



The Consumer Voice in Europe

## Air Passengers' Rights

Revision of Regulation 261/04 on the rights of air passengers in the event of denied boarding, cancellation and long delays

BEUC position paper

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## Summary

The new proposal **constitutes a number of improvements upon** Regulation 261 issued in 2004; we welcome:

- More and better **information** for passengers on their rights;
- The **right to financial compensation for delayed passengers**;
- Protection given to passengers who miss their **connecting flights** due to a previous delay,
- Clarification of the right to **re-routing** to include options with alternative airlines or other means of transport;
- That the **rescheduling of flights** is rightly assimilated to (long) delays in some instances;
- The right of passengers to correct **spelling mistakes**;
- The new provisions strengthening the **powers of the enforcement authorities** including their obligations **to report** on their activities and to **cooperate with Alternative Dispute Resolution (ADR)** bodies;
- The obligation of **airlines** to put in place in house **complaint handling procedures** including deadlines to respect.

In contrast, the proposal **reduces** a few important **rights** provided now by Regulation 261/04 or by the European Court of Justice:

- The **right to compensation for long delays** is **weakened** and **deviates** from the rulings of the European Court of Justice which granted passengers the right to financial compensation for delays **of 3 hours or more**;
- The proposal **reduces** the currently unlimited **right to assistance in extraordinary circumstances** by limiting it to the provision of accommodation to 3 nights and 100 Euros per night.

Furthermore, a number of issues that currently cause consumer detriment in the air transport sector are **not tackled by the proposed review or only insufficiently addressed in the proposal**. The future Regulation **should include** the following elements and rights:

- A **full ban of the “no-show” clause**;
- The right to **re-routing** by other means of transport should be granted **as soon as possible** (the 12 hours timescale should be deleted);
- The right to **re-routing** should also be granted to passengers who suffer a **long delay**;
- A **presumption that technical problems** are **not** an “extraordinary circumstance”, should be introduced;
- **Pre-announced strikes and labour disputes** should **not** be considered “extraordinary circumstances”;

- **Weather conditions** which have been **foreseen and predicted** should not be considered “extraordinary circumstances” as a matter of course;
- The prices of air tickets advertised by airlines should be obliged to include the following minimum services: **checking-in, provision of boarding pass and 1 item of checked luggage**;
- Aside from one item of hand luggage, passengers should have the right to carry their **essential items** and the **airport retail purchases**.
- The right to **correct** spelling mistakes should be extended to booking mistakes of **day and time**;
- **Passengers** should have the right to **transfer their tickets** to another person in case they are prevented from travelling;
- **Airlines** should be obliged to **regularly report** on the quality of their services (e.g. on delays and cancellation rates);
- The right of passengers to **file complaints** with airlines should **not** be subject to **time limits**;
- **Airlines** should be **obliged to adhere** to Alternative dispute resolution (**ADR**) or on line dispute resolution (**ODR**) schemes;
- **Airlines** should be obliged to have **a representative in each airport where they operate**;
- **Airlines** should be **easily accessible for consumers** by providing passengers with inexpensive telephone contacts and e-mails addresses;
- When baggage is delayed or lost, **airlines** should be obliged to **compensate** passengers for each day of delay. Once found the airlines should be obliged to **transport it to the consumer**;
- The **scope** of the Regulation should be **extended to non-EU carriers arriving in the European Union (and European Economic Area)**;
- A **mandatory guarantee** that airlines reimburse and repatriate passengers in instances of **insolvency** should be introduced.

## **Introductory comments**

Regulation 261/04<sup>1</sup> provides a minimum level of rights to air passengers in the event of being denied boarding, cancellations and long delays of flights. Clearly this Regulation has helped improve the position of passengers, vis-à-vis the air companies.

And yet, the practical application of the Regulation has created many problems, mostly due to the complexity of its drafting, often biased interpretations by the industry of its provisions and some gaps in its scope.

Consumers are confronted with patchy compliance or general non compliance by the industry as well as ineffective enforcement of their rights. These have triggered numerous consumer complaints<sup>2</sup>. More often than not, passengers are left with the sole “alternative” of taking legal action against the non compliant airline. However, the majority of passengers cannot afford going to court and the difficulty of finding any alternative, out of court resolution to a dispute which is quicker and cheaper adds to their frustration when their rights are at stake.

Therefore, BEUC welcomes the new proposal as it represents an opportunity to make progress and improve the situation. The great volume of cases brought before the **Court of Justice of the European Union (CJEU)** on the interpretation of Regulation 261/04 and the consequent case law produced to date<sup>3</sup>, are clear proves of the need to revisit Regulation 261/04.

In all the cases dealt with by the Court of justice, the rights of passengers were reinforced and enhanced. The new legislative proposal is therefore the opportunity to codify the Court’s many rulings.

The new Regulation should aim to achieve and maintain a **high level of consumer protection** by clarifying and extending the rights of passengers in particular bringing them in line with the rulings of the Court of Justice. It should introduce the right incentives for airlines to fulfil their obligations including more effective and stringent enforcement measures.

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<sup>1</sup> Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

<sup>2</sup> Consumer complaints in the transport sector are at the top of the rankings. The ECC (European consumer Centers) reports of 2008 and 2009 indicate that consumer complaints in the transport sector represented 30% of all complaints; circa 80% of those, concern air transport. In the last 5 years the number of complaints in the air transport sector, has increased by 96% (ECC Report 2011).

<sup>3</sup> Since the enter into force of Regulation 261/04 the CJEU dealt with more than 20 cases.

## Detailed comments

### ▪ **The right to financial compensation – Long delays (Article 6)**

Regulation 261/04 provides for the right to financial compensation only in the event of flight cancellations; it does not grant this right to passengers for long delays. In practice, in order to avoid paying compensation this distinction has been used by airlines to present as delays situations that are in fact cancellations<sup>4</sup>.

As such, we very much **welcome** that the new proposal introduces the **right to compensation for long delays** (Article 6). Long delays can cause as much trouble for passengers as cancellations. In addition, BEUC supports the right to compensation to be based on the time of arrival at final destination point as this reflects better the inconvenience caused to passengers and better reflects the principle of equal treatment between cancellations and delays.

