

Opinion of the European Economic and Social Committee on the 'Common rules on compensation and assistance to air passengers (rolling programme)'

COM(2013) 130 final

(2013/C 327/20)

Rapporteur: **Ms ANGELOVA**

Co-rapporteur: **Mr HENCKS**

On 16 April and 16 July 2013 respectively the European Parliament and the Council of the European Union decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Common rules on compensation and assistance to air passengers (rolling programme)

COM(2013) 130 final.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 20 June 2013.

At its 491st plenary session, held on 10 and 11 July 2013 (meeting of 11 July), the European Economic and Social Committee adopted the following opinion by 136 votes to 6 with 7 abstentions.

1. Conclusions and recommendations

1.1 The EESC welcomes the additional legal certainty that the current proposal brings for both passengers and air carriers by offering more precise definitions of the relevant concepts used by the regulation, thus reflecting the principles of the Court of Justice of the European Union (CJEU) decisions and providing a sound legal framework. But the EESC regrets that the Commission's proposal does not contain a high level of consumer protection.

1.2 The EESC approves in principle of the measures that air carriers must take under different conditions to compensate passengers in the event of long delays, rerouting and rescheduling, and increase their overall comfort when flights are delayed or missed. But the EESC disagrees in particular with the planned compensation for delays, long delays to flights and to short-haul flights, where the proposal moves away from the relevant case-law of the CJEU.

1.3 The EESC appreciates that the proposal is made after an extensive impact assessment and reminds that the effective and timely implementation of the SES II+ legislation package is an important tool which should decrease air carriers' costs.

1.4 The EESC rejects the Commission's proposal to increase the time threshold after which the right to compensation arises, deviating from the three consecutive rulings of the CJEU.

1.5 The EESC understands the reasons for increasing substantially the threshold for delay compensation for long-haul journeys, but urges the Commission to continue its efforts to find incentives for air carriers to actually perform considerably below these thresholds. The above delay times should be reduced further for people with disabilities or reduced mobility to take into account the particular costs to these people of any long delay.

1.6 The EESC appreciates that a deadline is introduced and that if the air carrier cannot reroute the passenger on its own services, it must consider other carriers or other transport modes. But in the Committee's view, 12 hours before being able to use other services or carriers is too long. Moreover, the passenger should have the right to refuse travel by another mode of transport (e.g. bus, train or ship). To cover the additional costs of transferring to another carrier as swiftly as possible, the EESC reiterates its proposal of creating a "shared liability" fund for repatriating or rerouting passengers with other carriers.

1.7 Regarding the definition of "extraordinary circumstances", in the EESC's view it should be clearly stated that delays, changes of schedule or cancellations are only to be considered extraordinary if these circumstances:

1. are not by their nature or origin inherent in the normal exercise of the activity of the air carrier,

2. are beyond the control of the carrier, and
3. could not have been avoided even if all reasonable measures had been taken.

It will then have to be checked each time extraordinary circumstances are invoked, if they really meet all three conditions, which will not always necessarily be the case for some of the circumstances listed in Annex 1 of the proposal for a regulation (e.g. health or safety risks, weather conditions or labour disputes).

1.8 The EESC urges the Commission to prepare a regulation that is neutral with regard to other modes of transport, in order not to break with the principle of equal treatment or give rise to favouritism to the detriment of other modes of transport.

2. Introduction

2.1 The improvement of air transport in Europe has remained high on the agenda of the European Commission in recent years. Compliance with increasingly rigorous Community rules on the Single European Sky safety, efficiency and the environmental impact of aviation⁽¹⁾ have improved the operation of air services and strengthened the established rights of people travelling by air. The EESC has drawn up opinions on all of the relevant texts⁽²⁾, and encouraged the Commission to continue its efforts along the same course, on the understanding that more work is needed.

2.2 In view of the fact that travelling by air is no longer a luxury, but a necessity to meet business needs and allow European citizens to exercise their self-evident right to free movement, the EESC believes that there are still areas that need to be further explored in order both to guarantee passengers' rights and to provide air carriers with a sound legal and business environment which will allow them to be successful in a highly competitive market. The areas where improvement of the legal framework and more effective application of existing legislation are required include rules on compensation and assistance to air passengers.

