

The Consumer Voice in Europe

## AIR PASSENGER RIGHTS

BEUC comments on Commission draft interpretative guidelines on Regulation 261/2004 on air passengers' rights



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## Background information

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Legislative proposal for a revision of Regulation 261/2004 and Regulation 2027/97<sup>1</sup> was published in 2013. It has not been adopted yet and is currently blocked in the Council. European Commission (hereinafter 'the Commission'), admitted in its recently issued Roadmap<sup>2</sup> that it does not expect it to enter into force within the next few years. In the meantime, it announced therefore publication of its Interpretative Guidelines. This is an attempt to codify the existing case law of the Court of Justice of the European Union (hereinafter 'the Court' or CJUE) in one single document, designed to help to ensure better application and enforcement of the existing legal provisions.

BEUC would like to focus its comments on the Commission's interpretation of the Regulation and the good practice examples it refers to, instead of commenting in detail on the judgments of the Court and its interpretation of the Regulation.

## Introduction

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Since its entry into force on 17<sup>th</sup> February 2005, Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EC) No 295/911 (hereinafter 'the Regulation'), was often a subject of Court of Justice of the European Union (hereinafter 'the Court' or CJUE) decisions, like the famous Sturgeon judgement<sup>3</sup>, where the Court confirmed the right to compensation in cases of flight delays as of 3 hours, which is not explicitly mentioned in the text of the Regulation.

BEUC welcomes the current effort of the European Commission (hereinafter 'the Commission') to gather all the jurisprudence of the Court in one single document together with some further interpretation advice and good practice examples. Taking into account the amount of case law issued in this area, such a document can even be considered as a **necessity in order to summarize and codify** the relevant case law.

BEUC would like to focus its comments on the Commission's interpretation of the Regulation and the good practice examples it refers to, instead of commenting in detail on the judgments of the Court and its interpretation of the Regulation.

Even if the guidelines themselves do not create any new rights or new legal obligations for passengers or the airlines, they are a tool to facilitate the work of the national enforcers and courts, while supporting the uniform application of the Regulation across the EU. Guidelines could be, at the same time, a **valuable source of information for the passengers**.

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<sup>1</sup> 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.

<sup>2</sup> Roadmap from February 2016 on "Interpretative Guidelines on Regulation n°261/2004 on Air Passenger Rights.

<sup>3</sup> Joined cases C-402/07 and C-437/07, Sturgeon e.a.

## Guidelines – can they help passengers?

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Interpretative Guidelines have the potential to provide additional information not only to the airlines or national authorities but also directly to passengers, who sometimes proactively check the text of the Regulation after they receive basic information on their rights at the airport. Nowadays however, after many judgments of the Court, simply verifying the text of the Regulation will not help them to answer all of their frequently asked questions. Sometimes they also need to verify if the information provided to them by the air carrier is correct, for example if the later refuses to compensate them on the basis of the fact that their flight cancellation was caused by a technical problem of the aircraft claiming it constitutes an extraordinary circumstance etc. In such a case, if a passenger does not know the binding interpretation of the Regulation, he might even decide not to proceed with his complaint, not realising that he might have been misled by the air carrier.

Does the Draft Interpretative Guidelines in question fulfil this role? Partially. Because of their form and the language they use, they seem to be rather directed to professionals dealing with air passengers' rights within the national authorities or consumers organisations but not necessarily to passengers. In this context the announcement made by the European Commission that they will replace the information provided on their websites in the form of frequently asked questions, is worrying. We call on the Commission to continue developing material addressing consumers in the more 'passenger friendly' form, based on the guidelines, and keep publishing them on their website even after the publication of the Interpretative Guidelines in question. In our view, information can help the efficient enforcement of the Regulation only if it is **easily accessible and understandable to all** actors involved in its application.

At the same time we appreciate the efforts of the European Commission to publish its guidelines in all EU official languages, like it was done in the case of the guidelines related to the rail passenger rights<sup>4</sup>. This is one of the aspects that can greatly improve the accessibility of this interpretative document across the EU.

## Specific comments

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### Scope of the Regulation

#### *a) Geographical scope*

We support the idea to include the information on the geographical scope into the draft guidelines, even if it does not contain an interpretation of the Regulation as such. It contributes to making this document a complete and useful tool for both passengers and national enforcement bodies (NEBs). We would however suggest adding the list of overseas countries and territories (OCTs), listed in the annex II to the Treaty on the Functioning of the European Union (TFUE), to this document. This list could simply be added in the form of a footnote. It would save the passenger the need to check the text of the treaty if needed. Since some of the OCTs are popular holiday destinations, passengers may ask themselves often the question if the EU rules will protect them if they choose to fly there. Listing the names of OCT in the document will also facilitate the

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<sup>4</sup> Interpretative Guidelines on Regulation (EC) No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations, C(2015) 4089 final.

passengers finding the text of the Interpretative Guidelines on the internet by using one of the search engines.

