

The Consumer Voice in Europe

## EU AIR PASSENGER RIGHTS AND ENFORCEMENT - REAL IMPROVEMENTS ARE NEEDED

BEUC updated position paper



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## Why it matters to consumers

Every day, thousands of European consumers travel by air, hoping to reach their destination safely and on time. Unfortunately, things do not always go according to plan. In case of travel disruptions, which can cause a lot of trouble and stress, EU air passenger rights are there to provide consumers with the support they need. However, at the moment, only a limited number of consumers get to use them in practice due to overly lengthy, burdensome and ineffective enforcement procedures. This needs to change! Consumers need to see their rights protect them not only on paper but also in real life.

## Summary

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EU consumers benefit from harmonised air passenger legislation which protects their rights to mobility, information, assistance, and compensation in case of disruption. However, years after the adoption of the EU Air Passenger Rights Regulation, consumers continue to face problems to enforce their rights.

In 2013, the European Commission proposed a review of Regulation 261/2004, which after a successful first reading of the European Parliament, got stuck in the Council of Ministers for various reasons, including territorial disputes between the UK and Gibraltar. The Council of Ministers recently re-started debating its position with a view to achieving a General Approach in the coming months<sup>1</sup>. Because the new European Parliament has very recently confirmed its 2014 first reading opinion, it is possible that negotiations between the legislators will start on the basis of the 2013 European Commission's proposal.

Thus, with this position paper, **BEUC updated its 2013 position and added new elements** that have become relevant in the past 6 years.

Although the European Commission's proposal includes a number of improvements with regard to Regulation 261/2004, the proposal was and has become in the past 6 years even more insufficient. It is now outdated in the face of developments in the aviation market and would need significant amendments to effectively protect passengers.

### 1. Positive proposals

BEUC welcomes:

- The introduction of provisions guaranteeing 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;

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<sup>1</sup> [CM 4229/19](#) (TRANS) – 3 October 2019.

- That the **rescheduling of flights** is rightly considered as (long) delays in some instances;
- The right of passengers to correct **spelling mistakes in their names for example**;
- The obligation of **airlines** to set up in-house **complaint-handling procedures** with deadlines to respect.

## 2. The amendments to curtail passenger rights should be deleted

The proposal clearly **reduces** important **rights** provided by the current Regulation 261/2004 and 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 grants 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;
- The right to **re-routing** by other means of transport should be granted **as soon as possible** (the 12-hour timescale should be deleted).

## 3. There are significant gaps in the 2013 proposal which need addressing

A number of issues which currently cause consumer detriment are **not sufficiently tackled by the proposed review**. The future Regulation **should notably include** a clear focus on enforcement.

Despite a few improvements in the proposal, like 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, **there is no focus on enforcement in the new text**. However, developments in the last six years clearly show that the enforcement of air passenger rights is the Achilles heel of air passenger rights. **It is therefore high time that ambitious measures are taken in order to make a real change in this area.**

Such measures should include:

- Introducing automatic compensation schemes;
- Making the decisions of the enforcement bodies legally binding;
- Expanding the applicability of the decisions of enforcement bodies to other passengers travelling with the same flight.

Additional necessary improvements of the air passenger rights enforcement:

- **Clear and strict deadlines** for dealing with passenger complaints;
- A stronger and more formalised network of the national enforcement bodies;
- Truly dissuasive sanctions;
- Information about the reasons for travel disruptions made public;
- Possibility to launch collective redress court cases (e.g. in cases of mass flight cancellations);
- 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 online 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-mail addresses;
- **Airlines** should be obliged to **regularly report** on the quality of their services (e.g. on delays and cancellation rates).

#### 4. Issues which need to be tackled

Furthermore, in order to strengthen the rights of European passengers, the proposal should consider the following rights and improvements:

- A **full ban of the 'no-show' clause**, these clauses allow the airline to cancel reservations when the passenger has missed either the first leg of a multi-leg itinerary; or the outbound flight of a round-trip itinerary.
- 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";
- A **mandatory guarantee** that airlines reimburse and repatriate passengers in instances of **insolvency** should be introduced;
- 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 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 of impossibility to travel.

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## Introduction

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The Air Passenger Rights (APR) Regulation<sup>2</sup>, adopted in 2004, is a great EU achievement for consumers. It has created, together with the relevant case law of the Court of Justice, a body of strong rights to mobility, information, assistance, and compensation in case of disruptions, which bring very tangible improvements to the protection of passengers travelling by air.

In 2013, the European Commission proposed to amend this Regulation<sup>3</sup> with the aim of adapting it to various changes in the aviation sector. The legislative procedure related to this proposal is still pending. After the European Parliament adopted its position in 2014<sup>4</sup>, the work in the Council of Ministers got stuck and to date has not resumed.

Following this proposal, BEUC published a position paper<sup>5</sup> urging the EU institutions to focus on the enforcement of air passenger rights. Indeed, even if they look good on paper, their application is deficient.

In order to collect more recent data, the European Commission decided at the end of 2018, to conduct a new study on the current level of protection of air passenger rights in the EU. The study at the time of writing this paper is still ongoing<sup>6</sup>.

To date, the fate of the EC proposal of 2013 is unclear. The interinstitutional paralysis of already 5 years works against European consumers and passengers' rights, which often cannot be effectively used.

Thus, in this first part of the paper we focus on enforcement and present BEUC's suggestions which would bring real improvements in this area for air passenger rights. The second part will be dedicated to BEUC's position on the European Commission's proposal of 2013.

## 1. Passengers face many hurdles when enforcing their rights

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There are **multiple barriers** that passengers face when trying to enforce their rights under the Air Passenger Rights Regulation.

If, for example, a flight is cancelled, the EU APR Regulation grants the affected passengers the right to compensation. However, in order to make use of this right, s/he first needs to complain to the airline. Already at this first stage, passengers come across malfunctioning webforms, unavailable email addresses, broken links to the claim forms, webforms not available in their language etc.

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<sup>2</sup> Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

<sup>3</sup> Proposal for a Regulation amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (COM/2013/0130 final).

<sup>4</sup> European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (COM(2013)0130 – C7-0066/2013 – 2013/0072(COD)).

<sup>5</sup> <https://www.beuc.eu/publications/2013-00505-01-e.pdf>

<sup>6</sup> The final report from the study is expected to be published at the end of 2019.

Even if they overcome these first obstacles, they still have to face often **a very lengthy and frustrating procedure**. Many airlines send their responses with a long delay or even completely ignore the passenger's correspondence. Sometimes companies try to avoid paying fair compensation, for example by claiming that the flight disruption was caused by an extraordinary circumstance, even if the reason was an operational issue which was within the control of the airline. Passengers are often not aware that airlines are only exempted from the duty to compensate affected passengers if those circumstances were truly out of the airline's control.