3. Gist of the Commission proposal

3.1 This proposal amends the current act, Regulation No 261/2004, and is motivated by a number of developments:

- air carriers often fail to offer passengers the rights to which they are entitled in instances of denied boarding, long delays, cancellation or mishandled baggage;

- the Commission noted in 2011 that grey areas and gaps in the current rules meant that they were not being applied uniformly in all the Member States and by the various air transport operators;

- the case law of the CJEU has played a crucial role, e.g. in establishing what constitutes an "extraordinary circumstance" and on the rights of compensation in the case of long delays.

3.2 The main goal of the proposal is to guarantee the basic rights of passengers travelling by air – namely the right to information, reimbursement, rerouting, assistance while waiting to travel, and compensation under certain conditions⁽³⁾, while taking into account the financial implications for the air transport sector and ensuring that air carriers operate under harmonised conditions in liberalised market.

3.3 The proposal addresses the three main areas where the Commission considers that measures are still needed to improve application of the regulation i.e. the effectively harmonised enforcement of EU rights, the facilitation of their enjoyment in practice, and the raising of the public's awareness of these rights. It meets the EP's recommendation for "enhanced legal certainty, more interpretative clarity and uniform application of the regulations across the EU"⁽⁴⁾.

3.4 The legislative reform of Regulation No 261/2004 proposed by the European Commission thus:

- incorporates the principles of case-law laid down by the CJEU;
- defines the scope and precise meaning of "extraordinary circumstances" under which the air carrier is exempted from paying compensation in the event of cancellation, a long delay or missed connection;
- sets out passengers' rights in the case of a missed connection due to a delay or change of schedule to a preceding flight;
- sets a uniform delay limit beyond which the passenger is entitled to refreshments and meals;
- covers other aspects such as information for passengers, the right to correct spelling mistakes, acknowledging at the same time the right of the air carrier to seek compensation from third parties when they bear the responsibility for any disruptions.

⁽¹⁾ COM(2012) 573 final.

⁽²⁾ OJ C 24, 28.1.2012, p. 125-130, OJ C 376, 22.12.2011, p. 38-43, OJ C 198, 10.7.2013, p. 9-13.

⁽³⁾ COM(2011) 174 final.

⁽⁴⁾ EP Resolution of 29 March 2012 on the functioning and application of established rights of people travelling by air (2011/2150 (INI)).

4. General comments

4.1 The EESC regrets that the proposal does not follow the case law of the CJEU in its entirety, departing from it on one of the most important points in terms of passengers' rights. However, it acknowledges that in the areas in which the Commission has incorporated CJEU case law the proposal improves the current regulation.

4.2 The EESC expresses its satisfaction that the current proposal seems to have corrected most of the shortcomings of the previous version identified by both the industry and passengers⁽⁵⁾ and at the same time clarified a number of definitions.

4.2.1 For the industry the added value of the proposal compared with the existing rules could be found in the way it:

- limits the liability to provide care in the event of extraordinary circumstances beyond the carrier's control;
- outlines in a non-exhaustive manner what are considered to be "extraordinary circumstances";
- clarifies the possibility of claiming costs from a responsible third party and establishing a shared liability;
- extends the longer delay times after which the carrier must pay compensation;
- limits the obligation to provide accommodation to passengers to a maximum of three nights and EUR 100 per passenger under "extraordinary circumstances". This limit does not apply for people with reduced mobility, unaccompanied children, pregnant women or people requiring specific medical assistance;
- removes any obligation to provide accommodation for flights of 250 km or less in aircraft with a maximum capacity of 80 seats, except where the flight is a connecting flight.

4.2.2 For the passengers the added value of the proposal could be found in the way it:

- clarifies the conditions for application of the regulation;
- specifies how to deal with cases of denied boarding, cancellation and long delays, missed connecting flights, and states in clearer terms the rules regarding the right to compensation, reimbursement, re-routing and care;
- provides details regarding enforcement;

— introduces compensation for long delays;

— sets a uniform delay of two hours beyond which the carrier must provide refreshments and meals;

— substantially tightens the obligation for the carrier to inform passengers of their rights, as well as passenger compensation and complaint procedures, and oversight by the authorities to ensure that the rules are properly enforced.