In the *Sturgeon* and *Böck* case<sup>5</sup> as in the *Nelson*<sup>6</sup> and *Folkerts* cases<sup>7</sup>, the CJEU extended the right of passengers to financial compensation in the event of a **delay of 3 or more hours** at the final destination. Based on the Regulation 261's objective of providing a high level of consumer protection and some of its key provisions (particularly Recital 15 and article 5(1)(c)(iii)<sup>8</sup>), the Court concluded that the trouble and inconvenience caused to passengers **of 3 hours in arrival is comparable to that of a cancellation**<sup>9</sup>.

BEUC therefore **disapproves** of the Commission's proposal **to weaken the right to compensation** in the event of long delays (stipulated by the CJEU as of 3 hours delay) by establishing different delay periods of 5 hours, 9 hours and 12 hours (dictated by the length of the flight) before the right to compensation is triggered. This policy choice is more complex, less equitable and more difficult to enforce than the minimum delay of 3 hours for all flights. It will not improve the application and enforcement of passengers' rights.

Furthermore, in 2012 the European Parliament has called on the Commission to incorporate the CJEU's rulings (*Sturgeon*, *Nelson* and *Folkerts*) in order to ensure harm to the passenger is compensated on the basis of the principle of equitable treatment.

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<sup>4</sup> See facts in *Böck* Case (C-432/07).

<sup>5</sup> C-402/07 and C-432/07 (*Sturgeon* and *Böck*) of 19 November 2009.

<sup>6</sup> C-581/10 and C-629/10 (*Nelson* and others vs IATA, KLM, British airways) of 23 October 2012.

<sup>7</sup> C-11/11 (*Air France vs Folkerts*) of 26 February 2013.

<sup>8</sup> According to article 5.1c)iii in case of cancellation, compensation is not due if the airline can offer re-routing to the passenger on a flight departing no more than 1 hour before the schedule time of departure and arriving no more than 2 hours after the schedule time of arrival. This results in a loss of time of 3 hours in total.

<sup>9</sup> Points 43 of the *Sturgeon* ruling.

The Commission justifies this reduction of passengers' rights by assuming that it will encourage industry to better comply with their compensation obligations. This is not an acceptable justification. In addition, contrary to the Commission's justification, we do not believe a right to compensation after 3 hours delay would prompt airlines to cancel flights rather than to operate flights, as companies must compensate for cancellations. The impact assessment (IA) accompanying the Commission proposal does not spell out this argumentation.

The Impact Assessment estimates that the costs of the Regulation 261/04 changed to include compensation as of 3 hours would indeed raise in the years to come, but it states this would be mostly due to traffic growth and partly to the increased in possibilities for passengers to claim compensation (e.g. ADRs).

The Impact Assessment estimates the cost of Regulation 261/04 to be 10.4 million Euros, while the new proposal would cost 9.8 million euro<sup>10</sup>; this is not a very significant difference and cannot justify the proposed reduction of consumers' rights.

Moreover, in the wake of the Sturgeon judgment, the Commission published a number of estimates of the impact of an obligation to compensate as of 3 hours delay. It reported that between 2006 and 2009 *less than 1% of medium-haul flights* and 0.4% of short-haul flights were affected by the obligation to pay compensation<sup>11</sup>. This shows that setting such an obligation in law would not have a significant impact on airlines.

It should always be borne in mind that passengers' right to compensation is not applicable in case of extraordinary circumstances.

#### ▪ **Missed connections (right to assistance and compensation)**

We **welcome Article 6a** as it expressly provides a **right to assistance and compensation** for missed connections.

When missed connections occur due to the late arrival of a preceding flight passengers most often choose to be re-routed on another flight. This obliges the passengers to wait until they are re-routed and can easily cause considerable delay of arrival at the final destination. Therefore, the right to assistance while waiting and the right to be compensated for a long delay of arrival should be ensured.

As stated previously, BEUC supports basing the right to compensation on the time of arrival. If the time of departure would be the basis for compensation -as claimed by airlines- companies would opt to quickly re-route passengers on indirect flights causing extra inconvenience and likely an even longer delay at final destination (due to re-routing).

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<sup>10</sup> Table 6 of the Impact assessment: page 47.

<sup>11</sup> (SEC(2011) 428):

[http://ec.europa.eu/transport/themes/passengers/doc/sec\\_2011\\_428\\_staff-working-paper.pdf](http://ec.europa.eu/transport/themes/passengers/doc/sec_2011_428_staff-working-paper.pdf)

Airlines argue that this provision would potentially *destroy* interlining agreements, in particular provided by regional carriers. We acknowledge that in some cases a missed connection can be the result of a short delay of preceding flight arrival and that the obligation to compensation could seem unfair. However, airlines can reallocate liabilities among themselves once the airline which caused the delay pays compensation.

Article 6a only applies to flights which are part of the same contract of carriage. In practice, when the flights involved are part of a single contract, airlines tend to assist the passenger and find a solution. But for flights which are **part of different contracts** of carriage, passengers are often **unprotected** from missed connections. Considering this, we believe that for missed connecting flights which are not part of the same contract, **the right to assistance** should at least be granted (in particular if the same company operates the “connecting” flights).

If non-contractually linked flights are outside of coverage, airlines may simply change their business models and conclude different contracts for each flight. In addition, low cost carriers who only sell flights “point to point” would not be covered at all (not even by the obligation to assist)<sup>12</sup>.

- **Right to assistance (accommodation)**

BEUC welcomes the synchronisation of the trigger points to be assisted (as of 2 hours in all cases). Regulation 261 establishes a system around the right to assistance which has proved too complex (in particular for consumers) mainly because the trigger points for the right to assistance vary depending on the length of the flight<sup>13</sup>. In addition, the inconvenience felt by passengers confronted with disruptions does not depend on the length of the flight nor on the nature of disruption (delay, cancellation) but rather on the time that they are obliged to wait at the airport and the actual delay suffered on arrival.

The new proposal provides that in all cases (including before being re-routed after a cancellation) the right to assistance (food, drinks, telephone calls) is triggered, as is the right to accommodation after 5 hours. We hold that this is a more appropriate system which will also help consumers to understand their rights better.

