



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 response to the European Commission's consultation

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Ref.: X/2012/037 - 01/06/2012

**Public consultation on a possible revision of
Regulation (EC) 261/2004¹ establishing common
rules on compensation and assistance to
passengers in the event of denied boarding,
cancellation and long delay of flights, and
complementary measures to amend Regulation
(EC) 889/2002²**

1.1 Identification

(1) I speak on behalf of (Compulsory – one answer only)

X an organisation

(1a and 1b) (Respondent only answers this question if he/she has ticked “organisation” in the question above. Compulsory question) Please can you identify which organisation you represent, and a contact email address?

Answer for organisation name: BEUC, the European Consumer Organisation

Answer for email address: consumercontracts@beuc.eu

(1c) (Respondent only answers this question if he/she has ticked “organisation” in the question above. Compulsory question) Please select the organisation type?

(k) X Consumer or passenger association

(2) (Respondent only answers this question if he/she has ticked “organisation” in the question above. Compulsory question) Please indicate if your organisation is registered in the Transparency Register of the Commission:

X Yes

If you are speaking on behalf of an organization, note that as part of the European Transparency Initiative, organisations are invited to use the Register of interest representatives to provide the European Commission and the public at large with information about their objectives, funding and structures (http://europa.eu/transparency-register/index_en.htm).

If you are a registered organisation, your contribution will be considered as representing the views of your organisation. If your organisation is not registered, your contribution will be considered as an individual contribution.

You have the opportunity to register now by clicking on the above link.

BEUC identification number: 9505781573-45

1.3 Confidentiality

(3) (Compulsory – one answer only) Contributions received to this consultation, together with the identity of the contributor, may be published by the Commission, unless the contributor objects to the publication of the personal data on the grounds that such publication would harm his or her legitimate interests. In this case, the publication may be published in an anonymous form.

The contributor may also object to the publication of its contribution, but should be aware that he may later be requested to provide justification in accordance with the exceptions provided under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (http://ec.europa.eu/transparency/access_documents/index_en.htm#).

X The contribution may be published.

2. Assessment of the problems and need for action

The previous paragraphs gave an overview of the problem areas and of the policy objectives of the present initiative.

(4.1) Do you agree on the need to take action to address the above-mentioned problems?

BEUC answer

Mostly

Regulation 261/04 provides for a minimum set of rights passengers can benefit from in cases of denied boarding, cancellations and long delays of flights. At this point in time it is clear that the regulation has well contributed to improve the position of passengers, vis-à-vis the air companies. Thus, the level of protection in the regulation has to be maintained.

Yet, the practical application of the regulation has created many problems mostly due to its complex drafting, some gaps in its scope and the often biased interpretation by the air industry of some of its controversial provisions. In this regard, we think that there is scope for improvement, clarification and simplification of some of its provisions to the benefit of both passengers and industry.

In particular, the information obligations set up in the regulation, its scope and the cases/scenarios in which passengers should be protected, have to be extended, drawing on experiences of the practical application of the regulation.

The application and enforcement of the rights of passengers urgently need to be significantly improved. Overall, the new regulation should introduce the right incentives in order to encourage the airlines to fulfill their obligations (bearing in mind that the main expectation of the passenger is arriving at destination at the scheduled time and in conformity with the transport contract);

The sanctions to airlines for non-compliance with their obligations should be proportional and deterrent.

Moreover, Regulation 261 is only a part of the current regulatory framework on air passengers' rights. Other legislative texts address and give additional rights to passengers (e.g. Regulation 2027/2007, Regulation 2011/2005, regulation 1107/2006, Regulation 2111/2005, Regulation 785/2004). The dispersion of rights in different legislative texts makes it very complicated for consumers (and for the Industry) to find out their rights and obligations. Therefore BEUC considers that the different existing regulations should in the long term be integrated within a single text of law in a coherent manner. There also needs to be coherence with the rights of package travelers based on the Package Travel Directive.

Furthermore, even though the consultation at hand covers a wide range of issues that have proved problematic and should be improved, a number of other question are unfortunately left aside. We consider that the future regulation should also address the following issues:

- 1. The regulation 261/04 should cover (and make liable) the contractual carrier and the operating carrier (e.g. in cases of code-share);**
- 2. A "black list" of unfair contract terms in air transport contracts (on the basis of existing court cases), should be set up (see answer to question 14);**
- 3. Airlines should be required to provide for a financial guarantee to cover their liabilities against travelers in case of insolvency³.**

(4.2) Do you agree that there is a need to revise Regulation 261/2004 to address at least part of these problems?

Fully

(4.3) If you think that there is no need to revise Regulation 261/2004, do you think that other, non-regulatory actions should be undertaken in this area?

N/A

3. Options in relation to delay, cancellation and denied boarding

Extraordinary circumstances

In its judgment in the case *Wallentin-Hermann v Alitalia*, the European Court of Justice has clarified the circumstances in which technical problems with an aircraft may be considered extraordinary circumstances sufficient to exempt the airline from payment of compensation. It found that, to meet this criteria, the circumstances must be “not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control”. It also pointed out that, in order to exempt carriers from payment of compensation, circumstances must be both extraordinary and all reasonable measures must have been taken to avoid the circumstances.

Practice has also shown diverging opinions with regard to the consideration of nontechnical reasons as extraordinary circumstances; such as labour strikes (both air carrier's staff and third parties'), bird strikes or bad weather (e.g. when the airport and ATM conditions allow landing and taking off but the airplane's equipment does not).

Besides, since the operating air carrier is responsible for the payment of the compensation, sometimes passengers may be entitled to compensation when the reasons for the cancellation can be considered extraordinary, even when they are outside the control of the carrier (e.g. an announced ATM strike).

(5.1) Is further clarification needed of extraordinary circumstances involving technical reasons?

Yes

(5.2) If yes, how should this be clarified?

X Integrate the Wallentin judgment into the text of the Regulation, without further amendment

(5.3) Is further clarification needed of extraordinary circumstances for other reasons

than technical (e.g. strikes)?

X no

BEUC answer

The future regulation should Not change recital 14 as currently drafted; recital 14 should be maintained as an illustrative list. Any reason that could exempt airlines from having to pay compensation is closely linked to the specificities of each case; it is thus necessary to leave leeway to the courts to do justice in each particular case. As the Court stated in the *Wallentin* ruling, in recital 14, 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 (to exempt the company from paying compensation), neither did it mean, that other reasons (but those mentioned in recital 14) cannot lead to “extraordinary circumstances”⁴.

The rulings of the European Court of Justice (“Wallentin” and “Eglitis/Ratnieks⁵”) in relation to technical problems should be incorporated in the future regulation, as follows:

-Technical problems do not constitute “extraordinary circumstances” if they stem from events related to the normal exercise of the activity of an air carrier (e.g. maintenance obligations);

-The fact that the air company has complied with its minimum maintenance obligations does not necessarily mean that it has taken all “reasonable measures” to relieve the carrier from the obligation to pay compensation;

-the fact that a technical problem appears during a maintenance exercise does not necessarily imply that the air carrier has taken all “reasonable measures” to relieve the carrier from the obligation to pay compensation.

- the notion of “reasonable measures” includes the obligation of the airline to provide for a certain reserve time to allow the air company to operate the flight after the extraordinary circumstances have ended.

We underline that the rights of passengers to receive “assistance” also in cases of “extraordinary circumstances” must not be put into question on the grounds of the volcanic ash cloud. To diminish the rights of passengers to be assisted while stranded, is a disproportionate “response” to a very exceptional event that is the ash cloud. As a matter of fact, the advent of a second eruption did not result in major disruptions while the legislation was the same.