For what concerns flights coming from third countries into the EU, with an air carrier licenced in one of the EU Member States, we support the Commission's interpretation of the exception listed in art. 3(1)(b) of the Regulation. Entitlements already given to the passenger under the third country's legislation that might exempt the air carrier from the obligation to assure the rights provided in the Regulation should include both: benefits or compensation and assistance. 'And' being here a key word for its interpretation. The Court went even further in interpreting this exception by stating that "the mere possibility of entitlement cannot of itself justify the conclusion that the regulation is not applicable to that passenger"<sup>5</sup>.

#### *b) Scope of the Regulation in relation to the Package Travel Directive*

According to the newly adopted Package Travel Directive<sup>6</sup>, in cases where a passenger has a right to compensation both on the basis of this directive and on the basis of the Regulation 261/2004, those compensation amounts should be deducted from each other in order to avoid overcompensation. Since the question of whether the package tour operator or air carrier should bear the costs of this obligation is not answered in the text of neither of those acts, we agree with the Commission's interpretation that this issue should be regulated in the contract between those two subjects. Commission rightly stressed that "any arrangements made in this regard (including practical arrangements to avoid overcompensation) must not impact negatively on the passenger's ability to address his claim to either the package organiser or the air carrier and to obtain the appropriate entitlements"<sup>7</sup>.

## **Events giving rights under the Regulation**

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#### *a) Denied boarding*

##### No-show clause

An important horizontal issue, related to the unfair terms in air transport contracts, is missing in the draft guidelines (see more on this topic in the last section of this document entitled "What is missing?"). The document mentions only the so called 'no-show' clause in the chapter related to denied boarding and its definition. This contract clause permits an air carrier to deny boarding to those passengers that did not take their outbound flight in case of a round trip ticket or those who missed a first leg of a multi-leg itinerary.

BEUC, for years, has held a strong position that the **no-show clauses are unfair** under the Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts<sup>8</sup>. In our view a simple statement that such a practice "might [...] be prohibited by national law" is not sufficient.

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<sup>5</sup> Case C-257/14, van der Lans, paragraph 27

<sup>6</sup> Art. 14 (5) of 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, OJ L 326, 11.12.2015

<sup>7</sup> Point 2.2.6. (last sentence) of the Draft Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002.

<sup>8</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

The use of the no-show clause has been **considered unfair by a significant number of national courts** throughout Europe (e.g. Austria, Germany and Spain)<sup>9</sup>. Many of the rulings delivered across the EU are the result of actions instigated by BEUC members against airlines such as Lufthansa, British Airways and Iberia. There is no CJUE ruling confirming this conclusion yet, but the Commission should not pre-empt a CJUE judgement by a restricting and limiting interpretation as made in its proposal.

We urge the Commission to state clearly in its Interpretative Guidelines that such a clause is most likely unfair in the light of the Directive on Unfair Contract Terms<sup>10</sup>. This interpretation could be then referred to on the national level by all relevant actors. It would also add a practical indication to the passengers who could then contact national consumers' organisations which could help them to enforce their rights on the national level.

#### Mistakes made by the ground staff

In regards to travel documents, BEUC supports the Commission's interpretation that if the passenger is denied boarding due to a mistake made by the ground staff when checking his travel documents, this event constitutes a denied boarding in the context of the Regulation.

The last sentence of the draft text in this point refers to IATA's Timatic database, stating that the air carriers should fully use this database to verify travel documents and visa requirements. It should be clarified that this is considered a recommendation, but not a limitation of responsibility for airlines. When necessary airlines should have to check other sources as well.

#### Long security check

Moreover, we would also suggest to extend this interpretation on the excessively long security checks<sup>11</sup>. The air carrier should be obliged to indicate how long the security checks can reasonably take and how much in advance the passenger should present himself at the airport. In cases where he can prove that he arrived at the airport sufficiently in advance but due to the long security check was not able to present himself at the boarding gate on time, he should not be held responsible for the circumstances over which he cannot have any control.

#### *b) Cancellation*

#### Distinction between cancellation and delay

We appreciate the effort taken by the Commission to explain the distinction between cancellation and delay, which is in practice often not very clear for passengers. In addition, we would suggest mentioning in the text of the Interpretative Guidelines at this point that the individual assessment will be done on a case by case basis by the national enforcement bodies. Reference to the relevant complaint procedure could also be made here for the stake of clarity.

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<sup>9</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 Gerischtshof (Austria), 24 January 2013.

<sup>10</sup> The Commission should consider these aspects as e.g. done in point 5.1.1. of its Interpretative Guidelines.