Regarding the **right to accommodation**, BEUC **regrets** that the new proposal **dilutes the current Regulation** which ensures passengers are taken care of while waiting through disruptions. Article 9.4 as proposed **limits the right to accommodation to 3 nights and 100 euro per night** in case the disturbance was due to “extraordinary circumstances”<sup>14</sup>. BEUC does not support this reduction of the right to assistance. Instead the proposal should revert to an open right to accommodation encompassing necessary, proportionate and reasonable costs<sup>15</sup>.

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<sup>12</sup> E.g. a flight from Brussels to Madrid and a “connection” from Madrid to Malaga provided by the same (low cost) carrier.

<sup>13</sup> Article 6 of Regulation 261/04.

<sup>14</sup> We support however that this limitation does not apply to passengers with reduced mobility (PRM).

<sup>15</sup> C-12/11, Denise McDonagh v Ryanair Ltd, 31 January 2013.

The volcanic ash cloud incident in 2010 is at the heart of this policy choice. Since then, airlines have been calling for a reduction of their obligations of assistance in “extraordinary circumstances”. The question as to whether events such as volcanic eruption (highly exceptional) falls fully into Regulation 261/04 in terms of assistance obligations, was put to the Court of Justice in a case brought by Ryanair. In its judgment of 31<sup>st</sup> January, 2013, the CJEU acknowledged the merits of the Regulation in granting the right to assistance to passengers in these circumstances. The Court said that the right to unlimited accommodation is all the more justified in situations which persist over a long time and where passengers are particularly vulnerable. Yet, the Court also aimed to insure this right is not abused by passengers when clarifying that if the airline fails to provide the due care, the passenger can only claim the reimbursement of costs which were *necessary, appropriate and reasonable*.

The ash cloud was a very exceptional event. While it rightly served to alert the different actors of the need to engage into better management of crisis situations, it must not be used as the reason to lower standards of consumer protection in the air transport sector. Thus, we believe the new proposal is a **disproportionate response to a very exceptional event**.

Air transport cannot be compared with other means of transport in terms of the need for assistance. Air transport most often involves long distances and passengers affected by disruptions are often far from their homes, in a country whose language they may not speak and with nobody to turn to. The long distances often involved preclude passengers from finding alternative means to arrive at their final destination.

During the ash cloud crisis, hotels raised their prices considerably. Passengers do not have the opportunity to negotiate prices with hotels but airlines can. If the Regulation came into force as proposed, passengers – should they be able - will have to pay the cost of extra days and maybe also the possible extra costs during the first three days (if prices rise over 100 euro). Afterwards, they would be entirely on their own in covering any costs.

The 2011 Report (SEC/2011/428) on the costs of compliance with the Regulation (in the aftermath of the ash cloud), shows that the financial impact on airlines of the Regulation is often overestimated<sup>16</sup>. Furthermore, the annual financial reports of several major airline companies show that the volcanic ash incident did not prevent those airline companies from achieving very good results in 2010<sup>17</sup>.

Finally, the Impact assessment of the proposal itself acknowledges that the consequences and difficulties caused by the volcanic eruption (e.g. closure of the air space) are unlikely to be reproduced thanks to a better understanding of the problems being reflected in changes to safety regulations.

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<sup>16</sup> (SEC(2011) 428):

[http://ec.europa.eu/transport/themes/passengers/doc/sec\\_2011\\_428\\_staff-working-paper.pdf](http://ec.europa.eu/transport/themes/passengers/doc/sec_2011_428_staff-working-paper.pdf)

<sup>17</sup> See ECC Report 2011( page 29):

[http://ec.europa.eu/consumers/ecc/docs/ecc\\_net\\_air\\_passenger\\_report\\_2011.pdf](http://ec.europa.eu/consumers/ecc/docs/ecc_net_air_passenger_report_2011.pdf)



Notwithstanding, when mass disruptions linked to extraordinary circumstances occur all actors involved should cooperate and share the burden. Accordingly, there should be ways for airlines to recover from third parties some of the costs they incur when providing the due assistance to passengers<sup>18</sup>. However, the liability to the passenger should only lie with the airline, their contractual counterpart.

We **welcome** the obligation for airports to put in place **contingency plans (Article 5.5)** for dealing with mass disruptions and we understand that such plans already exist in certain airports. Emergency plans should include specific obligations to provide **care** until the affected passengers can be carried to their destinations.

However, the exclusion of airports with less than 3 million passengers is not appropriate, especially in small countries (e.g. in Austria it would only apply to Vienna Airport, in the UK it will not apply to Belfast, Southampton and other airports and in Sweden it will not apply to two main airports in Stockholm (Bromma and Skavsta). Moreover, this obligation only applies during major disruptions i.e. if several airlines and a significant number of air passengers are affected by flight cancellations and/or delays. Given this, we think that **emergency plans should generally be the norm throughout the EU**. At the very least the limitation should be 1.5 million passengers.

#### ▪ **Re-routing and reimbursement (article 8)**

We welcome Article 8 of the proposal which clarifies that consumers have the **choice** to be re-routed **free of charge** (in the event of cancellation) and that the airlines should also find alternatives in **other means of transport**.

Currently, when applying Regulation 261/04 airlines interpret it restrictively and do not offer rerouting with other airlines or means of transport<sup>19</sup>.

When a flight is disrupted, re-routing is the preferred option for most passengers<sup>20</sup>. Yet according to the Commission's proposal, passengers would be required to wait as long as 12 hours before being re-routed by other means of transport. 12 hours means that the re-routing is supposed to take place during the night when there may not be services anymore. Rather, it should be added that passengers should be offered the **re-route** (including by other means of transport) **as soon as possible in the airport**. It should also be expressly forbidden for airlines to refer passengers to a website or to a telephone number to arrange the travel (e.g. rail), by themselves.

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<sup>18</sup> This legal responsibility must not be hindered by contract terms that reduce the responsibility of third parties (e.g. airports) towards the airlines.

<sup>19</sup> In 2010, the Commission had clarified that when providing re-routing airlines should consider other airlines and/or other means of transport (Communication April 2010).

<sup>20</sup> According to the Impact assessment 75% of passengers whose flights are cancelled choose re-routing instead of refund.

For this obligation to be of practical use for passengers, it is important that every airline is obliged to have **a representative in each airport** where it operates who can deal with passenger's complaints and take the necessary decisions<sup>21</sup>. In addition, the alternative flight arrangements have to be reasonable and acceptable for the passenger (not every alternative arrangement can be considered compliant with Article 8).