Regarding the disruptions that occurred in winter 2010, caused by harsh weather conditions (snow), the subsequent assessing reports, showed that most of the disruptions could have been avoided if appropriate contingency plans had been in place; airports and airlines were not sufficiently equipped nor prepared for these situations.

Moreover, as mentioned above, last year’s Report of the European Commission (SEC/2011/428) on the costs of compliance with the regulation (in the aftermath of the ash cloud) demonstrates that the financial impact on airlines of the regulation is often overestimated. The annual financial reports from several major airline companies show that the volcanic ash crisis did not prevent those airline companies from achieving very good results in 2010.

Re-routing

The Regulation specifies that in the event of cancellation or denied boarding air carriers must offer the passenger “re-routing, under comparable transport conditions, to their final destination at the earliest opportunity”. The air carriers tend to apply a narrow interpretation of this concept, limiting re-routing to their own flights, and consequently, sometimes only offer passengers a re-routing several days later. National jurisprudence, the Commission (in its Communication of April 2011), several NEBs and consumer associations have considered that this article requires airlines to offer re-routing on other airlines, or on land/maritime transport, if it is faster than re-routing on its own services. Besides, the Regulation does not fix any timeframe for the provision of the triple choice between reimbursement, re-routing at the early opportunity and re-

booking at a later stage, and it does not impose on carriers the provision of a means of proof to passengers (e.g. offer made and accepted/rejected in written), even if it seems implicit that the choice must be offered to the passenger on the spot. As a consequence, passengers sometimes find themselves stranded at airports (usually at secondary airports and late in the day) with no interlocutor from the carrier, where no clear rerouting is offered on the spot, and are simply referred to websites or phone numbers, not necessarily easily accessible and at the expense of the passenger at normal or special phone rates

(6.1) Is further clarification needed of the requirements for the triple choice reimbursement/re-routing/rebooking?

X yes, airlines should clearly record the choice of the passenger, otherwise the choice for re-routing (incl. care) would be assumed

(6.2) Is further clarification needed on the definition of re-routing at the earliest opportunity?

X yes, this should include a requirement (beyond a certain time period) to offer rerouting on other airlines, or by land/maritime transport, if this is closer to the passenger's original travel plans

If the airline does not offer re-routing when it should, the passenger may be able to claim costs back from it, but this may be difficult and time consuming to do. This could be addressed by introducing an automatic right to compensation if the choice between reimbursement and re-routing is not offered when required, as it is the case for coach transport. This would also give airlines a financial incentive to comply with the requirements of the Regulation.

(6.3) Should automatic compensation be introduced where airlines fail to offer the option of re-routing when the Regulation requires it?

Yes

(6.4) Please provide any further information or comments on the requirement for

rerouting.

BEUC answer

Meeting consumer expectations (with regard to travel plans) should always be the yardstick when deciding about passengers' rights if the airline breaks its obligations under the contract. Thus, passengers whose flights have been cancelled should always have the right to choose the option that better fits their needs and their travel plans. It should be specified that the option of re-routing includes flights with other airlines and also in other means of transport (rail, bus, coach)⁶; this will encourage inter-modality.

The option between re-routing and reimbursement should be offered in a clear and expressed way to the consumer In THE AIRPORT as soon as possible. For this obligation to be materialized, it is of utmost importance that every airline is obliged to have a representative in each airport where it operates that can deal with passenger's complaints. In addition, the alternative flight arrangements have to be reasonable and acceptable for the passenger (not every alternative arrangement can be considered to comply with article 9). In any case it should be forbidden that airlines refer passengers to a website or to a telephone number to arrange the new flight by themselves.

The notion of "cancellation" should cover cases where the plane takes off but is subsequently reverted to the airport of departure and passengers are transferred to other flights (case Sousa Rodríguez, C-83/10 of 13 October 2011).

Compensation in cases of delay

In its judgment in the case *Sturgeon and Bock*¹¹, the European Court of Justice identified that there was a right to compensation in cases of delays of over 3 hours. This was on the basis of the principle of 'equal treatment': as compensation is due for cancellations, there should also be a right to compensation available in case of long delays which cause equivalent inconvenience to passengers. Note that the Regulation also specifies that passengers must be provided with assistance (such as refreshments and telephone calls) after 2-4 hours, and have the right to select a refund and not travel after a delay of 5 hours.

If the delay, after which compensation is payable, would be increased to more than 3 hours, there would be less instances in which passengers would be able to claim financial compensation. On the other hand, it may also present advantages to passengers: experience has shown that re-routing at the earliest opportunity for all passengers of a cancelled flight can be difficult, notably in peak times (e.g. Christmas/Easter period) and for long haul or island flights. In instances where rerouting is difficult or even impossible, the passenger may be better served by a late departure than by a cancellation of the flight. Therefore, if the right to compensation arises after a longer delay than the current three hours, airlines could be induced to prefer delay over cancellation.

(7.1) Is the current 3 hour delay after which compensation is payable in cases of delays appropriate?

Yes

(7.2) Please provide any further information or comments on the issue of compensation in case of long delay (open-ended box).

BEUC answer

Before the “Sturgeon” judgment was delivered (C-402/2007, C-432/2007), many air companies often qualified as “delays”, situations that in reality were “cancellations” for the following reasons: a) Regulation 261/04 obliges airlines to provide re-routing in case of cancellation but not in case of delay; b) the Regulation obliges airlines to provide compensation in case of cancellation but not in the case of delay.

After the Sturgeon judgment passengers have in theory the right to compensation after 3 hours of delay. However, despite of being binding for airlines, our members report that in most cases airlines refuse to apply the judgment, arguing in particular the prejudicial question in Case C- 629/2010⁷ pending before the ECJ that addresses this matter in relation to the Montreal convention.

Therefore the obligation to provide compensation after 3 hours of delay should be expressly included in the new regulation.

Time periods for assistance

Despite the judgment in the Sturgeon case, there are still some cases in which passengers’ rights may be interpreted as differing, depending on whether the

disruption to their journey is caused by delay, cancellation or denied boarding. For example, in cases of denied boarding or cancellations, passengers would immediately be entitled to provision of refreshments, whereas in cases of delay this would not be provided before 2-4 hours, depending on the flight length. The Regulation could be simplified by introducing common time thresholds after which assistance was provided, regardless of the cause of the problem or the length of the flight.

(8.1) Should the Regulation be amended to introduce consistent time periods, after which there would be a right to **assistance** (such as refreshments and telephone calls), regardless of whether the disruption was caused by delay or cancellation and regardless of the length of the flight?

1. Yes

(8.1b) **If yes**, what should the time period be, after which there would be a right to assistance such as refreshments and telephone calls?

2 hours

(8.1c) Open box: please explain/justify briefly your choice

BEUC answer

The current system is inappropriate from the consumers' point of view. The inconvenience felt by passengers confronted with disruptions does not depend on the length of the flight neither on the kind of disruption (delayed, cancellation) but rather on the time that he/she is obliged to wait at the airport (and the actual delay suffered on arrival).

At present passengers would also have the right to a refund or re-routing after cancellation or denied boarding, but in cases of delay there is no right to a refund until 5 hours, and there is no right to re-routing. This apparent inconsistency could be addressed by introducing a right to a refund or re-routing after a given number of hours delay, regardless of whether this was caused by delay, cancellation or some other reason like in the other modes of transport. For consistency, in cases of cancellations or denied boarding, if the carrier could offer re-routing within an amount of time less than the threshold, the passenger would no longer have such a choice.

