming to be independent, in the various transport sectors. Several countries have set up transportation safety boards that were structured along lines similar to the NTSB.

3. The value and significance of independent investigation

The sole task of independent investigation of an event is establishing precisely the facts of what has taken place. To find out what has happened, the investigators need to get answers to all their questions. To achieve this, it is imperative to guarantee that all persons involved in the event are able to speak freely, even about their own mistakes. This aim is to be distinguished from the aims of allocating blame, responsibility, or legal or financial liability, or of identifying criminal activity.

It is essential for an independent investigation that the questions of guilt and liability are totally excluded from its remit.

Establishing whether the law has been broken is the domain of criminal investigations and in a criminal investigation possible suspects are permitted – it is even a human right – to remain silent, since no one is required to incriminate themselves. In civil proceedings to allocate liability, strong incentives to withhold information can also arise.

That is why independent investigations should be organised quite separately from criminal investigations and civil proceedings. It should not be permissible to use the proceedings of independent investigations as evidence in criminal or civil proceedings. Nor should evidence given to an independent investigation be admissible as evidence in other kinds of proceedings without the consent of the independent investigation and of those involved. When it is appropriate for a criminal investigation to proceed in parallel with an independent investigation, it may well be important to arrange for sharing of factual information, but evidence provided by witnesses to the independent investigation should remain strictly confidential to that investigation.

The possibility should, however, be recognised that an independent investigation may bring to light criminal activity, in which case the importance of those involved speaking freely to the investigation about the event being investigated has to be weighed against reluctance to condone criminal activity. A possible resolution of this dilemma is to require the independent investigation to report to the Public Prosecution Service the possible

occurrence only of certain specified particularly serious criminal offences (for instance murder or attempted murder, manslaughter, hostage-taking, terrorism, crimes against the State and cases of serious corruption), but to require them to refrain from reporting other possible criminal activity.

In each case where it is apparent that an event has resulted from terrorism or other criminal activity, it is for consideration whether independent investigation should proceed alongside the necessary criminal investigation.

4. Independence of the investigators

In addition to securing the confidence of those involved in an event being investigated, it is also important to avoid any suspicion of conflict of interest on the part of the (independent) investigating organisation.

Experience has made abundantly plain that when a serious event takes place, numerous conflicting interests may play a role. Some interests may conflict to the extent that some parties may be motivated to try to prevent the truth from coming to light. So it is important to avoid any semblance of conflict of interest on the part of those conducting an independent investigation and any suspicion that they might have been involved in any way in the event or the circumstances in which it occurred. If any such suspicion arises, the public may well lose confidence in the investigation.

5. Some lessons from experience so far with independent investigation in transport

Pioneering development of independent investigation in the aviation industry and pooling of investigative resources across the transport sector in the USA to establish the National Transportation Safety Board (NTSB) have paved the way for independent investigations, but in different ways.

Although the recognition of the need for independent investigations has led to the advent of separate investigation bodies in the different transport sectors, several countries have set up transportation boards structured along lines similar to the NTSB. In addition, three countries to date (namely Sweden, Finland and The Netherlands) have decided to introduce independent investigations of events in all sectors – that is, not only in transport.

Some lessons from experience relevant to European Countries and the EU seem to be as follows.

The civil and criminal courts are precluded by their primary duties in respect of legal liability and criminal activity from carrying out investigations with the required independence. Nor are government inspectorates and regulatory bodies in a position to do so because their own procedures and previous actions may come into question.

Longstanding practice of setting up ad hoc committees to investigate particular adverse events should not be relied upon to provide the required independence because the powers such committees are given are liable to be influenced by the particular circumstances of their establishment.

Proposals to legislate for independent investigation procedures in a country that has not so far had such legislation may well have to overcome reluctance, or even strong resistance, stemming from anxiety about changing arrangements that may be perceived as having worked well enough as they are.

Even the EU's implementation – currently in Regulation 996/2010 (Article 4 et seq) – of the international procedure established in 1951 for investigating accidents and incidents in civil aviation may fall short of one of the key requirements for independence of the investigation, namely the confidentiality and protection of its proceedings, through the requirement in Article 12 to share information with other authorities in certain circumstances. (Note: Proposal 2015/0277 for a Regulation that would modify previous Regulations governing safety in civil aviation envisages no changes in this aspect of Regulation 996/2010.)

6. Proposed European principles for independent investigation

ETSC proposes the following principles concerning procedures for independent investigation of accidents and other adverse events, for the EU itself and each European country to implement within their respective institutions through one or more independent investigating organisations.

A - Sole purpose of independent investigation of adverse events

The sole task of independent investigation is systematically establishing the truth and the facts of what has taken place with the aim of learning to improve safety and helping to prevent recurrences, without involvement in criminal investigation or proceedings to establish liability.