Such feedback<sup>7</sup> and a lack of proper communication<sup>8</sup> about the exact nature of the flight disruption discourages consumers from proceeding with their claims already at this stage.

This situation stems from the drafting of Regulation (EC) N° 261/2004, which does not give a clear definition of the concept of "extraordinary circumstances". As a result, the European Court of Justice has had to rule very regularly on this concept. This was particularly the case for staff strikes, weather conditions or even aircraft technical problems. For more legal certainty, BEUC is calling for the introduction in the Regulation of a clear definition of extraordinary circumstances in line with decisions of the European Court of Justice and the introduction of an exhaustive list of situations which can be considered extraordinary circumstances.

In the end, only passengers who are persistent and well informed about their rights pursue their claims. They have several options to consider:

### **1.1. Complaining to the National Enforcement Body (NEB) in the country where the incident occurred.**

If they go down this path, they cannot be sure the NEB will even deal with their individual claim, as the **NEBs' powers vary greatly between Member States**. Many of these authorities do not have the power to deal with individual claims at all, which is in line with the current text of the Regulation<sup>9</sup>.

Even if their claim is accepted, they will most probably need to wait for months (if not a year) before they receive their response. Finally, the whole procedure might prove fruitless if the airline still refuses to pay a passenger's compensation, despite the NEB's opinion, given that NEB opinions are **not legally binding**. In the meantime, the passenger might lose his/her right to launch a court case, since in some countries, transcription periods can be quite short (e.g. only one year for this type of case in Belgium).

### **1.2. Contacting an alternative dispute resolution (ADR) body to seek an out-of-court settlement**

While in theory this should be an easy and less costly way for the passengers to enforce their rights, in practice many of them do not have access to it. This happens either because there is no ADR body that operates in this sector in their country<sup>10</sup> or because the airline they are complaining about, did not agree to participate in the ADR scheme (**airline participation is not obligatory in most EU countries**). Finally, even passengers who successfully completed an ADR procedure might not receive any

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<sup>7</sup> ECC-Net Air Passenger Rights 2015 report 2015 - [Do consumers get the compensation they are entitled to and at what cost ?](#) (p.21-22 and p.34).

<sup>8</sup> Idem - (p.59).

<sup>9</sup> Judgment of the Court in joined cases C-145/15 and C-146/15, Ruijssenaars, issued on 17<sup>th</sup> March 2016.

<sup>10</sup> ECC-Net Joint Project 2012 report: [Alternative Dispute Resolution in the Air Passenger Rights sector](#).

compensation either as the **decisions of the ADR bodies are not legally binding** in most EU countries.

If these two out-of-court paths are unsuccessful, passengers have no choice but to initiate individual legal actions. However, in practice most consumers do not undertake these procedures because they can be **long, burdensome and costly depending on the country where the action is launched**<sup>11</sup>. Consumers tend to doubt it is worth it.

In response to this situation, consumer organizations and ECCs are doing their utmost to support passengers and ensure that their rights are respected by providing them with legal advice and informing them of existing enforcement procedures.

Some national consumer associations go further by engaging in negotiations with the airline on behalf of the consumer(s) or launch collective actions in order to obtain redress before the court for larger groups of consumers. Unfortunately, these latter tools are currently only available in some Member States. Consumer organisations therefore only have limited powers to assist all people affected by violations of air passenger rights.

**The lack of effective enforcement tools for air passenger rights has undeniably contributed to the emergence of claim agencies.**

## **2. Changes proposed five years ago are not enough!**

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The 2013 Commission proposal already made some small suggestions to improve the enforcement of the APR Regulation. Unfortunately, it merely suggested to introduce deadlines for handling consumer complaints: for the airline (2 months) and for the ADR bodies (max 3 months) and to oblige the NEBs to publish statistics on their activity, including the sanctions applied. It did not address the problem of non-legally binding decisions of the enforcement authorities at all.

A positive suggestion was to improve the consistency of the application of the APR Regulation across Europe by putting more emphasis on the role of the European Commission: it should have the power to examine cases where differences in the application of APR Regulation arise, and clarify the relevant provisions with the aim of promoting a common approach (via a recommendation). It has also proposed an enhanced cooperation between the NEBs and ADR bodies (mainly a closer information exchange) while at the same time distinguishing more clearly their missions: those dealing with general enforcement (NEBs) and the ones handling general complaints (ADR bodies).

The European Parliament in its first reading opinion from 2014, went further but still not far enough to deal with today's reality. Most importantly, it suggested to introduce amendments that would make the participation in the ADR schemes mandatory for the airlines and the decisions of ADR bodies legally binding. It also wanted to oblige the NEBs to assess individual complaints. Finally, it suggested that all passenger claims that remain unanswered by the airline, shall be deemed to be accepted.

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<sup>11</sup> In France, Greece, Lithuania, Luxembourg and Romania an ESCP is free of charge, while in Germany and Portugal the cost of the procedure exceeds €100. As regards the duration of the procedure, in some member states it is very rapid, such as Belgium and Lithuania (about 3 months), in other Member States the procedure can last between 1 and 3 years, such as in Cyprus and Malta. These significant differences lead to a reluctance of consumers to use the procedure.

Unfortunately, the last five years have proven that in order to make a real change and effectively improve the enforcement of the air passenger rights in the EU, **changes proposed by the European Commission and the European Parliament will no longer be sufficient.**

**It is now time to reflect on the real improvements of the APR enforcement.**

### **3. Innovative and more effective solutions are indispensable**

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#### **3.1. Legally binding decisions**

In situations where a consumer's claim has been rejected by the airline, it might need to be referred to a specialised body responsible for the air passenger rights claims (currently, this could be either a NEB or an ADR body).

Following this path should bring tangible results for consumers. To achieve this objective, participation in ADR schemes should be mandatory for airlines and their decisions should **be legally binding on the airline**. Otherwise, it might prove to be a dead end if the airline still refuses to compensate the consumer.

This power could be given either to a NEB or a specialised ADR body as long as it is consumers know to whom they can turn and that this is harmonised across the whole EU in order to provide additional clarity and legal certainty.

Naturally, these decisions should be able to be appealed before courts but the burden of launching the court proceedings should be put on the airline, not on a consumer (who is a weaker party in this transaction).

Decisions of the authorities or ADR bodies should be legally binding.
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#### **3.2. Expanded applicability of the enforcement decisions**

In order to solve the problem of NEBs/ADRs being flooded with passenger complaints after they have been unjustifiably rejected by the airlines, we suggest introducing an expanded applicability of the enforcement decisions.