(8.2) Should the Regulation be amended to introduce consistent time periods, after which there would be **a right to refunds or re-routing**, regardless of whether the disruption was caused by delay or cancellation?

Yes

(8.2b) **If yes**, what should the time period be, after which there would be a right to refunds and re-routing?

X 3 hours

(8.2c) Open box: please briefly explain/justify your choice

BEUC answer

It is logical that in case of cancellation the right to be refunded or re-routed is offered immediately as the flight will not be operated! For the sake of consistency the right to be refunded in case of delay should start as of 3 hours (as in case of compensation according to "Sturgeon").

Regarding the right to be re-routed, passengers who suffer a delay (even 5 hours long) do not currently have the right to be re-routed. This is not appropriate from the point of view of the principle of equality (Sturgeon case) as also in case of 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 may be too expensive compared to the price of the first flight, mainly due to current widespread practices in the air industry based on "yield management". Thus passengers should also be offered re-routing in cases of long delays (as from 3 hours delay).

Information in cases of disruption

Passenger rights legislation applying in other sectors (for example, rail) requires operators to provide passengers with information on the causes of disruption.

The Commission wishes to consider if there should be an equivalent requirement in the air transport sector.

(9) Should airlines be required to provide passengers at the airport with appropriate information on the circumstances and the expected waiting time for delays and other disruption to their journeys?

BEUC answer

Yes. Passengers should be informed at all times on the disruptions that occur during their travel. The inconvenience felt by passengers when they are confronted with disruptions is a cause of stress; providing information on occurrences during travel contributes to reassure passengers. This is already obligatory in other modes of transport (bus and maritime transport).

Airline representative at the airport

Passengers affected by flight disruptions often face difficulties finding an interlocutor at the airport. One way to facilitate the contacts between passengers and airlines might be for each airline to be required to designate a representative available at each airport that they serve, in order to assist passengers in the event of disruption. This representative, who should not be necessarily an employee/agent of the airline but might be an employee/agent or another operator (e.g. ground handler) would be responsible and competent for ensuring passengers were provided with assistance and re-routing when required.

(10) Should airlines be required to designate a person at each airport that they serve, to assist passengers in the event of disruption?

X Yes, at all airports served by the airline

Role of airports

At present, the Regulation defines the airline as being liable for provision of compensation and assistance. Experience has shown that there can be two different scenarios: the daily running where some flights might be long delayed or cancelled, and special circumstances where a large majority of flights at a given airport are disrupted. It is possible that some functions could be implemented more effectively by airport operators in these cases of major disruption – for example, the airport could be responsible for providing information and facilitating refreshments to complement or supporting the

airlines in cases of a large number of flights with long delays, or for developing contingency plans.

A specific case relates to passengers with no visa in transit to third countries, who cannot leave the transit areas at the airport premises.

(11.1) Should airports be given any responsibilities, either to assist passengers directly, or to develop contingency plans (with the airlines and their ground handlers, and national authorities) whenever airports are affected by special circumstances where a large number of flights are disrupted (e.g. bad weather)?

Yes

(11.2) If yes, what responsibilities should airports be given and under which circumstances?

BEUC answer

In case of disruptions, airports have an important role to play - in particular in case of major disruptions - to mitigate the consequences of incidents and ensuring that passengers are properly advised on how to proceed. The lack of contingency plans at the time of the volcanic ash cloud in April 2010, very much contributed to the chaos experienced in the airports. Thus, airlines should be obliged to develop contingency plans for dealing with disruptions (e.g. availability of a help desk in each airport).

In order to encourage the airports to take the necessary measures in case of disruptions, airlines must have a possibility to hold airports liable for not fulfilling their obligations. This legal responsibility must not be hindered by contract terms that reduce the airports responsibility towards the airlines.

Notwithstanding, the responsibility regarding the fulfillment of the contract of transport vis-à-vis the passenger only lies with the airline.

4. Other issues

Cases of journey disruption not explicitly addressed by the existing legislation

Some issues – although many of them are already implicitly covered by the existing Regulation - are not explicitly named by the Regulation. The absence of such explicit reference has led to disputes between airlines and passengers as regards to the interpretation of the Regulation. If it were revised, it could be

clarified to explicitly define what rights passengers have in these circumstances.
Should the Regulation be amended to clarify explicitly that passengers are indeed covered in the following cases:

(12.1) Missed connections due to the delay or cancellation with re-routing of the previous leg of a flight, where the passenger has a single transport contract covering both legs of the flight?

Yes

(12.2) Diversion of the flight to an airport other than the intended destination airport?

Yes

(12.3) Long delays between boarding the aircraft and take-off, or between landing and disembarkation (tarmac delays) ?

Yes

(12.4) Please provide any further information or comments on how, if at all, the Regulation should be extended to cover cases of disruption not explicitly addressed at present

BEUC answer

The compliance with the timetable is an essential element of the contract of transport. However “Delays on arrival” are only partially covered by the current regulation (art. 7.2). The new regulation should cover “delays on arrival” in line with the Sturgeon case that introduces the notion of “delays on arrival”. The delay on arrival should refer to the arrival at the final destination (see ECJ case C-83/10), in particular when dealing with missed connections.

The coverage of delays on arrival is particularly relevant when missed connections occur. In cases of missed connections, in practice, when the flights involved are part of the same single contract or are operated by the same company, airlines tend to assist the passenger and find a solution (re-routing, assistance). However, passengers are most times unprotected in the case of missed connections of flights that are part of different contracts or where two different companies operate the flights.

Therefore, missed connections should be fully covered (assistance, re-routing), including missed connections of flights not included in a single transport contract.

In relation to the diversion of flights to a different airport than originally scheduled, it should be provided that in the cases where the diversion causes damage to the passenger (costs of alternative transport to the original destination, accommodation needed....) the right to recover the eventual costs or to be compensated should be foreseen. In practice, in many cases passengers arrange their own transport to the original destination but cannot recover those costs as the airline argues that the passenger has accepted the "re-routing".

Regarding tarmac delays, the inconvenience and anxiety caused to passengers who are left waiting inside the airplane or bus in the tarmac, should be treated differently than ordinary delays in the terminal. We think that, after one hour of waiting time inside the plane passengers should be provided with food and drinks (assistance).

Advance rescheduling

The public consultation undertaken by the Commission in 2009-10 showed broad support for specifying the rights passengers have if their flights were rescheduled in advance (although the industry group was divided on the issue). In particular, consumer groups and national authorities supported the idea of giving passengers whose flights are rescheduled by more than 5 hours the right to a refund.

If such rights were defined in future legislation, the question also arises whether such right should cover all flights under the same transport contract: e.g. the rescheduling of an outbound flight may also impact the usefulness of the timing of the return flight (of course, such measure would need to clarify the relation with the Package Travel Directive 90/314 to avoid any overlap or conflict of rules).

(13.1) Should the Regulation be amended to specify under what circumstances passengers whose flights are rescheduled in advance have a right to a refund?

Yes

(13.1b) If yes, should such right cover all flights under the same transport contract (outbound and return flights, connecting flights, etc.)?

Yes

(13.2) What should the time threshold be after which passengers would be entitled to a refund?

X Less than 5 hours

(13.2b) Open box: please explain/justify briefly your choice

BEUC answer

Rescheduling should be assimilated to cancellations notified in advance and thus it should trigger the same rights of refund or re-routing for the passenger.

