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COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT AND THE COUNCIL**

pursuant to Article 17 of Regulation [EC]261/2004

**on the operation and the results of this Regulation establishing common rules on
compensation and assistance to passengers in the event of denied boarding and of
cancellation or long delay of flights**

{SEC(2007) 426}

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1. BACKGROUND

On 11 February 2004, the Council and the European Parliament adopted jointly the Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding, cancellation or long delay of flights.^{1 2}

Article 17 of Regulation [EC]261/2004 provides for a report to be submitted by the Commission to the European Parliament and the Council on the operation and the results of this Regulation.

This Communication provides the report required under Article 17 of Regulation [EC]261/2004.

2. INTRODUCTION

Regulation [EC]261/2004 introduced new rules on compensation and assistance for air passengers in the event of denied boarding, cancellations, long delays and involuntary downgrading. Depending on the circumstances, the Regulation requires airlines to:

- provide passengers with assistance such as accommodation, refreshments, meals and communication facilities;
- offer re-routing and refunds;
- pay compensation of up to €600 per passenger; and
- proactively inform passengers about their rights under the Regulation.

The Regulation also requires Member States to set up enforcement bodies with the ability to impose dissuasive sanctions.

It applies to all flights from and within the European Union and to flights from outside the EU to an airport situated in the EU operated by EU-registered carriers.

The Regulation was strongly opposed by many airlines, particularly a number of low cost operators. The International Air Transport Association (IATA) and the European Low Fares Airlines Association (ELFAA) challenged the Regulation in the High Court of England and

¹ Official Journal L 46 of 17 February 2004, p. 1

² IP/05/181 of 16 February 2005

Wales, and the case was subsequently referred to the European Court of Justice (ECJ). However, the ECJ rejected the airlines' appeal in January 2006.³

The Commission has organised three separate meetings with the National Enforcement Bodies⁴ (NEB) which were designated by the Member States in accordance with Article 16 of Regulation [EC]261/2004. The Regulation is silent on the definition of competences and tasks to be accomplished by these enforcement authorities.

Following these meetings, the Commission remains in contact with the NEB on the development of an information document on the application of the Regulation.

3. METHODOLOGY

In order to have independent and unbiased quantitative and qualitative data on the application of this Regulation, the Commission contracted an external consultant.⁵ One of the most important characteristics of this study was the broad and intensive consultation of as many stakeholders as possible, including consumer associations and passenger federations.

The objective of the study was to assess the extent to which airlines are complying with the Regulation, to investigate whether the enforcement process is working and to examine possible amendments to the Regulation. In order to do this, four different main work streams were undertaken: desk research, interviews with stakeholders, a survey of actual air journeys and a legal review. This study has provided substantial input for the preparation of this Communication.

4. MAIN OBJECTIVES AND PROVISIONS OF THE REGULATION

The main objective of the Regulation is to improve the situation of passengers if their journey is disrupted. It sets out minimum rights for passengers to be respected by any airline, as the inconveniences suffered by passengers are comparable when stranded at an airport, whether that airport is a hub⁶ or a regional airport and whether passengers fly first class or at a low fare.

4.1 Quantitative evidence of impact

The objective of this Communication is to assess the degree to which airlines are complying with Regulation [EC]261/2004 and to investigate whether enforcement procedures are working properly. The following chapters analyse whether the existence of the new Regulation [EC]261/2004 has had a quantitative impact in reducing cases of denied boarding, cancellations and delays.

³ Case C-344/04: <http://curia.europa.eu/juris/cgi-bin/gettext.pl?where=&lang=en&num=79939889C19040344&doc=T&ouvert=T&seance=ARRET>

⁴ Abbreviation used in this Communication: NEB (in plural form, read: *NEBs*)

⁵ Official Journal 2006/S 36-038536 of 22 February 2006

⁶ HUB is an airport that an airline uses as a transfer point to get passengers to their intended destination.

4.1.1 *Denied Boarding – Overbooking*

There are no publicly available statistics on denied boarding and downgrading of passengers for European carriers. Air carriers have been asked to provide information on this issue but, with two exceptions, they have all refused, stating that this aspect is part of an individual commercial business strategy.