Whenever a NEB handles a complaint from a dissatisfied passenger by ruling in his/her favour, that decision should also be applicable to all the other passengers who were travelling on the same flight and have suffered from the same problem. As a result, if according to the NEB compensation is due for a specific flight cancellation, all passengers travelling on that flight, with the same cause for compensation (regardless of whether they complained about it or not) shall be compensated by the airline.

This kind of rule would relieve the authorities from having to treat each complaint separately (in cases where they concern the same flight and the same circumstances that led to the travel disruption) and significantly **improve their effectiveness**, even if the compensation amounts due for a particular passenger might need to be adapted to reflect his/her individual situation, for example travelling on connecting flights etc. It would also **incentivise the airlines to treat the complaints** they receive first directly **in an appropriate and timely manner**.

This kind of system is already applied in Canada<sup>12</sup>. The Canadian system not only allows authorities to apply a decision to all passengers on an impacted flight, it also considers the various situations that may exist and gives flexibility for the authorities.

For example, if passengers have different damages and/or financial consequences (i.e. connecting flights/one-way flight), the authority can decide to order the carrier to use two different compensation schemes.

Decisions of enforcement authorities issued after an individual complaint should be automatically applicable to all other passengers travelling on the same flight and who have the same cause for compensation (i.e. same cancellation or delay).

### 3.3. Automatic compensation

Many passenger claims based on the APR Regulation are very straight forward.

For example, this may include a flight cancellation that is directly covered by the Regulation 261/2004 or a delay on arrival of the flight for more than three hours as specified by the European Court of Justice case law<sup>13</sup>.

In these situations, passengers are entitled to a compensation of €250/€400/€600, depending on the distance of the flight (unless these flight disruptions were due to an extraordinary circumstance). Yet, even simple claims are crippled by complicated and inefficient enforcement procedures.

This ends up being very frustrating for passengers though it should not be. In most cases, the airline has all the passenger's data and could simply transfer the money into the consumer's pocket.

This is why BEUC is calling for the European Commission to oblige the airlines to introduce **automatic compensation schemes**. This solution would also significantly limit the administrative burden for consumers, the airlines and the national enforcement bodies.

Automatic compensation is also **an official recommendation of the European Court of Auditors** formulated in its recent report on passenger rights, published in December 2018<sup>14</sup>. The Court undertook an in-depth assessment of EU passenger rights, which raised serious problems with enforcement in this sector. It therefore recommended the Commission to reflect on the possibility of setting up an obligation for airlines to introduce automatic compensation schemes.

BEUC supports this recommendation fully and suggests the Commission to conduct a **study** in order to analyse all the practical aspects of such a system that should be carefully considered. If for example algorithms are used by a company to decide on compensation, these should be subject to review by NEBs and consumer protection authorities, in order to make sure that the APR Regulation is being correctly applied. They should also take into account the currently applicable case law of the Court of Justice.

Airlines should set up automatic compensation schemes.

<sup>12</sup> Canada Transportation Act - s86(1)(h)(iii.1) & see the upcoming final report from the European Commission's study on the on the current level of protection of air passenger rights in the EU, mentioned above.

<sup>13</sup> Joined cases C-402/07 and C-432/07, "[Sturgeon](#)".

<sup>14</sup> [https://www.eca.europa.eu/Lists/ECADocuments/SR18\\_30/SR\\_PASSENGER\\_RIGHTS\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR18_30/SR_PASSENGER_RIGHTS_EN.pdf)

## 4. Additional necessary improvements

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### 4.1. Clear and strict deadlines for dealing with passenger complaints

Passengers struggle to obtain timely and complete responses from airlines to their complaints. In practice, they often need to send reminders in order to obtain a response or are even ignored by the airlines, in the hope of discouraging passengers from pursuing their claim further.

Since no time limits are set in the current law for handling consumer complaints, it is not often clear for passengers how long they need to wait for the response before they should proceed to the next step of the enforcement procedure. This can be crucial, especially as waiting too long may lead to the end of the prescription period of a claim which needs to be brought before the court.

This is unacceptable and could be easily remedied by introducing **strict deadlines for dealing with passenger complaints, which are no longer than 4 weeks** for the airlines.

Failure to comply with such deadlines would **expose airlines to fines which must be a real deterrent**<sup>15</sup>.

Such a deadline for responding to passenger complaints should also be established in the review of the Regulation for NEBs and ADR bodies. Thus, they should respond to consumers within a reasonably short time **after the complaint is filed**.

Clear and strict deadlines should be introduced for handling consumer complaints.

### 4.2. Stronger and formalised network of national enforcement bodies

Currently, only an informal NEB network exists which is a platform for exchanging information and good practices between the authorities.

However, in the light of incidents affecting large numbers of passengers all across Europe happening more and more often, a **stronger and more formalised network of air passenger rights enforcers** is needed. Formalised networks, dealing with EU consumer law matters, already exist in the European landscape and could serve as inspiration<sup>16</sup>. Most importantly, the network of NEBs should have well established mechanisms for the authorities to effectively cooperate in order to jointly deal with infringements of air passenger rights that have an EU dimension and be equipped with strong powers.

The NEBs network should speak with one voice when it comes to the interpretation of the EU APR legislation and the application of the Court of Justice's case law in mass harm cases affecting passengers in many EU countries. This would provide clearer guidelines to courts, which examine individual or collective cases, and to consumers, when they need to decide whether they should pursue their claims further.

NEBs should be able to launch coordinated enforcement actions and adopt common positions.

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<sup>15</sup> See point 5.3 below.

<sup>16</sup> e.g. Consumer Protection Cooperation (CPC) Network.

### 4.3. Truly dissuasive sanctions

Under the current APR Regulation, sanctions for infringing the Regulation need to be “*effective, proportionate and dissuasive*”. In practice, such a vague provision leads to a very fragmented landscape. In many countries, sanctions are very rarely imposed. If they are, their amounts are insufficient to have a real dissuasive effect on airlines. Moreover, information about the sanctions imposed is not publicly available. BEUC calls for an introduction of higher sanctions for infringing the APR Regulation, which would be based on the percentage of the airline’s annual turnover<sup>17</sup>. Moreover, the NEBs should be obliged to make the information about sanctions they imposed public.

Truly dissuasive sanctions, based on the percentage of the airline’s annual turnover, should be introduced.

### 4.4. Information about the reasons of travel disruptions made public

Passengers are often not informed about the exact reasons of their flight disruptions, even if this information is crucial for them to assess which air passenger rights apply in their specific case. Moreover, passenger complaints for compensation are sometimes rejected on the basis of the exception for extraordinary circumstances, without the airline specifying what was the exact reason for their flight being cancelled or delayed. This adds an additional burden on consumers who, in order to verify the airline’s statements, must send additional follow up messages to the airline and if this remains in vein, eventually complain to the NEBs or ADR bodies.