Moreover, one could treat advance rescheduling of flights in the same way as cancellations notified in advance. If the cancellation is notified more than 14 days in advance, there is a right to a refund or re-routing but no compensation; if the cancellation is notified less than 14 days in advance, there may also be a right to compensation, but this depends on the amount of time by which the passenger's departure and arrival times change.

(13.3) Should the Regulation be amended to provide the same rights to passengers in the case of advance rescheduling of flights as in the case of cancellations which are

notified in advance?

Yes

(13.4) Please provide any further information or comments on how, if at all, the Regulation should be extended to cover cases of advance rescheduling of flights

BEUC answer

Advance rescheduling of flights often causes damage to passengers even if they are informed of the change in advance. For instance many passengers make commitments, organise activities and/or book different services (hotel, car...) at the point of destination. If the flight is rescheduled this may impact on the reservations made at the destination. A refund may not be the best option for all passengers depending on their travel plans. Also the price of another flight taken later in time may well be higher than the refund. Therefore in these cases it should be possible to let the passenger choose between refund and rerouting.

"No show" policy

The public consultation undertaken by the Commission in 2009-10 showed strong support amongst consumer representatives for regulating the 'no show' policy imposed by many airlines, by which if the passenger does not take one flight on their booking, all subsequent reservations on the booking are cancelled, generally without any refund being available. Airlines strongly opposed this proposal. Some argued that it would interfere with their ability to undertake yield management, for example by offering cheaper tickets to passengers purchasing indirect flights or return journeys than those purchasing single tickets and direct flights. They argued that this would lead to lower load factors and higher fares for all passengers. Some national courts have found that the 'no show' policy breaches general consumer laws, in particular national laws implementing Directive 93/13/EEC on Unfair Contract Terms. Nonetheless, this policy is still widely applied by airlines.

(14) What if any rules should be specified regarding the 'no show' policy of some airlines?

X 'No show' policy to be further limited or prohibited - if yes, please specify what further limitation there should be

BEUC answer

The "no-show" clause should be prohibited as it is unfair. By using the "no show" policy the right of the consumer to fly turns into an obligation. In reality, this practice allows airlines to overbook and thus to receive two payments for the same ticket.

Many courts throughout the EU have already ruled the unfairness of the no-show clause.

In Spain the following judgments declared null and void the "no show" clause:

-Commercial Court nº 2 of Palma de Mallorca, Judgment of 22/03/2010: "passengers are free to acquire the tickets as it best suits him/her, using them or not, since once the price is paid the carrier cannot prove any damage if the passenger does not show-up at the boarding". This clause is considered unfair because it allows the company to sell twice the same seat and prevents the passenger to use all the coupons which he/she is entitled to;

-*Audiencia Provincial*, (Court of appeal) of Madrid, 27/11/2009: it qualifies the company's behavior as "unfair";

-Commercial Court of Bilbao, 7/7/2008;

-Commercial court of Bilbao, 25/7/2008;

-Commercial Court of Bilbao, 3/7/2009

In Germany, in a case brought to court by our member BZBV, the *BGH* declared the unfairness of the no-show clause against Lufthansa and British Airways, 29/4/2010.

In Austria, the *Handelsgericht* of *Wien*, declared the unfairness of the clause against Iberia, March 2010.

In the Nordic countries, in particular in Norway and Denmark, ADR bodies also consider this clause as unfair and their decisions are based on this opinion.

The scenarios of no-show are extending to cases of (growing) combinations between a "train coupon" ("train check-in") and a flight coupon, the flight being cancelled if the passenger does no show at train check-in.

Yet, the no show clause is just one among other unfair clauses that are recurrently used in air transport contracts. Different judgments have already been delivered that considered other airlines' contracts clauses unfair:

-In Belgium, the Commercial Court of Namur (March 2010), in a case instigated by our member Test-Achats, declared the unfairness of several commonly used clauses by Brussels Airlines, EasyJet and Ryanair. By way of example, the Court declared to be unfair clauses barring refunding of the ticket price in cases of force majeure affecting the passenger; the cancellation of non-reconfirmed return flights; the use of code-share agreements without the prior consent of the consumer; and those disclaiming the airline from any liability for not adhering to its timetables.

-In France, The *Tribunal de Grande Instance de Paris* (31st January 2012), in a case instigated by our member UFC Que Choisir, declared the unfairness of 23 clauses used by Easyjet in its contracts with passengers. In particular the Court declared the unfairness of clauses surcharging consumers for the use of credit cards as means of payment, exempting the company from any liability in case of delay and cancellation and stating that in case of dispute only the UK courts were competent.

In Germany, The German Federal Supreme Court (*BGH*), following an application for an injunction by our member VZBV, declared the unfairness of clauses which impose excessive credit card surcharges on passengers by Ryanair, 20/5/2010.

-In Spain, several commercial courts have delivered judgments against check-in fees. In Portugal, in France and in Spain, other judgments are expected in the coming months following the injunctions brought by our member organizations against several air companies (EasyJet, TAP, Air France, Iberia and Vueling)

Booking errors

The 2009-10 public consultation showed strong public support for allowing a limited time period within which passengers could correct errors in their reservations without charge. Airlines strongly opposed this proposal.

Some airlines may already allow passengers to correct booking errors free of charge.

But there is no explicit requirement for them to do so, and some may refuse or charge substantial fees. This could be addressed by requiring airlines to change booking errors without charge within a limited period, or introducing a 'cooling off' period in which the passenger can correct mistakes.

(15.1) Should the Regulation be amended to require that airlines allow passengers to correct booking errors without charge?

X Yes – obvious mistakes, such as misspelled names or duplicate bookings, should be corrected free of charge, provided this is identified within a limited period, but there should not be a more general right to cancel/change bookings

X Yes – there should be a 'cooling off' period within which the passenger can cancel and receive a full refund

X Yes – there should be a 'cooling off' period within which the passenger can cancel and receive a full refund, or can choose to transfer the ticket to another person (and the latter at no additional cost)

(15.1b – if one of the yes options is selected) In the consultation of 2009-2010, most respondents in favour of a "cooling off" period argued for a period of 24 hrs, arguing that this would be sufficient to correct mistakes while airlines pointed towards operational problems and additional costs attached to such possibility. If there should be a right to correct mistakes or a 'cooling off' period, how long should this period be?

X more than 24hrs

(15.1c) Could you briefly explain your reply?

BEUC answer

Since air tickets are increasingly sold and bought on line (at a distance) and - contrary to most goods and services - passengers always have to pay flight tickets in advance, a cooling-off period (at least for early bookings) and the right to correct booking errors in the reservation (minimum within 48 hours), should be specifically granted to passengers.

Concerning the cooling-off period, a 48 hour cooling-off period was already "agreed" by many airlines in the Airline passenger commitment, agreed in Lisboa in 2001.

As regards to misspelling of names, 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.

As regards the cooling-off period, two major airlines in Denmark are already offering a cooling off period of 24hrs.

It is of course essential that passengers are sufficiently informed of those rights before the purchase of the ticket.

Refund of taxes, fees and charges

Particularly on short-haul routes, a significant proportion of the price of the ticket may be accounted for by taxes and airport charges which are levied on the airline on a per passenger basis and which do not have to be paid by the airline if the passenger does not travel. Many airlines refund these taxes and charges if the passenger does not travel (even if the ticket is described as non-refundable), but airlines sometimes do not do that or do not make clear the fact that these can be refunded or set administration charges at a level which means it is not worthwhile for passengers to claim the refund that they may be entitled to.