4.1.2 *Cancellations – Delays*

It is difficult to determine whether a flight has been delayed or cancelled, as airlines might apply a different approach to the classification of delays and cancellations, thereby affecting the payment of financial compensation. In addition, the most comparable cancellation data are provided from airlines through their own associations, but there is no independent, definitive source of data available.

EUROCONTROL publishes regular information on delays and the main causes for these delays.⁷ It shows that almost 70% of delays are caused by airline- and airport-related operations.

A concern has been expressed by some that airlines may be reclassifying cancellations as long delays in order to avoid claims for compensation payments. If airlines were to transform cancellations into long delays out of economic interests in an attempt not to pay financial compensation under Regulation [EC]261/2004, a drop in the number of cancellations and a corresponding increase in the number of long delays might have been expected after the Regulation was introduced.

There is no detectable evidence of any such trend, although there is no guarantee that the classification of delays and cancellations used in statistics is the same as that used by airlines when deciding what compensation to provide under the Regulation.

4.1.3 *Complaints to National Enforcement Bodies (NEB) and the Commission*

Although little statistical evidence is available, there is anecdotal evidence that airlines have not always complied with the Regulation. This is indicated by the air passenger complaints sent to the NEB and to the Commission. These complaints statistics are not statistically representative but they give an insight into airline behaviour and show some interesting trends. The overall number of complaints received by the different instances might also give indication about a growing awareness amongst passengers about their rights.

4.1.4 *Conclusions*

As Regulation [EC]261/2004 has been in force only for two years, it is difficult to assess whether it has had any *quantitative* effect in changing the overall level of denied boarding, delays/cancellations, or in changing the classification of cancellations to delays. Although, in some cases, there may have been a switch from involuntary to voluntary denied boarding as a result of the requirement to call for volunteers.

This conclusion does not necessarily mean that the situation of passengers has not improved on a *qualitative* level, as airlines have indeed been making progress in their efforts to improve

⁷ <http://www.eurocontrol.int/eCoda/portal>

passenger treatment within the framework of Regulation [EC]261/2004. Over the last two years, airlines have shown that they are capable of managing some major incidents at airports by providing passengers with assistance.

The number of complaints, still being limited, is not an indicator revealing the quality of service rendered to the passengers. However, the evolution in time of those complaints may become an appropriate indicator uncovering improvement or degradation of passenger treatment. The Commission will therefore dedicate special attention to this issue.

5. REGULATION [EC]261/2004 INTRODUCED NEW RULES IN RELATION TO DENIED BOARDING, CANCELLATIONS AND LONG DELAYS

The following chapters analyse whether air carriers comply with these rules and whether they respect the rights of air passengers.

5.1 Denied Boarding – Overbooking

The rules relating to denied boarding appear largely to be observed by the majority of airlines and thus give little cause for concern. Indeed, the former 'Denied Boarding' Regulation⁸ dating from 1991 seems to have found its way into a commonly adopted commercial airline policy to which Regulation [EC]261/2004 added the provision to call for volunteers. However, passengers still report cases of denied boarding without any initial call for volunteers.

Denied boarding because of commercial overbooking is mostly solved quickly on the spot. The obligation to call for volunteers seems to have created more flexibility for passengers and airlines.

In more complex cases involving, for example, inappropriate travel documents, missed connection flights or late check-in, the ability of passengers to claim their rights depends on the airline's assessment of the situation on site at the time of check-in or boarding.

5.2 Cancellation

Within the legal framework of financial compensation to be paid to passengers for the cancellation of a flight, airlines can invoke extraordinary circumstances if a flight is cancelled⁹ and thus be waived from this obligation. *Recital 14* cites five potential examples of extraordinary circumstances – political instability, meteorological conditions incompatible with the operation of the flight, security, unexpected flight safety shortcomings and strikes. *Recital 15* mentions delays to flights by an aircraft resulting from an air traffic management decision earlier in the day.