4.2.3 The EESC recognises that it is very challenging to satisfy at the same time the requirements of all the stakeholders, so the added value offered to one party could mean less satisfaction for the other.

4.3 The EESC sees the Commission's actions aimed at improving passenger protection in the event of airline insolvency⁽⁶⁾ as a step in the right direction, but underlines that these measures are not sufficient to ensure a comprehensive and effective passenger protection in case of insolvency of the airline; considers that a mechanism should be established to guarantee that the air carriers comply with the proposed Regulation in case of insolvency.

4.4 The proposal draws a demarcation line between itself and Council Directive 90/314/EEC, giving passengers the right to choose under which law they introduce their claim, but not giving them the right to cumulate compensation for the same problem under both legal acts.

4.5 In its previous opinions on air passenger rights, the EESC made various proposals that would strengthen those rights⁽⁷⁾, many of which have been incorporated into this draft regulation. The EESC regrets to note, however, that the following proposals were not considered:

- Incorporating all solutions contained in CJEU judgments into the future regulation.
- For certain exceptional cases, establishing the extent and limits of the right to assistance, defining how the legitimate rights of passengers may be safeguarded through alternative mechanisms, by means of decisions that are binding on the parties and are taken within a reasonable period of time.
- Regulating situations currently arising in connection with flight rescheduling.
- Regulating the obligation to provide care at connection points.

⁽⁵⁾ SEC(2011) 428.

⁽⁶⁾ COM(2013) 129 final.

⁽⁷⁾ OJ C 24, 28.01.2012, p. 125-130 and OJ C 229, 31.07.2012, p. 122-125.

- Including ground-handling agents, who work on behalf of airlines in providing the services set out in the Regulation.
- Specifying which authority is competent to deal with users' complaints and enforcing compliance with the Regulation.
- Monitoring and publishing, at Community and Member State level, complaints regarding non-compliance with the Regulation, broken down by company and type, and providing for companies which have been granted an air operator's certificate to be audited in each Member State in this regard.
- Correcting the inconsistency in the wording of paragraphs 1 and 2 of Article 14 of the Regulation.
- Making passenger compensation compulsory if an airline declares bankruptcy, under the principle of "shared liability" for repatriating passengers by other airlines that have seats available, and setting up a fund to compensate passengers based on the "market player pays" principle.
- Introducing the possibility of transferring the travel contract to a third person.
- Prohibiting the current practice by airlines of cancelling the return flight if a passenger has not used the outward flight on the same ticket.

4.6 The EESC welcomes all improvements concerning the enforcement of the rights of disabled passengers and passengers with reduced mobility because they allow for the alignment with the provisions of the Convention on the Rights of Persons with Disabilities. In that frame the EESC proposes the following amendments:

4.6.1 The term "disabled person or person with reduced mobility", as mentioned in the Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, has to replace the general term "person with reduced mobility" used in the text of the Proposal.

4.6.2 The term "mobility equipment" used in proposed Article 6b shall be replaced by the term "mobility equipment or assistive devices".

4.6.2.1 The EESC strongly recommends more professional handling of mobility equipment and assistive devices during air travel. To this end, all staff handling such equipment should be further informed and trained. EU legislation touching upon the rights of passengers with disabilities should be amended accordingly. Increased professionalism would be to the advantage of handling companies, airlines, airports and passengers alike.

4.6.3 In the new Article 6 of the Proposal it has to be clarified that in case of long delay caused by any reason disabled passengers or passengers with reduced mobility shall be offered the same assistance as specified in Annexes I and II of the Regulation (EC) No 1107/2006.

4.6.4 It has to be strictly clarified that the provided accommodation, the transportation to it, the information about the arrangements and the means (including the websites and other electronic ones) used to disseminate it as well as the complaints procedures and declarations of interest if required shall be accessible to disabled persons and the needs of guide and assistance dogs should be equally met. In this frame, provisions of the proposed Article 14 concerning the obligations to inform passengers shall be extended to all categories of disabled persons and not only cover blind and visually impaired persons (relevant Article 14.3).

4.6.5 The Regulation establishes that boarding may not be denied on the grounds of a passenger's disability or reduced mobility, but its article 4 provides for a derogation from the principle in order to meet safety requirements or if the size of the aircraft or its doors make the embarkation or transport of the person with a disability or reduced mobility impossible.