B - Independence of an investigating organisation

- those investigating an event must have no involvement in the event or in the circumstances under which it took place
- the organisation's work must be protected from hindrance by outside influence and be adequately funded
- the organisation determines the content of its reports and publishes them, including any recommendations it makes
- recommendations should be addressed to any individual or body apparently able to help to improve safety
- recipients of recommendations are required to respond and monitoring of their actions in response is published

C - Separation of independent investigation from criminal investigations and civil proceedings to determine liability

- except for specified very serious offences, the organisation does not report to the criminal justice system any criminal offence that comes to its knowledge
- all proceedings of an independent investigation and associated material are strictly confidential to the investigation and evidence provided by witnesses must not be

made available to any legal proceedings, but factual information may be shared between investigations proceeding in parallel

D - Practical working of an investigating organisation

The organisation should be empowered to

- access and secure evidence at all locations and from all individuals and organisations relevant to the event being investigated
- require autopsies and obtain other expert assistance
- make interim recommendations where early action is called for in the interests of safety
- reopen a completed investigation in the light of new evidence

The organisation should be required to

- publicise how and on what intended but non-binding timescale it goes about each investigation
- provide for affected parties to comment on factual content of each report before it is finalised
- notify affected parties in advance of publication of each report
- report annually on its activities

7. Promoting independence in transport accident investigation in Europe

In advocating implementing the proposed principles in the transport context in Europe it is relevant to distinguish between aviation, maritime transport and rail transport on the one hand and road transport on the other.

Aviation, maritime and rail accidents

For the first three forms of transport there exist the European Aviation Safety Agency (EASA), the European Maritime Safety Agency (EMSA) and the European Union Agency for Railways (ERA), agencies charged respectively with the harmonisation and integration across Europe of aviation safety, maritime safety and environmental protection, and safety and other aspects of railway operation.

Under Regulation 996/2010, Directive 2009/18/EC and Directive 2016/798 respectively, these Agencies are to require each Member State to establish investigation authorities tasked to carry out investigation of incidents affecting their respective means of transport, subject to oversight by the Agency concerned. The envisaged investigations have many of the characteristics that ETSC sees as being required of independent investigation. (Note: Regulation 996/2010 may in due course be amended by proposed Regulation 2015/0277, but the amendments being proposed do not affect its relevant provisions)

In the cases of aviation, maritime transport and rail transport, ETSC would like to see independent analysis and reporting on the ways in which the respective agencies encourage and monitor arrangements for independent investigation of events in their respective modes of transport with a special focus on the extent to which these arrangements meet the requirements for independent investigation.

Road accidents

There is no counterpart EU agency for road safety, though there is a Road Safety Unit in DG-MOVE with a rather different range of responsibilities.

There is a need to investigate further the current scope of independent road accident investigation in Europe and assess the need to develop it further recognising both the relevance to road transport of what has been achieved in the other modes and the important practical differences between the number and nature of relevant events on the roads and their number and nature in the other modes.

A future EU strategy for developing independent road accident investigation should also take account of the SafetyNet programme recommendations for transparent and independent road accident investigations¹, the harmonised protocol developed by the DaCoTA programme for a Pan-European In-Depth Accident Investigation Network^{2,3}, and current practice in European countries.

Independent investigation may also have an important contribution in the safe evolution of automated driving and autonomous vehicles in Europe. Indeed, the NTSB in the United States has already published independent investigation reports into collisions involving such vehicles.⁴

If, as ETSC has long advocated, an EU road safety agency were set-up, supervision of independent road accident investigation could be a task for such an agency.

¹ Jähi H., Vallet G., Elliman R., Morris A., Fagerlind H., Usami D., Giustiniani G., Persia L., Parkkari K., Jänsch M and Otte D. (2008) Recommendations for Transparent and Independent Road Accident Investigation. Deliverable D4.5 of the EU FP6 project SafetyNet.

² Hill, J., Aldah, M., Talbot, R., Giustiniani, G., Fagerlind, H., Jänsch, M., (2012) Final Report, Deliverable 2.5 of the EC FP7 project DaCoTA.

³ Hill, J., Aldah, M., Talbot, R., Martinsson, J., Fagerlind, H. (Eds) (2012) Final Updated Protocol with Updates from the Final Review, Deliverable 2.4 of the EC FP7 project DaCoTA.

⁴ See: NTSB (2018), Car with automated vehicle controls crashes into pedestrian, <https://www.nts.gov/investigations/Pages/HWY18FH010.aspx> and NTSB (2018), Car with automated vehicle controls crashes into roadway barrier <https://www.nts.gov/investigations/pages/hwy18fh011.aspx>

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The European Transport Safety Council (ETSC) is a Brussels-based independent non-profit making organisation dedicated to reducing the numbers of deaths and injuries in transport in Europe.