- **Re-routing after long delays**

**Passengers who suffer a delay at the point of departure** (even 5 hours long) currently do not have the right to be re-routed, but have only the right to renounce to travel and be reimbursed. This is inappropriate from the point of view of the **principle of equality** (following the Sturgeon case). For long delays passengers may well need to take another flight as soon as possible or at a later time but the purchase of a new flight for a later date is often too expensive compared to the price of the first flight, due to the pricing policies applied by airlines. Therefore, it should be added that for **long delays, passengers have the choice to be re-routed unless this is proven impossible** by that airline.

Meeting consumer expectations of travel plans should always be the yardstick when deciding passengers' rights. Consumers expect to be taken from one place to a destination by the operator, in time and safely. It is then crucial that when there are disturbances, alternatives are given as quickly as possible.

- **Rescheduling of flights (short notice cancellations)**

We welcome that the rescheduling of flights is treated as a long delay in some cases. Advance rescheduling of flights often causes inconvenience and damage to passengers even if they are informed of the change in advance. If the flight is rescheduled, this may impact on any reservation made by the consumer at their destination. Moreover, flight times are an important quality factor for passengers who often favour convenient flight times<sup>22</sup>.

If the newly scheduled flight differs by 5 hours or more from the previous schedule the right to be refunded is provided for, but not the right to re-routing (Article 6.1iii of the proposal). However, as mentioned above a refund may not be the best option for all passengers<sup>23</sup> depending on their travel plans as the price of a new, later flight may well be higher than the refunded amount. Therefore, in these cases it should be possible to let the passenger choose between refund and **rerouting** at a later time.

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<sup>21</sup> The obligation for airlines to have a representative in each airport where they operate is supported also by airlines and NEBs.

<sup>22</sup> Some of our members report on an increasing number of relevant complaints concerning unfair practices employed by airlines on flight times: some airlines increasingly try to attract consumers with comfortable flight connections only to transfer them later to existing flight capacities with less favourable flight times.

<sup>23</sup> According to the Impact assessment only 10% of passengers affected by a delay of over 5 hours choose the option of reimbursement, the rest wait for the delayed flight (*Total burden, delays*, page 98).

- **Tarmac delays (article 6.5)**

We welcome the new **right of assistance** to passengers constrained in the airplane (toilet facilities, drinking water, air conditioning and medical assistance as of 1 hour of waiting time). However, believe that airlines should also offer a **snack** to passengers **after 1 hour**. More importantly, passengers **should not be obliged to remain in the plane for 5 hours**, rather should have the **right to disembark after 3 hours of delay**.

The inconvenience and anxiety caused to passengers who are left waiting inside the airplane or in a bus on the tarmac should be tackled differently than delays in the terminal.

- **“No-show” clause**

The contractual terms of many airlines include a clause which allows the air carrier to deny boarding to a passenger when they do not use all the coupons of the ticket and in the same order (sequence) of the purchase. This clause is based on Article 3.3 of the IATA Recommended Practice 1724<sup>24</sup>.

The “no-show” policy, results in situations where passengers, who miss a flight or decide not to take it for whatever reason, are denied boarding on the outgoing or the return legs of their tickets. Also the scenarios of “no-show” are increasingly extended to cases of (growing) combinations of a “train and flight coupons”, the flight being cancelled if the passenger does not show at train check-in. Passengers in these situations are then obliged to buy another ticket (subject to availabilities) or pay a disproportionate supplementary fee.

We value that the Commission tries to tackle the issue of the no-show policy in the proposal. However, the proposal regrettably does not provide a complete ban of the use of this clause. Article 4.4 only provides for a sanctioning regime when it is applied to the return leg of direct flights (not to outgoing or return legs of connecting flights). Thus, airlines will be allowed to continue applying the clause; if the passenger is then denied boarding, the company will have to compensate the passenger and offer re-routing by another flight.

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<sup>24</sup> **IATA RP: art. 3.3** (25<sup>th</sup> version, June 2005): the ticket you have purchased is valid only for the transportation as shown on the ticket from the place of departure via any agreed stopping places to the final destination. The fare you have paid is based upon our tariff and is for the transportation as shown on the ticket. It forms an essential part of our contract with you. **The ticket will not be honored and will lose its validity if all the coupons are not used in the sequence provided in the ticket** in the event you do not show up for any flight without advising us in advance, **we may cancel your return or onward reservations**. However, if you do advise us in advance, we will not cancel your subsequent flight reservations. Although this version is not yet ‘effective’ in IATA terms because it has not yet been approved by all necessary governments, many airlines have unilaterally adopted this term in their conditions of contract.

However, the use of the no-show clause has been considered **unfair** by a significant number of **national courts** throughout Europe (e.g. Austria, Germany and Spain)<sup>25</sup>. Many of the rulings delivered across the EU are the result of actions instigated by BEUC members against airlines such as Lufthansa, British Airways and Iberia. Most recently, in an action instigated by our Spanish member OCU, Iberia Airlines was condemned for using this term<sup>26</sup>.

The national courts have ruled that this clause is unfair as it entails a significant imbalance between the rights and obligations of the parties in the contract (based on the respective national laws implementing the Directive on unfair contract terms). The obligation of the passenger under the contract is the payment of the price, not the complete use of the service paid. Even if the passenger decides not to or cannot take one of the flights or uses them in a different order, the company cannot prove any damage (as the price has been paid). On the contrary, the no-show policy allows airlines to sell the same ticket twice and thus obtain an unjust enrichment<sup>27</sup> because the company does not refund the price of the unused ticket to the passenger (to the contrary, the passenger is asked to pay for another ticket).

Therefore the new Regulation should **fully ban the use of the “no show” clause** for both direct and indirect flights and in relation to both return and ongoing legs.

Airlines argue that allowing passengers to use their coupons as they wish, would impinge on their pricing policies based on sophisticated yield management techniques related to the characteristics of each market in terms of offer and demand (market segmentation)<sup>28</sup>. However we conclude that the pricing policies of airlines cannot be such that they impinge on the right of passengers to fair contract terms and infringe the Unfair Contract Terms Directive.