The minimum needed in this area would be a policy of transparency regarding the possibilities of access to aircraft by means of clear and transparent information when booking tickets, which is not the current practice.

5. Specific comments on the amended rules

5.1 The EESC approves the principle of the measures that air carriers must take under different conditions to compensate passengers in the event of long delays, provide better care, rerouting and rescheduling and increase passengers' overall comfort when flights are delayed or missed.

5.2 The EESC considers that the Commission's proposal to increase the time threshold after which the right to compensation arises from three to five hours for all journeys within the EU is not acceptable. The EESC does not understand why the reduction of the threshold to receive compensation would reduce the rate of cancelled flights as in the case of cancellation airlines have to pay compensation anyway.

5.3 It is understandable that journeys to/from third countries should be subject to thresholds that depend on the journey distance, taking into account the practical problems encountered by air carriers when addressing the causes of delays at remote airports. The EESC nevertheless considers the proposed times of nine or 12 hours to be too long and believes the Commission should continue its efforts to find incentives for air carriers to actually perform considerably below these thresholds. The above delay times should be reduced further

for people with disabilities or reduced mobility to take into account the particular costs to these people of a long delay. The EESC sees the effective and timely implementation of the SES II+ legislation package as an important tool for decreasing air carriers' costs, allowing them more flexibility in financing the reduction of the thresholds.

5.4 The EESC appreciates that a deadline is introduced and that if the air carrier cannot reroute the passenger on its own services within this deadline, it must consider other carriers or other transport modes (subject to seat availability). But in its view 12 hours before being able to use other services or carriers is too long. Moreover, the passenger should have the right to refuse travel by another mode of transport (e.g. bus, train or ship). To cover the additional costs of transferring to another carrier as swiftly as possible, the EESC reiterates its proposal of creating a "shared liability" fund for repatriating or rerouting passengers with other carriers, in close discussion with all the stakeholders.

5.5 The EESC believes it is necessary to more clearly define airports' responsibilities to assist passengers in the case of multiple flight cancellations, caused by airport authorities' failure to provide the needed conditions for smooth flight service provision.

5.6 The EESC supports the second test of the application of the "extraordinary circumstances" clause in Article 1(4)(b) of the proposal and recommends that the National Enforcement Bodies (NEBs) ensure it is thoroughly performed.

5.7 The EESC supports the proposal to introduce a single time threshold of 2 hours for flights of all distances to replace the current thresholds for care, which now depend on flight distances. This is greatly in the interest of passengers and provides them with fair and comfortable conditions while waiting.

5.8 EESC welcomes the proposal that passengers who miss a flight connection because of a delayed previous flight have a right to care and, under certain circumstances, a right to compensation, because it also improves the position of passengers.

5.9 A step towards better guaranteeing passengers' rights is the proposal that passengers on flights rescheduled with advance notice of less than two weeks should have rights similar to those of delayed passengers.

5.10 The EESC strongly recommends to the Commission to find measures for improving the cooperation between the

airports and the air carriers as to significantly decrease the time passengers should spend when their aircraft is delayed on the tarmac.

5.11 The EESC calls on the Commission to prohibit the current airline practice of cancelling the return flight if a passenger has not used the outward flight on the same ticket⁽⁸⁾. The Committee agrees with strengthening the right of passengers to information about flight disruptions (as soon as this information becomes available) as this will also improve passengers' ability to plan their next course of action when their final destination is reached.

5.12 The EESC understands the need to limit the time during which the air carriers should take care for the accommodation of passengers in the event of extraordinary circumstances and accepts the proposed limit of 3 overnights. However, the Committee strongly advises the Commission to let the NEBs set a price limit for these overnights for each Member State. The price limit should not be applied for persons with reduced mobility (PRMs).

6. Enforcement

6.1 The proposal for an amendment to Regulation No 261/2004 clarifies the role of NEBs by allocating them the role of general enforcement. The out-of-court handling of individual complaints will become a job for complaint-handling bodies (Alternative Dispute Resolution Bodies); as suggested earlier by the EESC⁽⁹⁾. These provisions give more power to the bodies responsible for the proper sanctioning of carriers' non-compliance with the provisions of Regulation 261/2004 and provide passengers with a more reliable means of pressing for proper application of their rights.