It can even happen that two passengers flying on the same flight receive different and contradictory information from the airline about the reasons of their flight delay/cancellation.

In order to **improve transparency** in this area, BEUC supports the recent recommendation made by the European Court of Auditors in last year’s report on passenger rights<sup>18</sup>, which obliges airlines to publish a note to passengers about the causes of the travel disruption and specifically, whether it is due to extraordinary circumstances. For BEUC, passengers who experience travel disruption should be informed of the reasons for the disruption within 30 minutes of its occurrence.

Airline should make the reasons for travel disruptions public.

### 4.5. Collective redress

Recently there have been more and more cases of mass harm, for example mass flight cancellations of Ryanair in 2017 (due to the company’s maladministration) and in 2018 (due to the strike of the airline’s staff) or mass flight cancellations at Barcelona airport in 2016 due to operational issues. Such events impact very high numbers of passengers, who should be able to jointly seek compensation before the courts.

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<sup>17</sup> Similar constructions have been already applied in the General Data Protection Regulation (Regulation (EU) 2016/679) or more recently in the proposal for the directive on better enforcement and modernisation of EU consumer protection rules (COM(2018) 185 final).

<sup>18</sup> [European Court of Auditors special report no 30/2018](#): EU passenger rights are comprehensive, but passengers still need to fight for them.

Test-Achats/ Test-Aankoop, BEUC's Belgian member organisation, has recently introduced a collective redress action against Ryanair in order to help all the affected consumers to get redress<sup>19</sup>. In practice, this proved to be the only way to effectively pursue claims of thousands of Belgian consumers.

Under the current Air Passenger Rights Regulation, passengers only have procedures which allow them to seek redress individually. Unfortunately, in the light of events affecting many consumers at once, this is not enough anymore. While some countries in the EU have collective redress instruments in their legal systems already, there are still many which do not<sup>20</sup>.

This is the reason why BEUC very strongly supports the European Commission's proposal for a directive on representative actions<sup>21</sup>. In a recent BEUC position<sup>22</sup>, we also stress the importance of passenger rights legislation remaining in the scope of this proposal and explain why the review clause concerning air passenger rights, included in the art. 18(2) of the proposal, is unjustified and should be deleted.

All European passengers should have the possibility to seek redress via collective court actions.

## 5. The right to financial compensation – Long delays (article 6)

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The current Regulation does not provide a right to compensation in the event of delay, but only in the event of cancellation. 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>23</sup>.

In itself, BEUC **welcomes** that the 2013 proposal introduces the **right to compensation for long delays**. The latter can cause as much trouble for passengers as cancellations. In addition, BEUC supports the right of compensation to be based on the time of arrival at the final destination, as this reflects better the inconvenience caused to passengers and better reflects the principle of equal treatment between cancellations and delays.

However, the European Court of Justice in the *Sturgeon* and *Böck* case<sup>24</sup> as in the *Nelson*<sup>25</sup> and *Folkerts* cases<sup>26</sup>, extended the right of passengers to financial compensation in the event of a **delay of 3 or more hours** at the final destination. These rulings were based on the Regulation 261's objective of providing a high level of consumer protection and some of its key provisions<sup>27</sup>. The Court concluded that the trouble and inconvenience caused to passengers **of a 3-hour delay on arrival is comparable to that of a cancellation**<sup>28</sup>.

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<sup>19</sup> <https://www.test-achats.be/action/espace-presse/communiqués-de-presse/2019/ca-ryanair---lancering>

<sup>20</sup> <https://www.beuc.eu/collective-redress-all-eu-consumers#wheretheconsumersaccesscollectiveredress>

<sup>21</sup> Proposal for a directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC ([COM\(2018\) 184 final](#)).

<sup>22</sup> Proposal for a Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (COM (2018) 0184 final).

<sup>23</sup> See facts in *Böck* Case (C-432/07).

<sup>24</sup> C-402/07 and C-432/07 (*Sturgeon* and *Böck*) of 19 November 2009.

<sup>25</sup> C-581/10 and C-629/10 (*Nelson* and others vs IATA, KLM, British Airways) of 23 October 2012.

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

<sup>27</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>28</sup> Points 43 of the *Sturgeon* ruling.

BEUC therefore **strongly disapproves** of the Commission's proposal **to weaken the right to compensation** in the event of long delays (stipulated by the CJEU as of a 3 hour 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. The introduction of these levels will have the opposite effect to that intended. They will weaken passengers' rights and create more legal uncertainty for them, which is contrary to the objective of the review.

In addition, BEUC specifies that already in 2012, the European Parliament has called on the Commission to codify the CJEU's rulings (*Sturgeon, Nelson and Folkerts*) in order to ensure harm to the passenger is compensated based on the principle of equitable treatment.

The Commission justifies this reduction of passengers' rights by assuming that it will encourage industry to better comply with their compensation obligations. However, this is not an acceptable justification. Contrary to the Commission's explanations, BEUC does not believe that a right to compensation after a 3-hour delay would prompt airlines to cancel flights rather than to operate flights, as companies must compensate for cancellations. The impact assessment accompanying the Commission proposal does not spell out this argumentation.

In 2011, the impact assessment estimated that the costs of the Regulation 261/04 to include compensation as of 3 hours would indeed rise in the years to come, but it specified this would be mostly due to traffic growth and partly to the increase in possibilities for passengers to claim compensation (e.g. ADRs).

The impact assessment estimated the cost of Regulation 261/04 to be €10.4 million, while the 2013 proposal would cost 9.8 million euro<sup>29</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 a 3-hour 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>30</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.

The reform of the Regulation 261/2004 must be **an opportunity to codify the case law of the European Court of Justice and must not serve to reduce passengers' rights.**

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<sup>29</sup> Table 6 of the Impact assessment: page 47.

<sup>30</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)

## 6. Right to assistance and compensation for missed connection (new article 6a)

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BEUC **welcomes the new Article 6a** of the proposal 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<sup>31</sup>. This obliges the passengers to wait until they are re-routed and can easily cause considerable delay of arrival at the final destination. **Therefore, there must be rights to assistance while waiting and rights to be compensated for a long delay of arrival.**

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).

Airlines argue that this provision would potentially *destroy* interlining agreements, in particular provided by regional carriers. BEUC acknowledges that in some cases a missed connection can be the result of a short delay of the preceding flight and that the obligation to compensation might 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 (especially 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>32</sup>.

## 7. No limitation to the right to assistance in case of extraordinary circumstances (article 9)

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Although BEUC supports the synchronisation of assistance trigger points (from 2 hours in all cases), which is a clear improvement on the current Regulation 261/2004, **we are strongly opposed to limiting the right to accommodation in case of "extraordinary circumstances"**.