Yet, the no-show clause is only one of the many **unfair terms** used by airlines in contracts with passengers and which have been ruled unfair by a number of national courts throughout the EU. In several actions instigated by BEUC member in Belgium, Spain, France, Germany, Italy and Austria many airlines were condemned for the use of unfair terms in their contracts<sup>29</sup>.

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<sup>25</sup> OCU v Spanair 31 July 2012 (Juzgado Mercantil n 1 Barcelona; OCU v Iberia 11 September 2012 (*Juzgado Mercantil* n 12, Madrid); AG of Köln (Germany), 05/01/2005; AG of Frankfurt (Germany), 21/02/2006; Langericht Frankfurt Am Aim (Germany), 14/12/2007; Commercial Court n. 2 Barcelona (Spain), 22 March 2010; *Audiencia Provincial* (Court of appeal) of Madrid (Spain) 27/11/2009; Commercial court of Bilbao (Spain), 7 July 2008; Commercial court of Bilbao (Spain), 25 July 2008; Commercial court of Bilbao (Spain), 3 July 2009; Oberlandesgericht (Higher Regional Court) of Frankfurt (Germany), 18 December 2008; *BGH* (Federal Court of Justice, Germany), 29 April 2010; *Handelsgericht* of Vienna (*Austria*), March 2010; VKI v Lufthansa, Oberster Gerichtshof (Austria), 24 January 2013.

<sup>26</sup> OCU against Iberia Airlines, 11 September 2012: (*Juzgado Mercantil* n 12, Madrid).

<sup>27</sup> A general equitable principle that no person should be allowed to profit at another's expense without making restitution for the reasonable value of any property, services, or other benefits that have been unfairly received and retained.

<sup>28</sup> In relation to the obligation to use the tickets in the same order as bought (in sequence), airlines argue that this allows them to manage directional imbalances and offer incentives for the routes where there is less demand. Regarding the complete use of coupons, airlines argue that in markets offering (cheaper) indirect flights, if the passenger could buy (cheaper) indirect flights and then not showing at the first outgoing flight, those market offers would disappear.

<sup>29</sup> See BEUC letter to IATA of 5 February 2013 on unfair terms in air transport contracts:

<http://www.beuc.eu/BEUCNoFrame/Common/GetFile.asp?ID=44425&mfd=off&LogonName=Guesten>

We underline that the European Parliament called last year on the Commission to address the proliferation of unfair terms in air carrier contracts, including the use of the no-show clause<sup>30</sup>.

▪ **“Extraordinary circumstances”**

Airlines are released from the obligation to pay compensation if the long delay or a cancellation is due to an “extraordinary circumstance”. The new proposal now also discharges airlines from the obligation to provide unlimited accommodation in “extraordinary circumstances” (Article 9.4).

BEUC does **not support the new list of extraordinary circumstances** proposed in Annex 1. The proposal moves away from the illustrative list of the current Regulation (Recital 14) to an extensive and still non exhaustive list of events which in practice will be considered “extraordinary” in all cases. In contrast, the list of non-extraordinary circumstances is significantly shorter and seems to be exhaustive.

Clearly, experience shows that determining and proving an “extraordinary circumstance” is often a source of controversy and a challenge, mainly because the specifics of each case are different. We think that even though increased legal certainty is necessary, any reason which could exempt airlines from having to pay compensation is closely linked to the specificities of each case. As the Court of Justice stated in the *Wallentin* ruling, in recital 14 (of Regulation 261/04), the legislator acknowledged the limitations of law making in relation to the exemption of “extraordinary circumstances”: the legislator did not mean that in all the cases mentioned in Recital 14, “extraordinary circumstances” can be argued for neither did it mean that other reasons (but those mentioned in Recital 14) cannot lead to “extraordinary circumstances”<sup>31</sup>.

In general the **list** of circumstances which would in all instances be considered extraordinary is **too long**.

As regards **technical problems**<sup>32</sup>, it is not clear-cut when a technical problem will be considered extraordinary. Even though the proposal includes the *Wallentin* case<sup>33</sup> which clarified that not all technical problems can be considered extraordinary, in practice it is difficult to fairly apply this. Moreover, the question of whether the identification of a defect during the flight operation should qualify as an “extraordinary circumstance” has not been clarified by the Court<sup>34</sup> and thus should not be considered as such. Finally, the proposal should add that mere compliance

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<sup>30</sup> European parliament Resolution of 23 October 2012 on passenger rights in all transport modes, point 35:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-371>

<sup>31</sup> Point 22 of the *Wallentin* ruling (C-549/07, Friederike Wallentin-Hermann vs. Alitalia Linee Aeree Italiane SpA, 22 December 2008).

<sup>32</sup> According to the Impact assessment (Annex 2b, page 68), technical problems, is the second cause for delay (10.3% on average between 2007/2010).

<sup>33</sup> C-549/07, Friederike Wallentin-Hermann vs. Alitalia Linee Aeree Italiane SpA, 22 December 2008.

<sup>34</sup> Point “ii” of the list of “extraordinary circumstances” includes defects identified during the flight operation.

with the minimum maintenance requirements does not in itself suffice to prove that the airline took all “reasonable measures”<sup>35</sup>.

In any case, generally passengers cannot verify the accuracy of the airline’s claims. Very often airlines abuse the excuse of technical failures, to exclude their liability<sup>36</sup> and the claim of the airline would often be “accepted” by the passenger.

Therefore we believe that in the case of **technical problems**, there should be a **presumption that the technical failure was not due to an “extraordinary circumstance”**. The airline should be obliged to prove the occurrence of an “extraordinary circumstance” (aside from providing the proof of having made “reasonable efforts” to avoid the disturbance).

Regarding **strikes** and **labour disputes** (in particular by service providers) it should be stated that **pre-announced strikes** are **not** extraordinary.

Concerning **weather conditions**, we agree that they should be considered extraordinary when they prevent the operation of planes. However the incompatibility can also depend on the circumstances of the case; for instance adverse weather conditions which have been **foreseen and predicted** and for which preparations could have been made to avoid flight disruptions should in principle **not** be considered “extraordinary” because the prediction should allow time to take measures to avoid disruptions (e.g. buy more de-icing liquid).

Finally, we propose that governments should provide neutral expertise in determining and identifying “extraordinary circumstances”<sup>37</sup>.