(16) Should it be specified that per-passenger taxes and airport charges have to be refunded if a passenger does not travel, and administration fees for making this refund be limited?

Yes, including fuel, security, and other “extra charges”. Any administration fees should be limited in such a way that it does not hinder passengers in making a claim for refund.

The Norwegian Consumer Ombudsman has stated that taxes and airport charges should be refunded without any costs for the passenger.

A 'Key facts' document

There are significant differences between airlines on the terms and conditions applied to bookings – for example, whether tickets can be changed, check-in procedures and what baggage can be transported. Although information on this is available on airline websites it may be hard to find; often passengers making reservations are required to confirm that they have read the Conditions of Carriage but these are long and complex documents and it appears unlikely that many passengers would read them. If passengers do not comply with the conditions, they may be charged additional fees by the airline, which in some cases may be high in comparison to the price of their ticket.

This could be addressed by requiring airlines and travel agents to provide a 'Key facts' document in a standard format to passengers before bookings are confirmed; this would summarise essential information such as: what baggage was included; the check in process (for example if online check-in is required to avoid extra fees); whether the ticket could be changed; and what additional fees could be levied. The content and structure of such a document could be harmonised on EU level and be regularly adapted in line with the evolution of industry practices.

(17) Should airlines and travel agents be required to provide a standard format 'Key facts' document to passengers (either in paper or in electronic format) before they confirm a reservation of tickets?

Yes

If yes, do you consider that such a standard key facts document should be defined on an EU level rather than on the national level?

Yes

Geographical scope

At present, the Regulation does not apply to flights to the EU from non-EU airports operated by non-EU airlines, even if the ticket was purchased in the EU or the flight is operated as a codeshare with an EU airline. In contrast, some similar legislation in third countries also covers flights to the country concerned departing from EU territory. Passenger protection could be improved if the Regulation was extended to cover some or all of these flights to the EU. Article 17 requested a reflection on whether the scope of the Regulation should be

extended to all flights sold by EU carriers, even if operated by a third country carrier. Another issue to be considered is the flights sold by a non-EU carrier but operated by an EU carrier from a third country to the EU, and finally cases when the ticket has been sold to a customer located in the EU territory for a flight whose final destination is the EU. Finally, another question is whether all flights towards the EU territory should be covered.

(18) Should the scope of the Regulation be extended to include flights to the EU from non-EU airports operated by non-EU airlines?

Yes

(18b) If yes, under which of the following circumstances should the Regulation also apply to non-EU airlines when not departing from an EU airport?

X Any other flight to the EU from a non-EU airport

(18c) Open-ended box – do you see legal impediments to extending the scope of the Regulation to flights from non-EU airports operated by non-EU carriers? (e.g. third country sovereignty, international agreements)

BEUC answer

No, any service provider that operates in the EU should comply with EU law. This is particularly important in the context of code-sharing agreements with airlines from outside the EU.

Example of practical cases: many flights offered by IBERIA between Spain and Morocco are operated by Air Maroc (through code-share agreements); our members in Spain often receive complaints from consumers who bought return flights that suffered disruption on the way back to Madrid. Iberia denies its responsibility referring passengers to air Maroc (which is a non-EU company entering into the EU and thus not covered by the regulation 261/04). 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.

5. Options related to baggage and additional services

Comparability of ticket prices, taking into account luggage allowances and other optional elements

There are significant differences between airlines on what is included within the standard ticket price that they advertise for purchase. For example, some airlines allow carriage of one or more items of checked baggage without additional charge, whereas others do not; and some strictly limit the number of items that can be taken into the cabin (some apply a "**one-item policy**" only, including anything purchased in the airport, or cases where the passenger brings two small items instead of a single suitcase, like a woman's small handbag or a laptop – anything beyond this allowance is then either prohibited or subject to an additional fee). Some airlines levy extra charges for check-in at the airport, or for the issue of a boarding pass. These additional fees may be confusing for consumers and may make it difficult to compare prices between airlines.

(19.1) How could the comparability of ticket prices be improved, especially with regard to luggage allowances?

X Definition of a certain basic level of service to be included in all air tickets, for example carriage of a defined minimum amount of cabin or hold baggage⁸

(19.2) In case of the last option, what services should be included in all air tickets (for example: cabin baggage; hold baggage; boarding pass; anything else) and how could this be defined?

BEUC answer

The basic level of service should include the check-in and the boarding pass.

Regarding baggage, the basic level of service should include at least one checked luggage; however consumers who do not want or need to check any luggage, should be able to benefit from price reductions.

The commercial practices of most air companies in relation to the advertising of ticket fares and pricing policies often cause consumer detriment. New business models excessively rely on ancillary services and extra charges that are often not included in the price advertised to the consumer. There are no rules or guidelines on “optional” and “non-optional” services⁹ linked to extra charges and each company applies a different policy, often disregarding the legislation.

This selling strategy renders very difficult the comparison between different offers. Moreover some of these extra charges should be considered unfair; in particular, airlines should be expressly forbidden to apply extra charges for the payment with credit and debit cards, as contrary to the recently approved Consumers’ Rights Directive.

As regards baggage, over the last few years airlines have started to introduce a new set of extra fees for the carriage of checked luggage; the carriage of checked luggage is not considered (anymore) by airlines as a service that is “unavoidable” (Regulation 1008/2008) in the contract of transport. The main consumer issue in relation with extra charges is the lack of transparency that these practices entail as airlines try to mislead consumers about the final price they will have to pay for the ticket. Besides, Each air company has a different policy on baggage restrictions which complicates further the comparison of prices.

We acknowledge that there is a current trend among a range of passengers not to carry checked luggage, to be able to benefit from cheap tickets (the extra charge for checked luggage can be very significant in many cases); it appears that most passengers that do not check luggage mainly fall in the category of business travelers and young travelers who travel for short stays. There is however a large majority of passengers that still expect a minimum amount of checked luggage (usually one piece) 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.

Obligations when baggage is delayed or lost

Under current legislation, airlines are liable for delay, loss and damage to baggage, but there are several limitations to this. In particular:

- There is no obligation to transport delayed baggage to the passenger's final destination (although if the airline did not do so the passenger might be able to claim associated costs from the airline). This could be addressed by requiring transport of baggage to passengers' final destinations or to their (temporary) residence (home/hotel).
- Where airlines charge additional fees for transport of baggage, it is not clear that there is any obligation to refund these in the event of loss of the baggage (in contrast, this is required by equivalent legislation in some third countries).
- This could be addressed by requiring airlines to refund baggage fees if the baggage is lost.
- It may be difficult for a passenger to demonstrate, and the airline may dispute, what costs have been incurred as a result of delay to baggage. This could be addressed by requiring provision of automatic compensation per day of delay. In the consultation undertaken in 2009-10, this idea was supported by the consumer representatives whereas airlines opposed it.
- There is currently no time-limit for carriers to tell passengers when the baggage is not any longer delayed, but lost. Air carriers usually inform the passenger when they stop looking for the baggage through their search and retrieve systems.

Note that, in many cases, passengers can take insurance cover for luggage mishandling, either offered via the airline specifically for the booking in question or via more general insurance cover. The question arises whether passengers should be left the choice to take out such insurance or whether it is preferable to have standardised forms of assistance provided by the airlines.

