



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Bundesrat for its Opinion concerning the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air {COM(2013) 130 final}.

The Commission takes note that the Bundesrat welcomes the proposal's objectives to strengthen air passengers' rights by enhancing the enforcement of passenger rights and clarifying key principles that currently are subject to varying interpretations. The Commission will strive to preserve these main elements of its proposal in the course of the legislative process.

The Commission would like to comment on a number of particular issues raised by the Bundesrat.

Compensation for long delays

The Bundesrat takes the position that the proposed increase of the time threshold for delay compensation from 3 hours to 5 hours (or 9 and 12 hours depending on the distance on long-distance journeys to/from third countries) is excessive. It rather proposes to keep it at 3 hours (but to increase it to 6 hours for long-haul flights to/from third countries of more than 3500 km).

The Commission understands that the Bundesrat shows concern about a measure which at first sight may seem to reduce passengers' rights. However, the higher delay thresholds for the right to compensation are an essential part of the Commission's proposal as they aim to soften the financial impact of the Regulation on the sector and to remove incentives that could trigger more cancellations.

First, this is the main measure that helps soften the financial impact of successive EU Court judgements and of the numerous measures in favour of passengers contained in the Commission's proposal. The proposal is based on the cost estimates made in the impact

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assessment that was published at the same time as the proposal¹. The cost data show that the proposal reduces the total cost of implementing Regulation 261/2004 by about 10%². At the same time growing passengers' awareness about their rights and hence more compensation claims could easily cancel out this reduction³.

More importantly, a too short threshold could lead to an increase of cancellations. Indeed, as a delay has also an impact on the subsequent flights with the same aircraft (and where compensation would also need to be paid out), a too short threshold creates an incentive to cancel one or two flights in order to be able to operate the subsequent flights on time and to avoid compensation for those subsequent flights. However, for passengers a cancellation (with the always unsure seat availabilities for rerouting) is even worse than a delay. Therefore, the Commission proposes longer thresholds which – according to objective data – give airlines a reasonable time to deal with the causes of the delay.

No show

The Bundesrat finds that there are contradictions between the explanatory memorandum, the recital and the proposed Article. It finds that the promised ban is being watered down in the Article and could be circumvented via the terms and conditions of the contract of carriage.

The Commission's proposal does not exactly ban the no show policy, but it assimilates it with denied boarding. This means that when a passenger is denied boarding on the inbound journey of his return ticket on the grounds that he did not take the outbound journey, he or she has the choice between refund and rerouting and the compensation of between €125 and €600 depending on the distance of the flight and the delays experienced before being rerouted (extraordinary circumstances cannot apply here). Where the passengers choose rerouting, the airline must also provide assistance, for example food, drinks, hotel accommodation of one or more nights if necessary and transportation between the airport and the place of accommodation.

This rule does not apply where the no show policy relates to intermediary segments of a same origin-destination journey (e.g. the passenger buys a ticket Brussels – New York via London and then tries to board in London without using the Brussels-London segment). In that case, airlines remain free to apply such policies. This is because such a full ban of no show policies would make it impossible to offer indirect flights at lower prices than direct flights (which would lead to a reduction of competition and higher air fares).

Cap on accommodation

The Bundesrat refuses limitations to accommodation with regard to extraordinary events of more than 3 days and with regard to regional flights.

The ash cloud experience has shown that the cost of accommodation can endanger the financial stability of the airlines, especially when the airline is not responsible for the flight

¹http://ec.europa.eu/commission_2010-2014/kallas/headlines/news/2013/03/passenger-rights-air-revision_de.htm

² Table 7 of the impact assessment

³ Currently, only 10% of the entitled passengers claim their compensation.

disruptions. The cost of the regulation for one week of ash cloud was about 1.5 times the cost of the regulation over a whole year. A limitation in time, as already exists for other transport modes, is necessary to provide more financial certainty, especially for such events which are not insurable. However, to limit the impact on passengers, the proposal foresees other measures in such circumstances:

a) the limitations do not apply to the most vulnerable passengers as the disabled persons and persons with reduced mobility, unaccompanied children, pregnant women or persons in need of specific medical assistance;

b) airports, airlines and ground handlers must have contingency plans in place to assist stranded passengers and provide basic care;

c) the new obligations in the Regulation with regard to quicker rerouting should reduce the risk of passengers being stranded for such long periods.

As it results from the impact assessment, among the categories of carriers, regional operators are those for which the cost of the Regulation is the highest. The proposal aims at reducing these costs. In addition, as there might be limited accommodation capacity in places where small regional carriers operate, it may be more accurate to reserve it to the passengers mentioned under a) above.

Rerouting/Reimbursement

For delays, the proposal does not change the 5 hour threshold for the right to reimbursement, but the Bundesrat would like to shorten this to 2 or 3 hours and to add the right to rerouting.

The Commission considers that this policy option is too costly and quite burdensome for both passengers and air carriers. A rerouting in case of delay is not really necessary as the flight is still being operated and moreover a rerouting is, in most cases, unlikely to offer the possibility to the passenger to reach his final destination quicker than just waiting for his original flight.

In any case, passengers should receive assistance and care (meals, refreshments, accommodation, etc...) while waiting for the rerouting, in a proportionate relation to the waiting time.