Furthermore, we notice that the **definition of “extraordinary circumstances”** was changed from that in Regulation 261/04. First, the reference to “reasonable measures” should be included in the definitions of Article 2: it should be clear that the airline can only be exonerated from liability **if it proves that it took all reasonable measures to avoid the disturbance** in spite of the extraordinary circumstance<sup>38</sup>. Article 2 and Article 5.3 of the proposal should be aligned. Second, the wording “*not inherent in the normal exercise of the air carrier*”, does not belong to a general definition of extraordinary circumstances; this addition was taken from the *Wallentin* judgment which refers specifically to technical problems. Therefore it should be deleted as it could cause interpretation problems in a general context.

Moreover the fact that the airline complied with all **safety obligations** and/or with the minimum rules on maintenance cannot suffice to establish that the carrier took all reasonable measures (*Wallentin* ruling).

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<sup>35</sup> See point 43 of the *Wallentin* ruling.

<sup>36</sup> Technical problems are the second cause for delay (Impact assessment (Annex 2b, page 68)).

<sup>37</sup> In Norway, for instance the Civil Aviation Authority provides expertise and explains the evidence to the Air Passenger Complaint Handling Body so that they can determine whether an “extraordinary circumstance” has occurred.

<sup>38</sup> Recital 14 of Regulation 261/04.

Regarding the **effects of “extraordinary circumstances”** on subsequent flights (not directly affected by the extraordinary event), we support Article 6.4 of the proposal which follows the ruling of the CJEU of 4 October 2012<sup>39</sup>. In that case the Court ruled that passengers have the right to compensation when they have been denied boarding to a flight as a result of a strike that had taken place at the airport 2 days previously.

- **Information obligations**

We **welcome the new information obligations** on airlines about the rights of passengers under the Regulation, in particular regarding the information about **complaint handling procedures, the contact details of enforcement bodies and Alternative Dispute Resolution (ADR) bodies**. We also welcome the obligation to inform consumers of their rights at the **boarding gate**.

However, we believe information on the rights of passengers has to be already given **at the time of booking**. Also, passengers should be **informed as soon as possible** as to the **type and reason of the disruptions** which occur **during their travel**.

The inconvenience felt by passengers when they are confronted with disruptions is a cause of stress and providing information on occurrences during travel helps reassure passengers. Besides, this is already obligatory in other modes of transport (bus and maritime transport).

- **Baggage policies**

BEUC does **not** support **Article 6d** of the proposal. Article 6d allows airlines *full commercial freedom* to decide on the conditions for the carriage of baggage. We however support the obligation of airlines to inform consumers about their baggage policies.

*“Full commercial freedom”* runs contrary to the EU law principles and rules on transparency and comparability of air fares, set up in Article 23 of Regulation 1008/2008<sup>40</sup>. We also underline that the different policies applied by airlines in relation to the carriage of luggage cause confusion among passengers and are a source of distress especially at check-in times.

Thus BEUC is in favour of establishing **minimum requirements of service quality** regarding the **carriage of baggage**. As regards **checked-in** baggage the basic level of service (included in the advertise price) should include at least **1 checked luggage** (thus considered “unavoidable”). Consumers who do not want or need to check any luggage should be able to benefit from price reductions.

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<sup>39</sup> C-22/11, Finnair Oyj v Timy Lassooy, 4 October 2012.

<sup>40</sup> Article 23: “... The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication”.



As regards **hand luggage**, the strict application of the “**one bag rule**”<sup>41</sup> policy by some airlines should be mitigated with the right for passengers to carry a **hand-bag** with **essential items** and any **airport retail purchases**.

Moreover, the basic level of service should also include the boarding pass and the check-in service.

We emphasise that last year the **European Parliament** called for a **minimum amount of luggage** and personal belongings to be **included** in the **basic fare** and called on the Commission to propose measures to protect passengers against **excessive restrictions** and allow them to carry on board a reasonable amount of hand luggage, including purchases from airport shops<sup>42</sup>.

Regulation 1008/2008 obliges airlines to include in the advertised price all taxes, fees and charges which are **unavoidable and foreseeable** at the time of the publication of the price. As a matter of fact, the carriage of checked luggage is not considered “unavoidable” anymore by airlines in transport contracts.

The policies of most air companies in relation to the advertising of ticket fares often cause consumer detriment. New business models excessively rely on ancillary services and extra charges whose costs are not indicated in the advertised price, in particular as regards the carriage of baggage<sup>43</sup>. Besides, each air company has a different policy on baggage restrictions which limits transparency and complicates the comparison of prices as well as causing distress to consumers in particular at check-in times.

It appears that most passengers who do not check luggage mainly fall in the category of business travellers and young travellers who travel for short stays. There is however a large majority of passengers that still expect a minimum amount of checked luggage (usually one item) to be included in the ticket without extra cost. This category of passengers should be taken into consideration while still allowing passengers travelling light to benefit from low prices.

- **Spelling errors**

BEUC **welcomes** article 4.5 of the amended proposal which allows **48 hours** for passengers and intermediary sellers **to correct** eventual **spelling mistakes** made at the time of booking<sup>44</sup>. We also think it should be added that **mistakes in the title** (Mr, Mrs, Ms) are included in this rule.

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<sup>41</sup> The Spanish Government has expressly prohibited airlines from applying the ‘one bag’ rule when departing from Spanish airports.

<sup>42</sup> European Parliament Resolution (Bach Report) of 23 October 2012, point 34: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-371> - European Parliament resolution of 10 May 2012 on the future of regional airports and air services in the EU (Bradbourn Report).

<sup>43</sup> The CPC Network (consumer protection cooperation) found that in absolute numbers a passenger pays almost €30 per ticket for extra charges that are not airport charges or government taxes. [http://ec.europa.eu/consumers/enforcement/docs/airline\\_charges\\_report.pdf](http://ec.europa.eu/consumers/enforcement/docs/airline_charges_report.pdf)

<sup>44</sup> The Norwegian Consumer Ombudsman and The Market Council of Norway have stated that they consider online sale of airline tickets without the possibility to change obvious misspellings, to be unfair. The Ombudsman has made guidelines to the airlines stating that online sale of airline tickets must allow the passengers to change obvious booking errors within reasonable time. Major Norwegian airlines therefore follow this practice already and the practice of the ADR is also according to this view.