<sup>11</sup> Our UK member Which? is not signatory to this point.

### Diverted flight

BEUC supports the interpretation of the Commission stating that if a diverted flight does no longer serve any purpose in relation to the passenger's original travel plan it is to be treated in the same way as a cancellation.

#### *c) Upgrading and downgrading*

There is no justification for the exclusion of advantages offered through a frequent flyer programme or other commercial programme provided by an air carrier or tour operator, since these regularly are not free of charge, but only calculated differently.

#### *d) Advance rescheduling of a flight*

There was no CJUE ruling that would confirm the interpretation of the Commission that advancing of a flight is not covered and does not provide by any right under the Regulation. This statement is pre-empting an (possibly different) interpretation by the CJEU. There are many possible problems to be addressed in order to interpret the Regulation accordingly, like evidence issues regarding the information of passengers about the rescheduling of a flight and as a consequence the question whether the original ticket might be considered still valid (art 3 (2) (a) of the Regulation), and denying boarding anyway might be treated under Art 4 of the Regulation.

## **Passengers' rights**

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#### *a) Right to information*

We support the draft guidelines stating clearly that partial, misleading or wrong information to passengers on their rights, either individually or on a general basis, should be considered not only an infringement of the Regulation but may also constitute an unfair or misleading commercial business-to-consumer commercial practice under Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market<sup>12</sup>.

We agree with extending the scope of the draft guidelines to also cover issues regulated by other horizontal legal acts related to consumer protection. We would also encourage a similar approach in assessing different terms contained in air transport contracts under the Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (on this topic see also the last section of this document entitled "What is missing?").

For what concerns information to be provided in case of delay, we agree with the draft guidelines stating that following the Sturgeon judgment<sup>13</sup>, flight delays of at least three hours upon arrival must be treated in the same way as cancellations and therefore the affected passengers should be provided also at that moment with all the relevant information.

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<sup>12</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

<sup>13</sup> Joined cases C-402/07 and C-437/07, Sturgeon e.a.

*b) Right to reimbursement, re-routing or rebooking*

We do not support the interpretation expressed in the draft guidelines stating that in the case of a denied boarding or a flight cancellation, the mere fact that the “air carrier can demonstrate that it has sought to contact a passenger and to provide the assistance” lifts his obligation to reimburse the passenger in the situation when he made his own rerouting arrangements. We consider this interpretation to be too severe. Passengers facing such events during their journey do not always have easy access to means of communication. In our view, only a successful contact with the passenger could prove that the passenger consciously decided not to use the assistance he was offered and therefore does not have the right to be reimbursed any longer. The air carrier should have therefore an obligation to prove that he contacted successfully the passenger. The same should be considered regarding communication to passengers regarding their options.

BEUC welcomes a list of good practices related to the notion of “comparable transport conditions” mentioned in the draft guidelines. We hope they will be followed consistently by all the air carriers and national enforcers.

For what concerns the interpretation of art. 8(1) of the Regulation, regarding the choice to be made by the passenger, we do not agree with the statement appearing in the draft guidelines that as soon as the passenger has chosen one of the three options expressed in this article “right to compensation according to Article 7 [...] ceases”. Under our understanding it would mean that if the passenger chooses the reimbursement or rerouting he cannot any longer claim compensation. This is incorrect as the right to compensation is independent from the rights expressed in art. 8(1).

*c) Right to care*

We support the draft guidelines stating that the air carrier is obliged to actively offer his assistance foreseen in the art. 9 of the Regulation. We also agree that if he does not fulfil this obligation the passenger should be allowed to claim a reimbursement of the costs incurred.

We agree with the Commission that the extent of the adequate care needs to be assessed on the basis of the needs of passengers in the relevant circumstances and the principle of proportionality, or that the relevant ‘waiting time’ should be also taken into account. However, the fact that the ‘adequate care’ is being assessed on a case by case basis can lead to the misinterpretation and abuses of the air carrier, who for example provides only for a 5€ voucher or a single sandwich to a passenger that is forced to spend many hours waiting at the airport. This kind of assistance is clearly insufficient and does not cover the basic needs of passengers affected by the incidents covered by the Regulation. We would therefore suggest that the Commission in its Interpretative Guidelines provides for some additional good practice examples in order to clarify better what an ‘adequate care’ stands for.

On the other hand, we support the view that the exception expressed in the Recital 18 of the Regulation, could only be allowed in the very exceptional circumstances as indeed, the effort to reduce the inconvenience suffered by the passengers should be made.

*d) Right to compensation*

We support the draft guidelines in their statement that in calculation of the compensation, the total distance of the flight should be taken into account and not the distance of a specific segment of the journey during which the incident occurred.