In practice, experience has shown that, in most cases, airlines invoke these extraordinary circumstances when facing a cancellation. In 2005, the Commission advised all Community carriers that such a practice cannot be abused.¹⁰ However, airlines argue that they have no

⁸ Regulation [EEC]295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport - published in Official Journal L036, 8 February 1991

⁹ Recitals 14 and 15 and Article 5(3) of Regulation [EC]261/2004

¹⁰ DGTREN, correspondence of 10 March 2005, D(2005)104765

interest in any voluntary cancelling of flights, as this would have a negative commercial impact.

This *force majeure* provision allows an air carrier to exclude financial compensation in cases where “an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken”. One of the main problems has been the interpretation of this clause. Passengers themselves, of course, would not want air safety to be compromised but the suspicion remains that the 'exceptional circumstances' card is played too often by airlines in order to avoid paying compensation for which no payment deadline is foreseen in the Regulation.

This matter covers a large proportion of all claims submitted by passengers to airlines, the NEB and the Commission, although it only concerns a limited part of the Regulation. Not all NEB seem to be challenging air carriers on this issue. This leaves passengers with little choice but to accept the decision of the air carrier, or to take legal action.

5.3 Re-routing

In the event of denied boarding and cancellations, the Regulation obliges airlines to offer passengers a choice between a refund or re-routing. In practice, when some airlines cannot provide an alternative flight on their own aircraft, they only offer the passenger a refund. The Regulation itself does not specify whether airlines should re-route passengers via other carriers or by surface transport if there is no alternative flight available on their own aircraft. The concept of 'comparable transport conditions' is open to diverging interpretations. The 'network airlines'¹¹ generally have reciprocal agreements enabling them to re-route passengers via other carriers if necessary, at a reasonable price.

Low cost airlines do not have equivalent agreements and they appear to be unwilling to organise re-routing through other carriers, leaving passengers stranded for days at regional airports. In these cases, some airlines reportedly refuse to provide appropriate assistance and hotel accommodation, or even to refund passengers.

5.4 Delays and Assistance

When a flight disruption causes passengers to be at least two hours late, the airline has to provide appropriate assistance in order to minimise discomfort. This should be in the form of drinks, meals, communication facilities and hotel accommodation, if necessary.

Low cost carriers, usually operating from regional airports, often struggle with the obligation to provide assistance. In fact, the limited accommodation available at those airports (catering services, hotels, etc.) does not always permit these airlines to organise assistance properly.

In many cases, this assistance is not spontaneously provided or not given at all. Airlines sometimes even seek to invoke *force majeure* although the Regulation does not provide for this kind of exemption. Air carriers are bound to inform passengers of their rights and to provide assistance.

. The provision of assistance may become difficult if, for example, hotel rooms in the surrounding airport area are no longer available because of a lengthy strike or exceptional

¹¹ Structures that express strategic choices made by airlines to serve or not to serve given airports.

meteorological conditions or if catering services are not available on the airport premises. Nevertheless, the Regulation does not distinguish between airports according to their size or location.

Under Regulation [EC]261/2004 there is no definition of delays. There is some confusion concerning airlines' obligations towards passengers during long delays of over 24 hours and this could become an important source of conflict.

Minimum entitlements for stranded passengers are defined and airlines operating from regional airports should take special measures to comply with them. Whether flying first class or low cost, the inconveniences suffered by passengers are comparable and should be addressed as defined in the Regulation.

5.5 Information

Overall, airlines' terms and contract conditions are broadly consistent with the Regulation, but some airlines provide a general statement (sometimes misleading and inaccurate) when addressing points of the Regulation in their terms and conditions. It would help passengers (and NEB) if a contact person of the airlines would be indicated on the information provided by the airlines.

Airlines have to proactively inform passengers about their rights by way of a sign at check-in and by means of a written document to passengers facing a delay of at least two hours.¹² In many airports, these signs are not available and, in some cases, the written notice is not at hand when requested. The entitlement to information is instrumental and should be honoured by all parties concerned.

6. ENFORCEMENT BY THE NATIONAL ENFORCEMENT BODIES (NEB)

As the Regulation does not define in detail the competences and tasks to be accomplished by the NEB, passengers are faced with inconsistent application and enforcement of their rights. Passengers filing a complaint often have to wait a very long time before receiving any feedback or they are confronted with a language problem when submitting a claim in another Member State where the flight disruption took place.