(20.0) Are the present rules (e.g. Regulation 889/2002) with regard to delayed and lost luggage sufficient or are further measures needed to protect passengers?

X yes, further measures are necessary (see questions below)

(20.1) Should airlines be required to transport delayed baggage to passengers' final destination (not only to the airport, but also to their residence (home/hotel)?

Yes

(20.2) Should airlines be required to refund any baggage fees where the baggage is lost, on top of the possible compensation due?

Yes

(20.3) Should baggage be considered as lost after a certain period of time?

Yes

(20.3b) If yes, how many days? (box allowing just a figure)

21 days, as foreseen in the Montreal Convention.

(20.4) Should airlines be required to provide automatic compensation per day, in cases of delayed baggage?

X Yes

(20.4 b) If yes: how should the amount of compensation be defined and from when until when should compensation be granted?

BEUC answer

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.

Items missing from baggage

Although airlines are in principle liable if items go missing from checked baggage, it may be difficult for the passenger to prove that an item has gone missing and therefore it may be difficult for them to claim compensation from the airline.

(21.1) Should action be taken to make it easier for passengers to claim against airlines when items have gone missing from their baggage?

Yes

(21.2) How could the problem of items going missing from baggage be addressed?

Compensation for lost or damaged mobility equipment

As a result of the Montreal Convention (and Regulation 889/2002), under most circumstances airlines' liability for loss or damage to baggage is currently limited to 1,131 Special Drawing Rights (approximately €1,250). Mobility equipment counts as baggage under the Convention, but this limit is much lower than the cost of some mobility equipment (for example electric wheelchairs). The consultation undertaken in 2009-10 showed strong consumer support, but strong airline opposition, for increasing the limit on liability for mobility equipment. Other countries like the USA and Canada have already removed this limited liability for their domestic flights. EU regulations on passengers' rights in other modes of transport do not provide such limitations.

(22) Should the rules on liability for loss or damage to mobility equipment be changed?

X Yes – the limit on liability should be abolished (i.e. unlimited liability) for domestic and intra-EU flights.

The abolition of the liability limit should only concern the mobility equipment needed by Persons with reduced mobility (it should not extend to the carriage of skis, bicycles or other sports equipment)

6. Options to limit the economic burden on airlines and improve compliance

Amend right to compensation

At present airlines are required to pay up to €600 compensation: in all cases of denied boarding; after 3 hours delay if the delay is not caused by extraordinary circumstances; and if a flight is cancelled, after 2-4 hours, depending on the amount of time the passenger is informed in advance and again provided the delay is not caused by extraordinary circumstances. The amount of the compensation depends on the length of the flight but does not reflect the ticket price, or (in most circumstances) the length of delay the passenger faces. Some airlines consider that this represents an unreasonable economic burden.

This could be addressed by either extending the period after which compensation is payable (see also question 6.2); linking compensation to the delay suffered; or linking compensation to the number of hours delay the passenger faces (in this latter case, the airline is incited to offer quick rerouting in order to reduce the delay).

(23) Should airlines' liability to pay compensation be further limited, and if so, how?

X No – no change

BEUC answer

There should be no change in the regulation on this matter. It is important that the level of compensation is coherent with the possible burden for the passenger. This again is often depending on the length of the flight and/or the length of the delay, but has no coherence with the price of the ticket. It is important to underline that air transport is different from other modes of transport as it may transport people over long distances in a very short time. Thus the burden and economic damage to the passenger as a result of denied boarding or cancellation is assumed to be large, no matter the price of the ticket.

Recourse against third parties (burden sharing)

Article 13 of Regulation 261/2004 does not hinder airlines from claiming compensation from third parties responsible for the disruption. However, in practice airlines have not done this, partly because their contracts with third parties (such as airport management companies) may prevent them from making any such claim.

Some such third parties are monopoly services that airlines have no alternative but to use, and therefore airlines may not be able to negotiate alternative contract terms with them which allow them to pass on claims. Different stakeholders seem to believe that air carriers already pass these costs to passengers through the ticket price, regardless of the party responsible for the disruption.

This could be further specified by amending the Regulation to state that airlines can claim against specified third parties, and that any condition in a contract which defines otherwise shall be void.

(24.1) Should airlines explicitly be given the right to claim costs of compliance from third parties, where these are responsible, even if this is not permitted by their contract?

Yes

(24.2) Can you suggest any other mechanism by which such burden sharing between airlines and responsible third parties could be facilitated?

(open box)

BEUC answer

In order to encourage the airports to take the necessary measures in case of disruptions, airlines must have a possibility to make a claim directly towards airports for not fulfilling their obligations in relation to contingency plans. This legal liability must not be hindered by contract terms that reduce the airports responsibility towards the airlines.

Liability for costs of assistance in extraordinary circumstances

If a flight is delayed or cancelled, airlines are required to pay for assistance such as refreshments and overnight accommodation whilst passengers wait. There is no limit to this liability. In the volcanic ash crisis in April 2010, airlines in some cases had to pay for accommodation for an exceptionally prolonged period, which was a substantial cost. This could be addressed by limiting airlines' liability for assistance costs in cases of extraordinary circumstances, in particular with regard to accommodation. Limitations to the provision of accommodation exist in the passenger rights regulations for sea or bus/coach transport, but they do not exist for rail transport.

(25) Should airlines' liability be limited for providing accommodation in exceptional circumstances?

X No change to the current rules

(25b) Do you have other comments with regard to the right for accommodation?

BEUC answer

The rights of passengers to receive "assistance" in case of extraordinary circumstances must not be put into question on the grounds of the volcanic ash cloud. Any reduction of such rights would be a disproportionate and ill-founded response to a very exceptional event that is the volcanic ash cloud.

Regarding the disruptions that occurred in winter 2010, caused by heavy snow falls, the subsequent evaluation reports showed that most of the disruptions could have been avoided if appropriate contingency plans had been in place (ECC Report on air passengers' rights, 2011). Clearly airports, airlines and authorities were not sufficiently equipped nor prepared for these situations.

We do not share the statements made by airlines arguing that compliance with the regulation entailed a considerable economic burden for them. The recent report of the European Commission (SEC/2011/428) on the costs of compliance with the regulation (in the aftermath of the ash cloud) demonstrates that the financial impact on airlines of the regulation is often overestimated. The annual financial reports from several major airline companies show that the volcanic ash crisis did not prevent those airline companies from achieving very good results in 201010.

Finally, the rights of passengers to receive “assistance” (especially accommodation) should be measured and decided taking into account the specificities of each mode of transport. In particular the long distances mostly involved in air transport make it more difficult for passengers to find alternative modes of transport to get to their destination in case of disturbances (an air passenger stranded in New York with destination Madrid cannot use rail, bus or taxi as alternatives).. In this regard, coach and rail transport are not comparable to air transport. Situations of air passengers blocked far away from their homes were seen at the time of the ash cloud with no possibility to find alternative modes of re-routing.

Helicopters, small aircraft and specific routes

At present the Regulation applies to all flights with fixed wing aircraft, but it does not apply to any helicopter services.

In some cases helicopter services compete with flights operated by fixed wing aircraft. It could be argued that this distorts competition on these routes. In addition, it may be difficult for certain operations with very small aircraft (for example, sea planes or planes landing on unpaved runways) to achieve the same levels of reliability as other air services, which means that compliance with the Regulation could be a disproportionate cost.