The new proposal dilutes the current text, which ensures that passengers are cared for during disruptions. Article 9.4 proposes to limit the right to accommodation to 3 nights and 100 euros per night if the disruption is due to "extraordinary circumstances". **BEUC does**

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<sup>31</sup> According to the Impact assessment 75% of passengers whose flights are cancelled choose re-routing instead of refund.

<sup>32</sup> E.g. a flight from Brussels to Madrid and a "connection" from Madrid to Malaga provided by the same (low cost) carrier.

**not support this reduction of the right to assistance in the Commission's text, nor the European Parliament's one<sup>33</sup>.**

Rather, the proposal should return to an open right to accommodation which includes necessary, proportionate and reasonable costs.

The volcanic ash incident linked to the eruption of the Icelandic volcano Eyjafjöll is at the root of this willingness to limit assistance to passengers in the event of extraordinary circumstances.

Indeed, since this incident, air carriers has constantly called for a reduction in their assistance obligations in case of "extraordinary circumstances". The question whether events such as the (very exceptional) volcanic eruption fall fully within the scope of Regulation 261/04 in terms of assistance obligations has been referred to the EU Court of Justice by Ryanair.

In a judgment of 31 January 2013, the ECJ recognized the merits of the Regulation by granting the right to assistance to passengers in these exceptional circumstances. The Court stated that the right to unlimited accommodation is even more justified in situations that have been going on for a long time and where passengers are particularly vulnerable.

The ash cloud was a very exceptional event. While it has rightly served to alert the various actors to the need for better crisis management, it should not be used as a pretext to lower passenger protection standards in the air transport sector. **We therefore believe that the new proposal is clearly a disproportionate response to a very exceptional event.**

**It is important to consider the specificities of the air sector before proposing such a limitation.** The latter is not comparable to other modes of transport in terms of need for assistance. In the vast majority of cases, air passengers travel long distances and if they are affected by disruptions, they are often far from home. These long distances often prevent passengers from finding other ways to reach their final destination.

In practice, during the ash cloud crisis, hotels raised their prices considerably. In such situations, passengers do not have the opportunity to negotiate prices with hotels, but airlines do. If the reviewed Regulation entered into force as proposed, passengers - if they can - will have to pay the cost of additional days and perhaps also any additional costs during the first three days (if prices increase by more than €100). Thereafter, they would be entirely alone to cover all costs.

The 2011 report (SEC/2011/428)<sup>34</sup> on the costs of compliance with the Regulation (following the ash cloud) **shows that the financial impact of the Regulation on airlines is often overestimated.** In addition, the annual financial reports of several major airlines show that the volcanic ash incident did not prevent these airlines from achieving very good results in 2010<sup>35</sup>.

Finally, the impact assessment of the proposal itself recognises that the consequences and difficulties caused by the volcanic eruption, for example the closure of EU airspace, are unlikely to be replicated.

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<sup>33</sup> Article 9(4) of the European Parliament position: in case of "extraordinary circumstances", the carrier can limit its assistance to 5 nights and 125 € per night, per passenger.

<sup>34</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>35</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)

However, in the event of massive disruptions due to “extraordinary circumstances”, all relevant players should cooperate and share the burden. As a result, airlines should be able to recover part of the costs they incur when providing the required assistance to passengers from third parties<sup>36</sup>. However, the responsibility towards the passenger should lie fully with the airline, his contractual counterpart.

Concerning massive disruptions, **BEUC welcomes the obligation for airports to set up contingency plans (article 5.5)**. The latter should include specific obligations to provide care until the harmed passengers can be carried to their destinations. However, we consider that the exclusion of airports with less than 3 million travellers per year is not appropriate, especially for small countries<sup>37</sup>. **In our view, contingency plans should be the norm**. As a last resort we could support Parliament's position<sup>38</sup>.

It is very important that travellers can keep their sense of security when they are planning their air travel. Highly exceptional events must not be used to reduce air passenger rights.

## 8. Right to re-routing and reimbursement (article 8)

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### 8.1. Right to re-routing with different airlines or transport modes

Under the current Regulation, re-routing should be provided at "*the earliest opportunity*" and under "*comparable transport conditions*". These terms are vague and give rise to different interpretations. **In practice, airlines use this lack of clarity to avoid offering re-routing with other airlines or via other means of transport to the detriment of passengers.**

Therefore, BEUC welcomes Article 8 of the proposal, which specifies that consumers have the option of being re-routed free of charge in the event of cancellation and that airlines must also propose the re-routing option via alternative means of transport<sup>39</sup> and with another air carrier.

As a reminder, when a flight is disrupted, 3 out of 4 passengers prefer to be re-routed rather than refunded. However, according to the Commission's proposal, passengers should wait at least 12 hours before being re-routed by other means of transport. In its position, the European Parliament proposed an 8-hour waiting period.

**These waiting times are unacceptable for a re-routing "at the earliest opportunity"**. Rather, it should be added that passengers should be offered re-routing (including by other means of transport) **as soon as possible at the airport**. Airlines should also be expressly prohibited from directing passengers to a website or telephone number to make their own travel arrangements.

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<sup>36</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>37</sup> 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).

<sup>38</sup> Article 5(5) of the European Parliament position: Contingency plans shall be mandatory for airports with annual traffic of at least 1.5 million passengers for at least three consecutive years.

<sup>39</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). Article 8 is also in line with the point 4(b) of the Interpretative Guidelines on Regulation (EC) n°261/2004 [C\(2016\) 3502 Final](#)

For this obligation to be of practical use to passengers, it is important that each airline be required **to have a representative at each airport to handle passenger complaints** and make the necessary decisions. In addition, alternative flight arrangements must be reasonable and acceptable to the passenger (not all alternative flight arrangements can be considered in accordance with Article 8).

BEUC strongly encourages the legislators **to delete such time limits before passengers can benefit from the re-routing right**. Moreover, alternative transport should be guaranteed **as soon as possible** even with alternative modes of transport (i.e. train, bus) if they allow consumers to reach their destination quicker.

## 8.2. The right to re-routing for passenger suffering long delays at departure should be granted

**Passengers who suffer a delay at the point of departure** (even a 5 hour-long delay) 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 later, 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, **for long delays, passengers should have the choice to be re-routed unless this is proven impossible** by that airline.

Consumers expect to be taken from one place to another by the operator, in time and safely. It is then crucial that when there are disturbances, that alternatives are given as quickly as possible.

## 9. Rescheduling of flights (short notice cancellations)

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BEUC supports the Commission's proposal that the rescheduling of flights be considered a long delay in some cases. An early re-routing 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 can have an impact on the booking made by the consumer. In addition, flight schedules are an important quality factor for passengers who often prefer convenient flight schedules.