Passengers bring cases to the attention of the Commission where the NEB confirm that the air carrier is in breach of Regulation [EC]261/2004, but that they will not take any further action to enforce the law or sanction the airline.

The Commission has initiated infringement proceedings¹³ against the United Kingdom on the basis of Articles 16(1) and 16(2) with a background of Article 12 of the Treaty.¹⁴ The Air Transport Users Council (AUC), the designated complaints handling body, prioritises complaints of UK citizens and/or flights contracted on UK territory.

¹² Recital 20 and Article 14 of Regulation [EC]261/2004

¹³ Case 2322/2006

¹⁴ Article 12: "*Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. ...*"

In the meantime, because progress through the enforcement authorities can be slow, the first cases of private legal actions have been launched.

6.1 Structure of National Enforcement Bodies

In the majority of Member States, the organisation responsible for complaint handling and enforcement of the Regulation is the Civil Aviation Authority (CAA).

There are significant differences in the enforcement process between Member States. The most effective appear to be Denmark and Belgium.

There is substantial variation in the level of resources that NEB have, and even some relatively well-resourced NEB considered that they did not have enough resources to handle the number of complaints that they were receiving. In some Member States, the NEB does not appear to investigate complaints in detail.

6.2 Independence of National Enforcement Bodies

In almost all cases, NEB state that they are independent from the aviation industry. The powers NEB have to take action on individual complaints are variable. Although NEB may have the power to fine an airline, they rarely have the power to impose payment of compensation in individual cases.

6.3 Imposition of sanctions

Article 16 of Regulation [EC] 261/2004 requires that enforcement bodies have the obligation to impose effective, dissuasive and proportionate sanctions. There is significant variation in the scale of the penalties that NEB can impose.

There is an important legal difference between the types of sanctions that can be applied in Member States. In the majority of Member States, any sanction issued for non-compliance with the Regulation would be an administrative penalty, usually issued by the CAA and subject to appeal to a civil court. However, in Denmark, Belgium and the UK, penalties would be applied under criminal law and therefore a higher standard of proof would be necessary. In Belgium, the law also allows for the relevant airline staff to be imprisoned for a period of up to 1 year for non-compliance with the Regulation.

7. CONSEQUENCES OF THE ANALYSIS

After more than two years of application of the Regulation, progress has been made but substantial improvement is necessary if more consistent application of the rules by airlines and more consistent enforcement of the rules by the Member States are to be achieved. In contrast with the past, stranded passengers now have specific rights, but too often they are in a weak position compared to the airlines.

To address the issues for improvement, the Commission considers work in a number of areas to be necessary.

7.1 Improve enforcement

Enforcement of the Regulation can be improved in a number of ways.

The Commission needs to enhance cooperation with and between the NEB in order to ensure an appropriate level of service to the public and better cooperation as a network. At a later stage, cooperation between the NEB might take the form of a 'Code of Good Practice' dealing with issues not addressed by the Regulation such as: the timescale for complaint submission by passengers and the replies delivered by NEB, the conditions under which complaints can be referred between NEB and the languages acceptable for referred complaints as well as the improvement of the quality of statistics.

The Commission has the option of bringing infringement proceedings against Member States where enforcement appears to be ineffective, which may lead to distortions of competition between airlines.

7.2 Clarify interpretation of those aspects of the Regulation which are unclear

The Commission will seek to clarify those aspects of the Regulation which are perceived as unclear, particularly where these have created difficulties with enforcement. In particular, the Commission intends to issue a Communication setting out its interpretation of the Regulation after consulting with the NEB. It is expected that such Communication, while not being legally binding, will carry significant weight with airlines, facilitate the enforcement process and also make it easier for consumers to understand their rights under the Regulation.

7.3 Establish clarity between delays and cancellations

At present, passengers, NEB and even airlines have difficulty differentiating between delays and cancellations and whether a delay of 24 hours, for example, is to be catalogued as a cancellation or as a long delay. There are situations where air carriers have 'postponed' flights for 48 hours (as a 'delay'), whereas, in reality, the flight was 'cancelled' because of technical problems, in which case they avoid potential claims for compensation from passengers.