Similarly, the operation of certain routes (e.g. flights between islands or linking islands to the mainland) – often operated by smaller aircraft - may be subject to much more frequent disruptions than on other routes due to local weather conditions (e.g. strong winds on islands, frequent and heavy snowfall in winter, etc.). Moreover, on some regional routes, the provision of re-routing by other means of transport may be very difficult (e.g. Northern European islands in the winter).

(26.1) How should flights with small aircraft and helicopters be treated?

X Do not change the current Regulation with regard to this issue

(26.2) Should certain routes, which are particularly vulnerable to disruptions, be fully or partially exempted from the Regulation?

(26.2b) If yes, which criteria should apply? (open box)

7. Improving enforcement

The questions in this section relate to enforcement – measures to be taken by the authorities to ensure that airlines in general comply with the Regulation, including sanctioning (measures that provide redress to passengers in individual cases are discussed under ‘passenger [redress](#)’ in the next section below).

Harmonizing enforcement policies

The NEBs have today very diverse practises and legal statuses, with regard to their monitoring policies and with regard to their sanctioning practice (e.g. systematic sanctioning of all infringements or sanctioning only in case of repeated infringements). This may have an impact on the level-playing field between air carriers.

Moreover, many enforcement bodies work in a purely reactive way, with a focus on sanctioning breaches of rules. A more pro-active, preventive action by NEBs could help to avoid such breaches in the first place. This could, for example, be implemented via a regular check of the airlines' operating manuals with regard to their procedures in case of flight disruption.

In some other parts of the world such as the USA, compliance with passenger protection legislation is a condition for issuing or for maintaining a license to an air carrier. This is not the case at the moment in the EU. The conditions for air carrier operating licenses (as currently given in the Air Services Regulation 1008/2008) could be amended to include this, in which case, if an airline consistently failed to comply, it would not be permitted to continue operations. This might provide a strong incentive to comply with the law.

(27.1) Should Member States' sanctioning policies be better harmonised?

X yes (e.g. via systematic administrative sanctions; via the possibility to seize or to ground aircraft; etc.)

(27.2) Should the airlines' operating manuals and procedures with regard to flight disruptions regularly be checked by the competent authority (NEB or licensing authority)?

Yes

(27.3) Should compliance with consumer protection legislation become a condition for issuing or maintaining an air carrier's operating license?

X yes, serious infringements of air passenger rights legislation or of other consumer protection legislation could lead to the re-examination of the operating license

Contingency plans

In some other big aviation markets such as the United States, airlines have to produce contingency plans to show how they would manage major cases of disruption, such as bad weather closing a major airport or airports, and mitigate their impact on passengers. This is not required in the EU. This could be addressed by requiring airlines to prepare plans to manage disruption, and provide these to the licensing authority or the national enforcement body (NEB); potentially this body would have to approve the plans. This might improve and make effective and as rapid as possible the provision of rerouting, rebooking and assistance to interested passengers, mitigating the troubles for passengers and minimising the costs for airlines as well.

(28) Should airlines be required to produce contingency plans to manage major disruption, and provide these to the relevant authority (e.g. NEB, licensing authority) which could sanction non compliance?

Yes

Baggage – need for a national enforcement body

At present, no authorities have specific obligations to ensure that airlines comply with the legislation relating to their obligations in cases of loss, damage or delay to baggage. This could be addressed by extending the responsibility of the current national enforcement bodies (NEBs) or introducing new NEBs to ensure that airlines comply with these obligations. The 2009-10 public consultation undertaken by the Commission showed strong support from consumer organisations, but strong opposition from the industry, to designating specific enforcement bodies for baggage.

(29) Should enforcement bodies be designated with responsibility with ensuring that airlines comply with their obligations in relation to baggage?

X Yes – extend the role of the current NEBs under Regulation 261/2004 to include baggage related issues

BEUC answer

In case of non-compliance by airlines with their obligations under regulation 889/2002, passengers have no choice but to seek a court action because there is no specific enforcement body assigned with this task and the NEB competent under Regulation 261/04 is not competent to deal with complaints about luggage.

According to the 2009 Eurobarometer on air passengers' rights satisfaction¹¹, 30% of passengers were dissatisfied of the way luggage is handled by the air companies. This percentage is 3 points higher than what was found in 2005.

According to the ECC report of October 2011 on air passengers' rights¹², in 2010 there was an increase in the number of complaints due to the ash cloud crisis. Air carriers and ground handlers reject responsibility and pass it from one another.

Baggage - declaration of special interest

Under the Montreal Convention, the liability of air carriers with regard to baggage is limited, but a passenger can benefit from a higher liability limit by making a special declaration at the latest at check-in and by paying a supplementary fee. However, despite the compulsory information of the passenger on this possibility, many passengers seem not to be aware of it.

Furthermore, the Montreal Convention contains no definition of baggage: everything that is checked/carried onboard with a passenger is baggage, the rest is freight. Many air carriers – drawing on this grey zone - have unilaterally limited the definition of baggage to exclude daily life items that might be expensive, like jewelry or electronic tools (electronic games, laptops and tablets, cameras), or big items like sport items. Unilateral restrictions decrease further the carrier's already limited liability, and in relation with new limiting rules on hand luggage, place the passenger in an unfavourable position.

(30.1) Should the obligation under the Montreal Convention to allow passengers to make a declaration of special interest be better implemented?

Yes

(30.1b) If yes, how could this obligation be better implemented?

BEUC answer

Passengers should be systematically and expressly informed about the possibility to make the special declaration and about the costs involved, as the majority of passengers are not aware of this possibility.

8. Passenger redress

Air carrier complaint handling procedures

The 2009-10 public consultation showed strong support from consumer representatives, but strong opposition from the industry, for some sort of harmonisation of airline complaint handling processes and making them more accessible to all passengers, including those with reduced mobility. Some other passenger rights legislation requires operators to provide a substantive response to passenger complaints within a limited time period (for example Regulation (EU) 1371/2007 on rail passengers' rights and obligations, Article 27(2)).

(31.1) Should airlines be required to clearly indicate their complaint handling procedures and to allow easy and non-costly submission of complaints in accessible formats (e.g. phone numbers at no special fee, e-mail addresses and complaints forms on their websites and in various languages)?

Yes

(31.2) Should airlines be required to provide a substantive response to passenger complaints within a specified time period?

Yes

(31.3) Do you have other suggestions or comments with regard to complaint handling procedures?

BEUC answer

Passengers need to be sure that they can assert their rights in an effective way without having to spend much time or money. Airlines should put at the disposal of consumers standard complaint forms available off- and on-line and free (or cheap) phone 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(s).

There should be a time limit (obligatory) within which airlines have to respond to the passengers' complaints: after a complaint is filed, the air company should send an acknowledgment of receipt or first answer within 15 days; a definitive answer should be sent within 6 weeks.

Airlines should be obliged to provide details of ADR schemes they adhere to (see below question 34).

Marketing carrier or operating carrier

At present, the passenger can only bring a claim under the Regulation against the airline that operates the flight concerned – which may be different from the airline from which the passenger bought the ticket, or which markets the flight. This may make it more difficult for the passenger to make a claim, especially where a journey involves travel on multiple airlines.

For example, in a two-segment journey with two different operating carriers, if the first leg of the flight is delayed causing the passenger miss the second leg, the passenger may encounter difficulties to determine the responsible carrier for providing care, assistance and, perhaps, compensation. Without prejudice of the other obligations under Regulation 261/2004 for the operating carriers (as regards information, rerouting, assistance, etc.), this could be addressed by allowing the passenger to make a claim against either the marketing or the operating carrier(s), or jointly or severally.