According to the Commission proposal, if the newly scheduled flight differs by 5 hours or more from the previous schedule, the right to reimbursement is provided, but not the right to re-routing<sup>40</sup>. In its position, the European Parliament lowered the time to benefit from this right to 3 hours<sup>41</sup>.

However, as mentioned earlier, reimbursement is not the best option for passengers in most cases, because the price of a new flight tickets may be far higher than the amount reimbursed.

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<sup>40</sup> Article 6.1.iii of the European Commission's Proposal.

<sup>41</sup> Article 6.1.iii of the European Parliament Position.

In these cases, **it should be possible to allow the passenger to choose between reimbursement and re-routing at a later date.**

## 10. Tarmac delays (article 6.5)

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BEUC supports the new right to assistance for passengers blocked on the plane after 1 hour of waiting (toilets, drinking water, air conditioning and medical assistance). However, we believe that airlines should also offer a snack to passengers after 1 hour.

The inconvenience and anxiety caused to passengers waiting inside the aircraft or on a bus on the tarmac should be treated differently from delays in the terminal building.

**More importantly, passengers should not be obliged to stay on the plane for 5 hours but should rather have the right to disembark after a 2-hour delay as proposed in the European Parliament's position.**

## 11. A full ban of “no-show” clauses is needed (article 4.4)

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Currently, the contractual terms and conditions of many airlines include a clause which allows the air carrier to deny boarding to a passenger when they did not use all the coupons of the ticket and in the same order (sequence) of the purchase.

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 leg of their tickets. Also, the scenarios of “no-show” are increasingly extended to cases of (growing) combinations of a “train and flight coupons”, the later flight getting cancelled if the passenger does not show up at the train check-in.

**Passengers in these situations are then obliged to buy another ticket (subject to availability) or pay a disproportionate supplementary fee.**

The Commission tried to address the issue of the no-show policy in its 2013 proposal. However, **the proposal regrettably does not provide a complete ban of the use of this clause.** Article 4.4 only provides 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.

**However, already at the time of the proposal, the use of the “no-show” clause was considered unfair by a significant number of national courts throughout Europe** (e.g. Austria, Germany and Spain)<sup>42</sup>. Many of the rulings are the result of actions

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<sup>42</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.

instigated by BEUC members against airlines such as Lufthansa, British Airways and Iberia<sup>43</sup>.

In December 2018, several BEUC members launched a coordinated action against several air carriers<sup>44</sup>. Although recent, some of these legal proceedings have resulted in a judgment, as the courts have declared the “no-show” clauses unfair<sup>45</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 damages (given that the price has been paid).

**On the contrary, the no-show policy allows airlines to sell the same ticket twice and thus obtain an unfair revenue increase<sup>46</sup>** because the company does not refund the price of the unused ticket to the passenger (on the contrary, the passenger is asked to pay for another ticket).

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 supply and demand (market segmentation)<sup>47</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.

BEUC would like to underline that the **European Parliament already called in 2012 on the Commission to address the proliferation of unfair terms in air carrier contracts, including the use of the no-show clause.**

On a more general level, BEUC would like to draw attention to the fact that the use of unfair contract terms by airlines is unfortunately widespread. The “no-show” clause is only one example. Among others, we can mention the use of clauses authorizing code share agreements without the consent of the passenger, clauses indicating that passengers would not be entitled to any refund in case of force majeure etc<sup>48</sup>. Many contractual terms have been considered unfair by national judgments but continue to be applied throughout the EU.

Furthermore, new practices and unfair terms appear to be harming European consumers. Some airlines such as Wizzair or Ryanair have recently started to charge consumers an additional fee for a normal-sized hand luggage. Although both airlines have been fined in

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<sup>43</sup> OCU against Iberia Airlines, 11 September 2012: (*Juzgado Mercantil* n 12, Madrid).

<sup>44</sup> [https://www.beuc.eu/publications/beuc-web-2018-046\\_unfair\\_no-show\\_clause\\_in\\_airline\\_tickets.pdf](https://www.beuc.eu/publications/beuc-web-2018-046_unfair_no-show_clause_in_airline_tickets.pdf)

<sup>45</sup> VKI against KLM – 15 July 2019: (OLG Wien 11.6.2019, 1 R 73/19s) and VKI against Brussels Airlines – 29 March 2019 (HG Wien 29.03.2019, 39 Cg 55/17g).

<sup>46</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>47</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>48</sup> See BEUC letter to IATA of 5 February 2013 on Unfair Contract Terms in transport contracts. <https://www.beuc.eu/publications/2013-00073-01-e.pdf>

Italy, following a complaint from our member Altroconsumo, they continue to apply these unfair hand luggage policies.

This proliferation of unfair contract terms has worried consumer associations for many years. The entry into force of the new CPC Regulation<sup>49</sup> in January 2020 would be a good opportunity to investigate this problem and find an EU-wide solution to stop the use of those unfair contract terms in contracts of carriage.

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

## 12. No expansion of the “extraordinary circumstances” exception

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### 12.1. A clear definition of the notion is essential.

In its current version, **Regulation 261/2004 does not include a clear definition of the concept of extraordinary circumstances**. This lack of definition is detrimental for passengers because it can have important consequences. Airlines can invoke it to avoid paying compensation to passengers.

The delineations of what is an extraordinary circumstance has been defined by the European Court of Justice on numerous occasions. This case-by-case analysis highlights the need to clearly define the concept. Currently, airlines are taking advantage of this lack of definition and legal uncertainty to refuse to pay compensation arguing extraordinary circumstances.

It is then up to the passengers to make the necessary arrangements with the competent NEB or with the competent court to assert their rights. **This situation is no longer acceptable, and a better enforcement of air passengers requires the creation of clear and understandable definitions for passengers and all stakeholders.**

The **definition proposed by the Commission 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>50</sup>.

Second, the wording *“not inherent in the normal exercise of the air carrier”* in relation to the article on exceptional circumstances, does not belong to a general definition of extraordinary circumstances. This addition was taken from the *Wallentin*<sup>51</sup> judgment which refers specifically to technical problems. Therefore, it should be deleted if the negotiations are relaunched because it could cause interpretation problems in a general context.

According to the *Wallentin* ruling, 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.

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<sup>49</sup> Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.

<sup>50</sup> Recital 14 of Regulation 261/04.

<sup>51</sup> *Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA* - Case C-549/07.

## 12.2. BEUC does not support the proposed list of “extraordinary circumstances”

Although BEUC supports the creation of a list of situations that could be considered as “extraordinary circumstances” for more legal certainty, BEUC does not support the list in Annex 1 of the Commission's proposal and the position of the European Parliament.