Air tickets are increasingly sold and bought online (at a distance) and passengers always have to pay the price in advance. Therefore, some measures should be put in place to avoid consumers losing their money if they commit errors when booking. Too often, bookings cannot be modified at all (except flexible tariffs and business) without having to pay disproportionate “administrative fees” which are often as high as the price of a new ticket.

Thus, this practical measure should not be limited to mistakes in names only. Other mistakes are even more likely to cause distress and damage than spelling mistakes. In particular, mistakes in relation to the **day and time of the flights** should be included in the rule. In fact, two major airlines in Denmark are already offering a general cooling-off period (of 24hrs).

Moreover, there should be a possibility for consumers to **transfer the tickets** to another person.

Based on the IATA Recommended Practice 1724 the contract terms of most airlines do not allow the passenger to transfer the ticket to another passenger. BEUC considers this ban to be both **unfair** (as by contrast the airline can itself transfer the contract to another carrier in code share agreements), and also **discriminatory** between “package” travellers do have the right to transfer the package in certain conditions.

We think that there is no valid reason to ban outright the transferability of seat-only tickets, as long as certain conditions, for instance on security needs, are met. The risk for abuse argued by the industry could be addressed by other less disruptive measures such as double checks to identify multiple bookings by the same passenger. Allowing the transferability of seat-only tickets would not create an economic burden to airlines as this would not impact on their yield management pricing policies.

Moreover, Article 11.2 of the E-Commerce Directive<sup>45</sup> should also be effectively applied by websites selling air tickets.

#### ▪ **Scope of the Regulation**

We regret that the proposal did not extend the scope of the Regulation to **non-EU carriers arriving in the EU (and in the EEA)**. Regulation 261 applies to EU carriers departing or arriving to the EU; it does not apply to non-EU carriers arriving in EU territory.

In practice this restriction is problematic and a source of complaints<sup>46</sup>, in particular in cases where the flight is operated by a different company from the contractual carrier (under a code share agreement) and/or when the ticket was bought in the

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<sup>45</sup> Article 11.2: Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

<sup>46</sup> This caused a number of complaints from passengers at the time of the ash cloud who were travelling back to the EU in non-EU carriers.

EU. For instance our Spanish member OCU reported that many flights offered by Iberia between Spain and Morocco are operated by Air Maroc (through code-share agreements); passengers on the return flights from Morocco often complain that when disruption occur Iberia denies its responsibility and refer passengers to Air Maroc (which is a non-EU company entering into the EU and thus not covered by the Regulation 261/04<sup>47</sup>).

Moreover, the results of the stakeholders consultation indicate that a significant number of stakeholders (including Member States, some airlines and consumer associations) were in favour of this measure.

Other countries which have recently regulated in the field of air passengers rights have extended the scope of their laws to all flights departing or coming into their territory<sup>48</sup>.

- **Definitions**

- **“Cancellation”**

- The notion of “cancellation” should reflect the ruling of the Court of Justice of 13 October 2011<sup>49</sup> and thus should cover cases where the plane takes off, but is subsequently reverted to the airport of departure and passengers are transferred to other flights.

- **“Denied boarding”**

- The new proposal should extend the definition of denied boarding (following the ruling of the CJEU in the case *Rodríguez Cachafeiro*) to situations where passengers are denied boarding as a result of the airline wrongly assuming that the passenger would not have arrived on time to the boarding gate<sup>50</sup> (e.g. in case of connecting flights).

- **Enforcement and redress (Articles 16 and 16a)**

One of the main objectives of the Commission proposal is to tackle the ineffective and patchy enforcement of the rights of air passengers.

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<sup>47</sup> Even though an agreement between Spain and Morocco has been signed on this issue (12 December 2006), it has not been approved by law in Morocco.

<sup>48</sup> In August 2012, Israel introduced its Aviation Services Law that covers all flights bound for and departing from Israel, irrespective of the airline operating the flight or the city from where it started.

<sup>49</sup> C-83/10, *Sousa Rodríguez*, 13 October 2011.

<sup>50</sup> Mr Rodríguez Cachafeiro and Ms Martínez-Reboredo Varela-Villamor (‘the applicants’) both bought airline tickets from the airline Iberia for the journey from Coruña (Spain) to Santo Domingo. That ticket comprised two flights: the flight Coruña-Madrid and the flight Madrid-Santo Domingo. At the Iberia check-in counter at Coruña airport, they checked their luggage in direct to their final destination, and were given two boarding cards for the two successive flights. The first flight was delayed by 1 hour and 25 minutes. In anticipation that delay would result in the two passengers missing their connection in Madrid, Iberia cancelled their boarding cards for the second flight. Despite that delay, on arrival in Madrid, the applicants presented themselves at the departure gate in the final boarding call to passengers. The Iberia staff did not, however, allow them to board on the grounds that their boarding cards had been cancelled and their seats allocated to other passengers.

BEUC supports the new proposals to increase the powers of the national enforcement bodies (hereafter: NEBs) to monitor the compliance with the Regulation by airlines. The proposed **enhanced coordination** among different NEBs and with the complaint handling bodies (ADRs) should contribute to a more consistent and effective enforcement in all EU countries. However, specific obligations on how the cooperation should be carried are needed.

We also **support** the **obligation of NEBs to regularly report** on their activities in relation to complaints; this would constitute an incentive for a better compliance with their obligations by the industry.

We **regret** however that a requirement for airlines to **regularly report** on the quality of their services (delays, cancellations and the reasons for them) was not included<sup>51</sup>. The publication of delays and cancellation rates by airlines would be an appropriate incentive for compliance. As the Impact Assessment acknowledges, this obligation would not be a costly measure as most data are already collected by Euro-Control. Moreover, the **European Parliament** last year stated that airlines and/or airports should be required to collect data on the number and length of delays, both to passengers and to their luggage<sup>52</sup>.

As regards **consumer redress**, we very much welcome that the airlines are obliged to put in place **complaint handling procedures** including deadlines to respect when dealing with complaints. However, the period of 3 months for the consumer to file a complaint is **too short** and could be interpreted as having a preclusive effect on the general limitation periods for civil law claims. Although the exhaustion of the period does not affect the timeline or the right to bring a court action, it is nevertheless to be feared that airlines will hold non-compliance with the period against passengers in court actions and make an attempt to deny them of their rights. In this regard it would be more appropriate to **refrain from establishing a time limit for complaints**<sup>53</sup>. Courts can always dismiss claims that they consider are disproportionate.