(In analogy with the Montreal Convention which allows (in some circumstances) the passenger to hold the operating and marketing carriers jointly and severally liable).

(32.1) With regard to financial compensation, should the Regulation be amended to allow passengers to make claims against the marketing carrier, as well as the operating carrier?

Yes

(32.2) With regard to care and assistance, and for multi-segment journeys with several operating carriers under the same transport contract, should the Regulation be amended to allow passengers to hold all involved operating carriers jointly and severally liable for compliance with the Regulation?

Yes

NEB complaint handling procedures

Regulation 261/2004 imposes on NEBs an obligation to handle passenger's complaints, but it does not contain specific rules to be observed by the National Enforcement Bodies with regard to this complaint handling. This especially concerns the provision of a substantiated answer to the passenger within a reasonable time period (which could be useful evidence in the context of court proceedings. Moreover, according to the voluntary agreement on complaint handling reached between the NEBs in 2007, complaints are handled by the NEB of the country where the incident took place, which sometimes create difficulties of communication due to different languages. However, when bringing such a case to court, the passenger has the choice between a court in the country of departure, the country of arrival or the country where the airline is established (EU Court Case C204/08, Rehder vs Air Baltic).

(33.1) Should NEBs be required to provide a substantive response to passenger complaints within a specified time period?

Yes

(33.2) If yes, how long should this period be at the least:

X 3 months

(33.3) Should passengers be given the choice of having their complaint handled by the NEB of the Member State that issued the airline's operating licence or the NEB of the Member State of departure or the NEB of the Member State of arrival (thereby requiring closer cooperation between NEBs)?

BEUC answer

Yes, but the consumer should also have the right to address the NEB of his/her country of residence. Subsequently, the NEB of the country of the consumer should forward the case to the competent NEB.

Alternative dispute resolution (ADR)

Whenever passengers have a claim against airlines they have the option of taking action through the courts, including use of simplified processes for small claims (where these exist). However, court processes can be expensive, slow and difficult for the consumer. Simple and easy-to-use out-of-court dispute settlement procedures can be useful for both, airlines and passengers.

On 29 November 2011, the Commission proposed a Directive on alternative dispute resolution for consumer disputes (Directive on consumer ADR) and a Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR). These proposals will now be discussed in the European Parliament and in the Council.

Under the **proposed Directive on consumer ADR**, Member States shall ensure that all contractual disputes between a consumer and a trader arising from the sale of goods or the provision of services can be submitted to an ADR entity. This also includes disputes between passengers and air carriers. The proposal ensures that consumers/passengers will be able to find information on the competent ADR entity in the main commercial documents provided by the air carrier. The air carriers will have to inform the passengers whether or not they commit to use ADR in relation to complaints lodged by passengers.

The proposal also imposes quality standards with regard to impartiality, transparency, effectiveness and fairness and ensures that national authorities will monitor the proper functioning of ADR entities. Furthermore, the proposed Directive provides that ADR entities should resolve disputes within 90 days (except for complex cases).

The **proposal for a Regulation on consumer ODR** aims at establishing a European online dispute resolution platform ("ODR platform"). The proposed ODR Regulation establishes a network of ODR facilitators for the

single EU-wide ODR platform, in the form of an interactive website which offers a single point of entry to consumers and traders who seek to resolve a dispute. The facilitators' network will be composed of national contact points for online dispute resolution. Each EU country may give the responsibility for being the ODR contact point to the European Consumer Centre in that country, to a consumer association or to any other body. The platform can be accessed in all official languages of the EU and it is free of charge. Consumers and traders will be able to submit their complaints through an electronic complaint form which will be available on the platform's website in all official languages of the EU. The platform will check if a complaint can be processed and seek the agreement of the parties to transmit the complaint to the ADR scheme which is competent to deal with the dispute. The competent ADR scheme will seek the resolution of the dispute in accordance with its own rules of procedure within 30 days from the date of receipt of the complaint. The proposals foresee close cooperation between ADR entities and enforcement bodies (NEBs), which is important where the enforcement (sanctioning) role and the mediation role were not assumed by the same bodies. The question arises whether the two horizontal proposals on consumer ADR and ODR need to be accompanied by complementary provisions for the air transport sector, e.g. with regard to the role of NEBs in complaint handling and vis-à-vis the ADR entity or the rules of cooperation between aviation authorities, NEBs and ADR entities. Should the role of ADR entities be assumed by the NEBs or should enforcement and alternative dispute resolution be assumed by separate entities? What should be the role of the European Consumer Centres (ECC) in this context?

(34) Are sector-specific complementary measures needed with regard to the ADR entities that will deal with consumer complaints in the air transport sector pursuant to the above-mentioned proposals on consumer ADR and ODR? If ADR processes are introduced, what if any specific characteristics or expertise would these need to be able to handle air transport cases?

BEUC answer

Specialised ADR/ODR for the sector of transport are needed; these ADR should have expertise in transport issues. Transport ADR/ODR already exist in some member states: for example in Norway there exists an ADR for transport that handles package travel, air transport and train transport (in the future its competences will be extended to include bus and coach transport, and most likely also travel by boat.

In relation to ADR procedures, a special role could be given to the European Consumer Centers (ECC), at least in cross-border disputes, since the ECC's are already dealing with most complaints).

Air companies should be obliged to adhere to an ADR/ODR scheme.

9. Other issues to which you would like to draw our attention

(35) Are there any other issues with the operation of the current Regulation to which you would like to draw our attention, or which you consider should be changed?

Please give details.

BEUC answer

The regulation is not complied with by the carriers which often interpret the provisions of the regulation solely to their benefit (e.g. grounds for exceptional circumstances exempting airlines from paying compensation, refusal to provide assistance in case of delay or cancellation, refusal to provide re-routing at the passengers convenience). In-house complaint handling systems are not satisfactory: airlines often use weak excuses in order to discourage consumers from asserting their rights and in general they do not offer a quality service to the passenger who has to claim his rights.

Overall the systems of enforcement are not efficient.

NEBs do not handle complaints effectively and the fines imposed are not high enough to be dissuasive for the airlines. They do not function in a holistic manner and the two voluntary agreements between the NEBs on complaint handling are currently not fully respected (e.g. the right of the passenger to refer to the NEB of his country of residency is not effectively applied)¹³.

Lack of harmonization in the complaint handling procedures of NEBs is also a problem for both consumers and airlines, since they may experience different complaint systems and different application of the regulation in various states. This lack of harmonization undermines the authority of the regulation and of the NEBs.

We welcome that the Commission in its communication of April 2011 announces that NEBs will be given a clear mandate to deal with passengers complaints. The amount of fines imposed on airlines in case of infringement should be higher and The NEB's should work as a network cooperating with each other to ensure a harmonized enforcement of air passengers' rights across the EU. The new regulation should expressly require NEB's to be independent. The consumer should have the right to address the NEB of his/her country of residence.

Airlines should regularly report on incidents (delays, cancellations) and NEB should regularly report and publish the complaints received, handled and solved. For instance, the Norwegian NEB regularly reports on its decisions, and also reports on airlines that do not comply with the decisions. The reports on this are made public and posted on the NEB website.

The reporting obligations of airlines and NEB's should be part of a comprehensive EU information system, mirroring the earlier project CAPRS (Community Air Passengers reporting system).

A means to encourage airlines to comply with the decisions of NEBs could be to publish the names of non complying airlines in a publicly available black list (e.g. this is the case in Sweden).

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