It would be helpful to discuss with airlines and NEB more precise criteria for differentiating between delays and cancellations. It would also be useful to improve collection of data to ensure that the status of a flight is clearly recorded both for purposes of enforcement of passenger rights and for better monitoring of overall service quality in the industry.

7.4 Establish guidelines on 'Exceptional Circumstances'

Exceptional circumstances seem to provide a source of persistent dispute between passengers, airlines and NEB. Assessment of such claims for cancelled flights accounts for about 30% of all complaints and takes up more than 70% of the resources of national authorities. As it stands at present, the Regulation makes no provision for financial compensation for delays.

If a number of cases could be investigated in depth by NEB, this could provide guidance for the future, but the NEB are not in a position to make a detailed examination of most of the complaints they receive about 'exceptional circumstances'. It might be useful to enter into a more detailed discussion with the NEB and all interested parties. On the basis of such discussions, the Commission will consider whether to issue, in an appropriate form, broad guidelines at least for the interpretation of 'exceptional circumstances'.

7.5 Enhance the role of the NEB

Given developments in passenger rights for other modes of transport¹⁵, setting-up different NEB for different modes of transport once passenger rights have been created in all areas might be inefficient. The concept of ECC¹⁷ (European Consumer Centres), which are already dealing with cross-border (international nature of transport) complaints, could be an approach to help NEB in their day-to-day tasks. In addition, complaints could be centralised in this type of structure thereby ensuring that complaints handling is harmonised with no conflict of interest. It would also facilitate statistical follow up and monitoring (centralised), emphasising once more the horizontal and harmonised approach to passenger rights for each mode of transport.

If there is a breach of the new Regulation, the ECC concerned could then forward the complaint to the appropriate Civil Aviation Authority or to a national ministry for legal action against the air carrier.

8. OPERATIONAL CONCLUSIONS

There are two main reasons why there have been difficulties with the Regulation in practice:

- imprecise text in the Regulation in certain areas,
- ineffective enforcement in some Member States.

– Clarification of provisions

The Commission will continue discussions with NEB and all interested parties on the day-to-day application of concepts that are currently the cause of dispute, such 'exceptional circumstances' and the right to re-routing.

– Clearer Recording of Cancellations and Delays

The Commission will discuss with the industry and the NEB how better information could be collected on the status of flights (completed on time, delayed or cancelled) and relayed to the NEB in order to improve assessment of the rights of passengers making claims under the Regulation and to improve data on the overall quality of service in the industry.

– Limited Enforcement by NEB

The Commission will intensify cooperation with the NEB in order to address shortcomings. The objective remains to establish proactive, harmonised enforcement regimes resulting in effective outcomes for consumers throughout the EU.

Over the next **six months**¹⁸, the Commission will organise as many meetings as may be needed with the NEB to tighten up and strengthen enforcement procedures.

¹⁵ Taken up in the Communication from the Commission to the European Parliament and the Council: 'Strengthening passenger rights within the European Union' - COM(2005)46 of 16 February 2005.

¹⁷ http://ec.europa.eu/consumers/redress/ecc_network/index_en.htm (DGSANCO)

¹⁸ starting from the day of the adoption of this Communication

The Commission will consider **intensifying infringement proceedings** against Member States where, after that six month period, enforcement regimes do not appear to be effective and dissuasive as required by Regulation [EC]261/2004.

– **Full application of Regulation [EC]261/2004**

During the coming six months, the Commission will examine, at airports, whether airlines provide passengers with the information, assistance and compensation as required by Regulation [EC]261/2004. In particular, the Commission will check whether the information boards at check-in and the written notices in cases of flight disruptions are available and handed out.

– **Better information towards passengers**

In order to improve the information available on air passenger rights, the Commission will provide updated information material to the public before the summer of 2007.

– **Possible amendment of Regulation [EC]261/2004**

The Commission considers that a period of stability is required in the current system to allow NEB, airlines, Member States and the Commission itself to develop practical, consistent and understandable application of the Regulation that will secure the rights of airline passengers.

It will work with all interested parties to improve clarity, implementation and enforcement. Only if these contacts fail to reach a satisfactory result will the Commission consider an amendment to Regulation [EC]261/2004 to ensure that passengers' rights are fully respected.