Moreover, airlines should remain **easily accessible** for consumers after the booking and the flight. They should put at the disposal of consumers **standard complaint forms** at the disposal of consumers, off and on-line and **free or at nominal cost numbers and e-mail addresses** (not automatic) that are **easily accessible**. In general passengers should be able to use the same means of communication for filing complaints as that used for booking the flight.

A recurrent problem in the airline Industry is the lack of good quality after sale services; too often airlines take too long to deal with consumer complaints, simply do not answer at all or give unsatisfactory replies. Passengers need to be sure that they can assert their rights in an effective way without having to spend much time or money.

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<sup>51</sup> Reporting on quality is already an obligation for the rail transport sector.

<sup>52</sup> European Parliament Resolution on the functioning and application of established rights of people travelling by air (Taylor Report) of 29 March 2012, point 6: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0099&language=EN&ring=A7-2012-0053>

<sup>53</sup> The Court of Justice ruled that the timelines for complaints are to be determined in accordance with the rules of each Member State on the limitation of court actions (C-139/11, Moré v KLM, 22 November 2012).

The **obligation of Member States** to set up **alternative dispute resolution bodies (ADR)** (set up in Article 16a.3) is a condition *sine qua non* to improve consumer redress in this area. In addition, we think that the refusal of airlines to participate in ADR systems and procedures constitutes a particular problem of this sector and thus the Regulation should provide for **the obligation of airlines to adhere to an ADR/ODR (on line dispute resolution) scheme, without prejudice to the right of the parties to seek a legal action in court.** Indeed, in practice passengers are often left with the sole alternative of going to court which is not an option for the majority.

- **Lost and damaged luggage** (revision of Regulation 2027/97)

The main difficulties suffered by consumers when their baggage is mishandled relate to the lack of information from airlines about their rights and how to exercise them, the provision of proof of the value of the baggage and the lack of an enforcement body they can refer to in case of disputes<sup>54</sup>.

Given this, we welcome the obligation of airlines to provide a **complaint form** to passengers at the airport (Article 3 paragraph 2) as it facilitates the filing of complaints. Currently, passengers have to send a registered letter of complaint (even if they complained already at the airport) and they are not aware of such obligation.

We also support an obligation for airlines to systematically inform disabled passengers at check-in that they can make a special declaration of interest in relation to the value of their mobility equipment. We however think that all passengers should be able to make such a declaration in relation to the value of their luggage<sup>55</sup>.

We finally welcome that the **competences of the NEBs** are to be extended to cover **baggage problems**. Currently, if passengers are confronted with a dispute on baggage with the airline, they have no choice but to seek a court action because there is no specific enforcement body assigned to this task (the NEB competent under Regulation 261/04 is not competent to deal with complaints about luggage).

However, other issues should be added to the proposal in order to facilitate consumer redress in relation to baggage problems:

- Should **baggage be delayed**, airlines should be obliged to compensate the consumer for each day the luggage is delayed - it should be a fixed amount of compensation per day until the baggage is found. The compensation should cover the purchase of necessary items and also include an amount to compensate for both material and immaterial damage (in coherence with the ECJ rulings on immaterial damages)<sup>56</sup>.

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<sup>54</sup> Problems related to baggage such as loss or damage, represent 13% of all complaints and disputes relating to air travel (ECC Report on air passengers rights of 2011): [http://ec.europa.eu/consumers/ecc/docs/ecc\\_net\\_air\\_passenger\\_report\\_2011.pdf](http://ec.europa.eu/consumers/ecc/docs/ecc_net_air_passenger_report_2011.pdf)

<sup>55</sup> The Montreal Convention establishes a liability limit of 1000 SDR (Special Drawing Rights) unless the passenger made a special declaration of interest previously to the flight.

<sup>56</sup> C-402/2007, C-549/07 and C-63/09.

- Once arrived or found the airline should **transport it to the consumers' residence** (home or hotel).

- **Protection of passengers in case of insolvency of the airline**

BEUC has since long called for the establishment of a mandatory guarantee which protects all passengers equally against airline insolvencies, covering the refund of the money paid and repatriation of stranded passengers. When an airline becomes insolvent, it suddenly stops its operations and cancels all its flights. As passengers are not privileged creditors, they often are not reimbursed of the money paid following the insolvency proceedings. For stranded passengers the situation is even more difficult as they should find alternative flights to get to their destination.

According to the latest Commission study<sup>57</sup>, from between 2000 and 2010, 96 insolvencies were identified and although the proportion of passengers impacted does not seem to be very high, the impact on affected passengers was significant<sup>58</sup>. Over this period 76% of passengers did not benefit from any form of protection. The Commission study shows that none of the existing forms of protection available for "seat only" passengers in various Member States offers comprehensive coverage to all passengers at low costs. Self-regulatory options have been clearly assessed as insufficient.

Therefore, we **regret** that the Commission did not use the opportunity of this revision to improve passengers' protection in case of **insolvency of airlines**. The recent Communication of the Commission<sup>59</sup> of March 2013 puts forward a number of voluntary measures which are insufficient to provide with strong protection and legal certainty to passengers<sup>60</sup>.

END

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<sup>57</sup> European Commission impact assessment on passenger protection in the event of airline insolvency, Final Report, March 2011, prepared by Steer Davies Gleave:

[http://ec.europa.eu/transport/themes/passengers/studies/doc/2011\\_03\\_passenger-rights-airline-insolvency.pdf](http://ec.europa.eu/transport/themes/passengers/studies/doc/2011_03_passenger-rights-airline-insolvency.pdf)

<sup>58</sup> The immediate average costs incurred by a passenger hit by an insolvency is 796 Euro (page 9 of the Report of March 2011).

<sup>59</sup> COM(2013) 129 final:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0129:FIN:EN:PDF>

<sup>60</sup> See BEUC position X/2011/105:

<http://www.beuc.eu/BEUCNoFrame/Common/GetFile.asp?ID=42132&mfd=off&LogonName=Guesten>