**We consider that several situations do not constitute extraordinary circumstances** *per se* and that an analysis should be made on a case-by-case basis according to the circumstances of each case.

### 12.2.1. Labour disputes at the operating carriers

The European Court of Justice ruled in the *Tuifly*<sup>52</sup> case that a “wildcat strike” by airline staff following the surprise announcement of a plan for restructuring the company did not constitute an “extraordinary circumstance”. This conclusion was taken by the court after it had analysed whether the strike in question fulfilled the conditions set in the *Wallentin* case.

For BEUC, labour strikes at the operating carrier should be removed from Annex 1 of the reviewed text and should not be considered as an extraordinary event.

In addition, regarding the effects of the “extraordinary circumstances” on subsequent flights (not directly affected by the extraordinary situation), BEUC supports the article 6.4 of the 2013 proposal which follows the ruling of the European Court of Justice of 4 October 2012<sup>53</sup>. In this 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 which took place two days before at the airport.

Strikes by employees of a company **are intrinsically linked to the activity and organization of the very same company!** Therefore, passengers should under no circumstances suffer from these situations.

### 12.2.2. Technical problems

As regard **technical problem cases**<sup>54</sup>, it is not clear cut when a technical problem will be considered an “extraordinary circumstance”. Even if the proposal by the European Commission integrates the *Wallentin* case<sup>55</sup> which clarified that not all technical problems can be considered extraordinary, in practice it is difficult to apply this fairly. Indeed, the operation of aircraft inevitably leads to many technical problems. However, the Court has repeatedly pointed out that the occurrence of technical problems does not, in itself, characterise an “extraordinary circumstance” and that this concept **must be interpreted strictly**. According to the Court, for the circumstance to be considered as extraordinary, the technical problem should not be inherent in the normal exercise of the activity of an air carrier and should escape the carrier's effective control.

Thus, technical problems revealed during the maintenance of an aircraft have not been considered extraordinary circumstances, while technical problems such as manufacturing

<sup>52</sup> Joined Cases C 195/17, C 197/17 to C 203/17, C 226/17, C 228/17, C 254/17, C 274/17, C 275/17, C 278/17 to C 286/17 and C 290/17 to C 292/17, Helga Krusemann and Others v TUIfly

<sup>53</sup> C-22/11, Finnair Oyj vs Timy Massooy, 4 October 2012.

<sup>54</sup> According to the Impact assessment of the Commission technical problems were the second cause for delay between 2007 and 2013 (Annex 2b, page 68),

<sup>55</sup> C-549/07, Friederike Wallentin-Hermann vs. Alitalia Linee Aeree Italiane SpA, 22 December 2008.

defects revealed by the manufacturer or by a competent national authority that may affect flight safety will be considered extraordinary circumstances. In 2015, the Court further refined the definition in the *van der Lans*<sup>56</sup> case by clarifying that unexpected technical incidents such as premature wear and tear on engine parts remain intrinsically linked to an aircraft's complex operating system which is operated by the air carrier in extreme meteorological conditions. For the Court, this unexpected event is inherent to the normal exercise of the air carrier's activity, as carriers are confronted, on a daily basis, with unforeseen technical problems.

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>57</sup> **and thus, for BEUC, should not be considered as extraordinary.**

BEUC also underlines that, as currently drafted, the Commission's proposal specifies that defects identified during the operation of a flight that affect flight safety will be considered "exceptional circumstances". This drafting is dangerous, as almost all aircraft technical problems are important for safety. In practice, airlines may be tempted to hide behind this safety argument all the time in order to avoid their obligation to compensate.

Finally, the proposal should add that mere compliance with the minimum maintenance requirements does not in itself suffice to prove that the airline took all "*reasonable measures*"<sup>58</sup>.

In practice, passengers cannot verify the accuracy of the airline's declarations. Very often airlines use the excuse of technical failures to exclude their liability<sup>59</sup> and the refusal of the airline is often "accepted" by the passenger. Cancellations for technical reasons are the least comprehensible cases for passengers.

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 to passengers and to NEBs the occurrence of an "extraordinary circumstance" (aside from providing the proof of having made "reasonable efforts" to avoid the disturbance).

### 13. Information obligations

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BEUC supports **the information obligations of the 2013 proposal** on airlines about the rights of passengers under the Regulation. It particularly supports providing 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, BEUC believes that information on the rights of passengers has to be already given **at the time of booking**.

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<sup>56</sup> C-257/14, Corina van der Lans vs KLM, 17 September 2015.

<sup>57</sup> Point "ii" of the list of "extraordinary circumstances" includes defects identified during the flight operation.

<sup>58</sup> See point 43 of the *Wallentin* ruling.

<sup>59</sup> Technical problems are the second cause for delay (Impact assessment (Annex 2b, page 68)).

Also, BEUC is calling for an obligation to inform passengers who experience travel disruption about the reasons for the disruption **within 30 minutes of its occurrence** as proposed by the European Parliament<sup>60</sup>.

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).

## 14. Luggage policies (article 6d)

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The 2013 EC proposal contains an Article 6d. The latter indicates that airlines enjoy a "*full commercial freedom*" to decide on the conditions of carriage of luggage. **BEUC is strongly opposed to such a provision.** However, we support the newly proposed obligation of airlines to inform consumers about their baggage policy.

Introducing "full commercial freedom" is contrary to the principles and rules of EU law on transparency and comparability of air fares contained in Article 23 of Regulation 1008/2008. We also point out that the different baggage transport policies applied by airlines creates confusion among passengers and is a source of distress, particularly at check-in.

BEUC therefore supports the establishment of minimum requirements of service quality for baggage transport. All airlines should accept a minimum of one piece of checked-in luggage at no extra cost. Consumers who do not want or need to check in their luggage should be able to benefit from price reductions.

Moreover, Regulation 1008/2008 requires airlines to include in the advertised price all taxes and charges that are "**unavoidable**" and "**foreseeable**" at the time of publication of the price. However, there is no clear definition of which elements could be considered as unavoidable and foreseeable. Consequently, most airlines' policies on advertising ticket prices often harm consumers. Their new business models rely excessively on ancillary services and additional costs which are not indicated in the advertised price, in particular regarding the transport of luggage<sup>61</sup>. In addition, each airline has a different luggage restriction policy, which limits transparency and complicates price comparison, while causing inconvenience to consumers, particularly at check-in times.

As regards "hand luggage", the European Court of Justice in the *Vueling* case<sup>62</sup> specified that they must be considered an essential element of passenger transport and, therefore, cannot be subject to an additional charge, provided that such baggage meets reasonable requirements in terms of weight and dimensions and meets the applicable safety requirements.