We also welcome the explanation given by the Commission, which confirms that in the event when the passenger accepts a re-routed flight, a new incident related to that new flight (denied boarding, cancellation or delay) gives him the right to further compensation.

In addition we agree with the interpretation stating that if a passenger accepts a flight to an alternative airport he does not lose his right to be compensated for his late arrival at the airport of his original destination (or another close-by destination agreed on with the air carrier).

We do not agree however, with the statement that a missed connecting flight due to significant delays at security checks do not give entitlement to compensation<sup>14</sup>. If a passenger bought his connecting ticket with a single air carrier he had legitimate expectations to believe that the arranged timeframe to present himself for the connecting flight will be sufficient. Air carriers are in the possession of information not accessible for a passenger allowing them to correctly assess this. They should be therefore obliged to make sure that the time needed for the flight change at the airport is correctly allocated. Moreover, if there is no sufficient time for such a change, they should not sell a ticket for this connection to the passenger who might not be aware of the fact that he risks not being on time. Passengers should not bear the consequences of excessively long security checks over which they cannot have any control. On the other hand, if the delay was caused by the "extraordinary circumstances" the air carrier should have an obligation to prove their existence and the fact that "these circumstances could not have been avoided even if all reasonable measures had been taken".

## **Complaint procedure**

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*a) Complaints to NEBs*

For what concerns the complaint procedure, draft guidelines state that "passengers' complaints to a national enforcement body [NEB] should be made only when they have first complained to the air carrier and disagree with the air carrier's answer". In our view, the situation when the airline does not respond at all should also be covered here. We would suggest to follow the guidelines indicated on the 'EU complaint form' and specify that the passenger can also complaint to the NEB if the airline fails to provide him with a reply within 6 weeks.

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<sup>14</sup> Our UK member Which? is not signatory to this point.



We would also suggest adding in this section an explanation on which NEB is competent to deal with a complaint. This aspect is often not clear for the passengers and their complaints, being sent to the wrong NEB, risk to be treated with a delay due to the necessity to transfer them to a different country. We would suggest to state clearly that the complaints should be sent to the EU country where the incident took place and in cases where the incident happened at an airport of departure outside the EU but involved an EU airline, to the EU country of destination. Problems due to language barriers should also be considered. In our opinion passengers should have the right to contact their national NEB in any case, at least for support in communication with another country's NEB.

#### *b) Other complaints*

We welcome the reference made in the draft guidelines to the alternative dispute resolution (ADR) and online dispute resolution (ODR) entities. This information will hopefully encourage the passengers to seek their assistance especially in cases that do not fall in the scope of the Regulation 261/2004 and cannot be therefore referred to the NEBs. However, we consider it necessary that airlines should be obliged to participate in ADR proceedings.

On the other hand, we are surprised that the **reference to the national consumer organisations** was not made as well. Especially that the draft guidelines do state that passengers can turn for assistance with their complaints to the European Consumer Centres Network. This omission should be rectified. National consumers' organisations inform consumers/passengers of their rights under EU and national legislation, give individual advice and provide direct assistance. Passengers should find in the draft guidelines an indication that they can contact them for their assistance in their respective countries.

### Montreal Convention

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We welcome the effort that the Commission put into summarizing the case law related to the application of the Montreal Convention<sup>15</sup> in the EU. Without this chapter, draft guidelines on air passengers' rights would not be complete.

### What is missing?

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Rights of the passengers in the EU are not only regulated by the Regulation 261/2004 or by the Montreal Convention. There are many other horizontal legal acts that apply here, like the Unfair Contract Terms Directive. BEUC urges the Commission to refer in its draft guidelines also to those horizontal acts, which can render the practices or contract terms used by an airline unfair and thus lead to passengers' compensation.

An issue of high importance concerns the **unfair contract terms in air transport contracts**. Passengers should be able to find in this document a list of different unfair contract clauses in air passengers' contracts according to national or European court rulings. Controversial clauses that could be defined as unfair<sup>16</sup> are for instance:

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<sup>15</sup> Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) from 28 May 1999.

<sup>16</sup> For more information on those clauses see BEUC letter to IATA of 5 February 2013 on unfair terms in air transport contracts:  
<http://www.beuc.eu/BEUCNoFrame/Common/GetFile.asp?ID=44425&mfd=off&LogonName=Guesten>

- Code share agreements without the consent of the passenger
- Use of “no show” clause
- Obligation to reconfirm bookings
- No right to refund in case of force majeure
- Exclusion of carrier liability for non-compliance with timetabling
- Exclusion of liability in case of death or disease
- Prohibition to check-in certain items and exclusion of liability of the airline
- Non-automatic refund of (undue) taxes
- Price increase charged after the booking
- The lack of transparency, accessibility and clarity of contract terms
- Non-transferability of tickets

END



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