6.2 The proposed exchange of information and the coordination between the NEBs themselves and between the NEBs and the Commission brought about by enhanced reporting obligations and formal coordination procedures will allow a fast reaction to all identified compliance problems.

7. Definition of "extraordinary circumstances"

7.1 The EESC welcomes the fact that the proposed regulation:

— is based on the definition of "extraordinary circumstances" accepted by the CJEU in case C-549/07 (Wallentin-Hermann) and

⁽⁸⁾ OJ C 24, 28.1.2012, p. 127.

⁽⁹⁾ OJ C 24, 28.1.2012, p. 130.

— stipulates that delays or cancellations can only be considered as extraordinary circumstances when these circumstances:

1. by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned (Article 1(1)(e)),
2. are beyond its actual control (Article 1(1)(e)); and
3. if the cancellation, change of schedule or delay could not have been avoided even if all reasonable measures had been taken (Articles 1(4)(b) and 1(5)(4)).

These clarifications will benefit both passengers and carriers, allowing the former to determine their rights in this area and the latter their responsibilities.

7.2 The proposed non-exhaustive list of circumstances to be regarded as extraordinary and of circumstances to be regarded as non-extraordinary (set out in Annex I to the proposed regulation) will also help reduce the risk of unnecessary arguments between passengers and airlines.

7.3 Consequently, in the EESC's view it should be clearly stated in the proposal for a regulation that whenever extraordinary circumstances are invoked, it will have to be considered whether they really do meet this triple condition, which will not always necessarily be the case for some of the circumstances listed in Annex 1 (e.g. health and safety risks, weather conditions or labour disputes).

Brussels, 11 July 2013.

The President
of the European Economic and Social Committee
Henri MALOSSE

APPENDIX

to the opinion of the European Economic and Social Committee

The following amendments, which received at least a quarter of the votes cast, were rejected during the discussions:

New point 4.1.3 (Amendment 7)

The EESC regrets that the proposal has upset the existing balance between all stakeholders, giving protection of the rights of carriers precedence over protection of the rights of passengers.

Outcome of the vote:

For: 52
Against: 70
Abstentions: 14

Point 5.3 (Amendment 11)

Amend as follows:

~~It is understandable/incomprehensible that journeys to/from third countries should be subject to thresholds that depend on the journey distance, taking into account the practical problems encountered by air carriers when addressing the causes of delays at remote airports. The EESC nevertheless considers the proposed times of nine or 12 hours to be too long and believes the Commission should maintain the current time of three hours for all scenarios continue its efforts to find incentives for air carriers to actually perform considerably below these thresholds. The above delay times should be reduced further for people with disabilities or reduced mobility to take into account the particular costs to these people of a long delay. The EESC sees the effective and timely implementation of the SES II+ legislation package as an important tool for decreasing air carriers' costs, allowing them more flexibility in financing the reduction of the thresholds.~~

Outcome of the vote:

For: 50
Against: 81
Abstentions: 12

Point 5.12 (Amendment 12)

Amend as follows:

~~The EESC regrets that the new proposal dilutes the current Regulation which ensures passengers are taken care of while waiting in case of disruptions, thus deviating again from a Court of Justice ruling as regards the right to accommodation (case Denise McDonagh v Ryanair, 31 January 2013). The EESC considers that the right to accommodation is justified all the more in situations which persist over a long time and where passengers are particularly vulnerable; moreover air transport unlike other means of transport, involves mostly long distances and often passengers affected by disruptions are far away from their homes and the often long distances involved do not allow passengers to find alternative means to arrive to their final destination. understands the need to limit the time during which the air carriers should take care for the accommodation of passengers in the event of extraordinary circumstances and accepts the proposed limit of 3 overnights⁽¹⁾. However, the Committee strongly advises the Commission to let the NEBs set a price limit for these overnights for each Member State. The price limit should not be applied for persons with reduced mobility (PRMs).~~

Outcome of the vote:

For: 56
Against: 78
Abstentions: 7

⁽¹⁾ ~~Article 8 (9) of the Proposal Article 9 of the amended Regulation (EC) No. 261/2004.~~