Connecting flights

The Bundesrat criticises that the proposal does not cover missed connections at airports outside the EU and of non-EU carriers.

Article 3(1) of Regulation (EC) No 261/2004 specifies that the Regulation applies to passengers departing from an airport located in the EU (to an airport located inside or outside the EU) and, if the operating carrier is an EU carrier, to passengers departing from an airport located in a third country to an airport located in the EU.

It follows that, as confirmed by the Court of Justice in the Emirates judgment⁴, the Regulation does not apply to passengers on flights from an airport located in a third country to an

⁴ C-173/07 *Emirates Airlines*, 2008 I-05237.

airport located in the EU if the operating carrier is not an EU carrier. Nor does it apply to flights where the departure airport and the arrival airport are located outside the EU.

The Commission does not propose a unilateral solution, through modification of the geographical scope of the Regulation, but prefers striving towards a better protection of passengers on flights from third countries operated by non-EU carriers in the context of international air transport agreements.

Furthermore, with regard to journeys including several flights, the proposal foresees the insertion of a new Article 6a with clear rules on assistance and compensation when a passenger misses a connecting flight because his previous flight was late.

Extraordinary circumstances

The Bundesrat finds that the list in the Annex is not clear. It finds the expression "non-exhaustive" confusing and questions whether the list is now binding or not.

Clarifying the notion of "extraordinary circumstances" which permits an airline to avoid the payment of compensation is one of the main points of the revision.

The proposal clearly defines the term in line with the decision of the Court of Justice in the Wallentin-Herman case. For further legal certainty, the proposal introduces a non-exhaustive list of circumstances to be regarded as extraordinary and of circumstances to be regarded as non-extraordinary. This list can only be modified by the co-legislators, but the Commission will have the possibility, in cooperation with National Enforcement Bodies, to issue non-binding recommendations on what is an extraordinary circumstance.

Finally one should not forget that in order not to pay compensation an airline should prove both that the delay at arrival/cancellation was caused by extraordinary circumstances and that this delay/cancellation could not be avoided even if all reasonable measures had been taken (double test).

Voluntary agreements

The Bundesrat considers that the new Article 7(5) creates a contradiction with Article 15.

The Commission would like to point out that the value of the compensation subject to such agreement should not be lower than what the passenger is entitled to receive. Thus, Article 15 still prevails and clearly states in paragraph 2 that: '(...) if the passenger is not correctly informed of his rights and for that reason has accepted compensation which is inferior to that provided for in this Regulation, the passenger shall still be entitled to take the necessary proceedings before the competent courts or bodies in order to obtain additional compensation'.

Compensation amounts

The Bundesrat takes the view that the compensation should be linked to the value of the ticket.

The Commission has carefully assessed this option and considers that defining the amounts of compensation as a percentage of the ticket price would not be appropriate.

From a practical point of view, a reference to the ticket price would create difficulties with respect to flights sold as part of a package: in these cases it would not be clear what the ticket price is, because there is a single price covering flights, accommodation and possibly other services. Moreover, in the case of denied boarding, there would be a preference of air carriers to deny the boarding first to passengers with "cheap" tickets.

Thus, a reference to the ticket price could lead to legal uncertainty and unequal treatment.

Need for 48h notification for persons with reduced mobility and other vulnerable passengers

The Bundesrat considers that this notification obligation as a condition for entitlement should be deleted.

In case of extraordinary circumstances within the meaning of new draft Article 9(4) passengers might have an incentive to avoid the limitation of the rights of accommodation specified in this provision and therefore claim to fall under one of the categories referred to in new draft Article 11(3). The requirement of a 48 hour notice helps to prevent abuses of the kind.

Unequal treatment of passengers

The Bundesrat considers that the proposed new rules will lead to unequal treatment between passengers on cancelled flights who are re-routed and who cannot be informed of the cancellation of the flight until they arrive at the airport, and passengers whose aircraft is delayed by three to five hours.

The Commission considers that such harmonisation would lead to a reduction of passengers' rights in case of cancellations.

Cumulative rights under passengers' rights Regulation and the package travel Directive

The Bundesrat considers there should be clarification in Article 1(2)(c) relating to Article 3(6) such that the ruling out of cumulative rights under Regulation (EC) No 261/2004 and Directive 90/314/EEC should not prevent passengers to safeguard their rights.

As a matter of principle, the Commission cannot support a legal position whereby a person could obtain payments from two sides, where such payments concern the same facts and safeguard the same interest or have the same objective. Likewise, any risk to come to such a situation should be avoided. Details are currently under discussion before the legislator.

EU-wide time limit of two years for the assertion of rights

The Bundesrat suggests applying a harmonised EU-wide time limit of two years for the assertion of rights or for the lodging of complaints as foreseen under the Montreal Convention.

The Commission proposed a time limit within which passengers can complain to the airline; this does not affect their rights to go to court. The Commission is open to consider support to clarifications of the text in the framework of the current legislative procedure.

Tarmac delay

The Bundesrat considers that the time limit of five hours after which air carriers must allow passengers to disembark in the event of a tarmac delay is unreasonable. The Commission takes note of this position.

The Commission hopes that these clarifications address the concerns raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

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Vice-President*