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<sup>60</sup> Article 14(5) of the European Parliament position : "*In the event of cancellation or delay in departure, passengers shall be informed by the operating air carrier of the situation, including the cause of the disruption, as soon as this information is available, and in any event no later than 30 minutes after the scheduled departure time [...].*[Am.111].

<sup>61</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>62</sup> C-487/12 - Vueling Airlines SA against Instituto Galego de Consumo de la Xunta de Galicia, 18 September 2014 – (point 40).

However, to date, and despite clear case law from the ECJ, some airlines continue to apply hand luggage policies contrary to EU law. Thus, for Ryanair, cabin luggage is a paid option since 1st September 2018. **The revision of the Regulation is an opportunity to clearly indicate that hand luggage should not be subject to additional fees.**

In a logic of transparency, the review should also be an opportunity to regulate the size of cabin baggage, which varies between airlines, making it difficult for connecting flights operated by different airlines.

The situation is even more complex when consumers book via an intermediary. As neither Regulation 261/2004 nor Regulation 1008/2008 provide minimum information standards that airlines must give to sales intermediaries, the final price paid by consumers is often much higher than the one announced. Therefore, it is essential to clearly define the “unavoidable and foreseeable” price elements that must always be included in the price in order to allow greater price transparency and comparability for consumers. In addition, the Regulation must require airlines and ticket vendors to post optional services at the beginning of the booking process.

BEUC calls for the deletion of Article 6d of the proposal which allows airlines full commercial freedom to decide on the conditions for the carriage of luggage.

## 15. Protection of passengers in case of insolvency of the airline

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Unfortunately, consumers are not protected against airline bankruptcies. **Since the beginning of 2017 at least 32 airlines went bankrupt.** Moreover, according to the Commission study of 2011<sup>63</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>64</sup>.

**Over this period 76% of passengers did not benefit from any form of protection.** At the time, the Commission study showed that none of the existing forms of protection available for flights-only passengers in various Member States offered comprehensive coverage to all passengers at low costs. **Self-regulatory options claimed by airlines have been clearly assessed as insufficient.**

BEUC has since long called for the establishment of a mandatory guarantee or the creation of a reserve fund which protects all passengers equally against airline insolvencies, **covering the refund of the money paid and repatriation of stranded passengers**<sup>65</sup>.

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 the money they paid. For stranded passengers the situation is even more difficult as they should find alternative flights to get to their destination.

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<sup>63</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>64</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>65</sup> See our full position paper on Airline insolvencies : <https://www.beuc.eu/publications/2011-09855-01-e.pdf>

Currently in Europe, all travel agencies must have a financial guarantee fund in the event of bankruptcy<sup>66</sup>. This is not the case for airlines. **In Denmark, there is a “guarantee fund”** financed by Danish travel agencies which can also be used in the event of the bankruptcy of Danish airlines.

In practice, this means that passengers who have purchased a flight-only ticket operated by a company that goes bankrupt can contact this guarantee fund to receive a reimbursement.

**This fund has already been successfully used during the 2018 bankruptcy of the airline Primera Air.** Passengers who were victims of the bankruptcy were able to obtain a refund of a maximum of €134.11 per passenger<sup>67</sup>.

We also recall that the Communication of the Commission<sup>68</sup> of March 2013 puts forward several voluntary measures which have proved insufficient in protecting passengers and giving them legal certainty<sup>69</sup>. As bankruptcies increase, there is an obvious and urgent need for legislative action to protect harmed passengers.

**The fund set up in Denmark should serve as an example.** BEUC strongly encourages the Commission and the Council to follow the direction taken by the Parliament which proposed in its 2014 position the creation of a mechanism to protect consumers against airline insolvencies<sup>70</sup>. In a new resolution of October 2019<sup>71</sup>, Parliament reiterated the urgency of protecting consumers in the face of increasing airline bankruptcies. BEUC therefore encourages the legislator to take appropriate measures to protect passengers who are victims of airline bankruptcies.

## 16. Spelling Mistakes (article 4.5)

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BEUC was pleased to see that the article 4.5 of **the European Commission’s proposal introduced the right to correct spelling mistakes within 48 hours of booking**<sup>72</sup>. However, we want the reform to go further and propose that this right be extended to errors relating to the days and hours of the flight (up to 48 hours after the booking).

Air tickets are increasingly sold and bought online, 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**

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<sup>66</sup> Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC

<sup>67</sup> The only condition to activate the fund is that the flights operated by this airline must depart from or land in Denmark.

<sup>68</sup> COM(2013) 129 final:

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

<sup>69</sup> See BEUC position X/2011/105:

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

<sup>70</sup> EP proposed a creation of a guarantee fund or a compulsory insurance scheme to ensure that passengers can be reimbursed or repatriated when their flights are cancelled due to the insolvency of an air carrier or the suspension of its operations as the result of the revocation of its operating licence [Am 11].

<sup>71</sup> [https://www.europarl.europa.eu/doceo/document/TA-9-2019-0047\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2019-0047_EN.pdf)

<sup>72</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.

**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<sup>73</sup>.**

## 17. Right for passengers to transfer their tickets

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Passengers should have the right to **transfer their tickets** to another person if they are prevented from travelling.

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** given that “package” travellers do have the right to transfer the package under certain conditions.

Therefore, we think that there is no valid reason to ban outright the transferability of tickets, as long as certain conditions, for instance security needs, are met. The risk for abuse, as 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 on airlines as this would not impact on their yield management pricing policies.

Moreover, Article 11.2 of the E-Commerce Directive<sup>74</sup> should also be effectively applied by websites selling air tickets.

**BEUC supports the introduction of the right to correct spelling mistakes but considers that the proposal does not go far enough.** Passengers should be able to modify errors in relation to the day and time of the flight during a similar period of 48 hours and **to transfer their tickets**.

## 18. Conclusions

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Currently, EU air passenger rights often only benefit the most persistent consumers who are ready to invest a lot of their time, energy and money in pursuing them. This is unacceptable. EU rights should be there for all European citizens.

In light of the increasing problems met by consumers to enforce their rights, it is clear that any revision of the APR Regulation would have to take much more far reaching measures than the ones proposed in 2013, to make a real change and effectively improve the current rights and enforcement procedures applicable in this sector.

Half-way solutions are not enough anymore. What is needed is a true reform of air passenger rights, which must include automatic compensation, binding decisions by enforcement bodies, and collective protection measures.

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<sup>73</sup> On 21/10/2019, our Belgian member Test-Achats/Test-Aankoop issued a [formal notice](#) to 10 airlines asking passengers to pay extremely high fees in order to be able to change a simple spelling error in their name. The costs of modification range from 25 € to 160€, which is totally disproportionate. Our member considers this practice as illegal and call for an end of it.

<sup>74</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.



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