

EUROPEAN UNION AIR PASSENGER RIGHTS COMPENSATION SCHEME

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Abstract

Purpose – In the air transport denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers and there is a need for ensuring a high level of protection for passengers and adequate compensation scheme in line with requirements of consumer protection in general.

Design – After the introduction, sources of law are elaborated, with relevant research on challenges in implementing passenger rights and further development of legal framework. The outcomes are presented in the conclusion.

Methodology – The legal research analysis is made on the basis of main sources of international and regional law, as well as analysis of obligation of air carriers, role of a National Enforcement Body (NEB) or an Alternative Dispute Resolution (ADR) scheme.

Approach – The author implemented a legal evaluation of the sources of law and a survey of legal practice.

Findings – Legal response in proper compensation scheme in order to regain consumer right of air passengers. Of utmost importance is that passengers should be informed of their rights so that they can effectively exercise those.

Originality of research – The paper provides the methodological framework original defined in stricter enforcement of existing law and sanctioning policy as an incentive to compliance with consumer rights of air passengers based on fair implementing practice of a number of air carrier.

Keywords air passenger rights, European Union, denied boarding, cancellation, long delays

INTRODUCTION

Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers. Action by the European Union in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers in line with requirements of consumer protection in general. The European Union is raising standards of protection both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market. In that sense, air passenger rights involve specific laws that support travelers and advocate for protection and compensation when people face flight disruptions.

The paper elaborates the main sources of international and regional law, challenges in implementing consumer right in air transport and further development of legal framework creating legal certainty.

1. CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR (THE MONTREAL CONVENTION), 1999

The Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), agreed at Montreal on 28 May 1999, aims to introduce uniform legal rules to govern air carrier liability in the event of damage caused to passengers, baggage or goods during international journeys. The Montreal Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

For the purposes of Montreal Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention (Montreal Convention, Article 1).

The Montreal Convention introduces comprehensive legal principles and rules the most important of which are the principle of an air carrier's unlimited civil liability in the event of bodily injury, this splits into two tiers, first tier of strict carrier limited liability for damages and in excess of that amount, a second tier of liability based on the presumed fault of the carrier, which the latter may avoid only by proving that it was not at fault. It implements the principle of making advance payments, in the event of bodily injury, to enable victims or the persons entitled to compensation to cover their immediate economic needs and the possibility for the victim, or the persons entitled to compensation, to bring suits before the courts in the passenger's principal place of residence. Moreover, it stipulates an increase in the air carrier's liability limits in the event of delay, and in the event of damage caused to baggage (delay, loss or damage, modernisation of transport documents (electronic airway bills and tickets), clarification of the rules on the respective liability of the contracting carrier and the actual carrier, as well as generalised institution of the obligation for air carriers to maintain adequate insurance.

In the Montreal Convention there is the so-called regional clause allowing economic integration organisation to accede to a legal instrument. In that sense, according to the Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) the European Union is a contracting party to the Montreal Convention (Council Decision 2001/539).

2. REGULATION (EC) No 261/2004 OF THE EUROPEAN PARLIAMENT AND 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 DELAYS OF FLIGHT, AND REPEALING REGULATION (EEC) No 251/91

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 (EEC) No 295/91 (Regulation 261/2004) entered into force on 17 February 2005. The Regulation No 261/2004 sets a minimum level of quality standards for passenger protection, adding an important citizen's dimension to the liberalisation of the aviation market.

The Regulation 261/2004 establishes minimum rights for passengers when they are denied boarding against their will, their flight is cancelled and their flight is delayed (Regulation 261/2004, Art 1). It shall apply to passengers departing from an airport located in the territory of a Member State to which the Treaty applies and to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier (Regulation, 261/2004, Art.3).

Thus it limits its scope to passengers departing from an airport located in the territory of a Member State to which the Treaty applies and to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies if the operating air carrier is an European Union carrier.

Regulation 261/2004 also applies to flights within a package tour, except where a package tour is cancelled for reasons other than cancellation of the flight. In addition, Directive (EU) 2015/2302 on package travel and linked travel arrangements, amending Regulation (EC) 2006/2004 and Directive 2011/83/EU of the European Parliament and the Council and repealing Council Directive 90/314/EEC does not affect the rights of travellers under the Regulation (EC) No 261/2004, but specifies that compensation or price reduction granted under passenger rights regulations and under that Directive shall be deducted from each other in order to avoid overcompensation (Directive 2015/2032).

2.1. Denied boarding

Denied boarding means a refusal to carry passengers on a flight, although they have presented themselves for boarding, except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation (Regulation 261/2004, Art.2j). When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted, such assistance being additional to the benefits mentioned in this paragraph. If an insufficient

number of volunteers comes forward to allow the remaining passengers with reservations to board the flight, the operating air carrier may then deny boarding to passengers against their will (Regulation 261/2004, Art.4).

Ticket is a valid document giving entitlement to transport, or something equivalent in paperless form, including electronic form, issued or authorised by the air carrier or its authorised agent, while the reservation means the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator. A person who has presented himself for boarding and responds positively to the air carrier's call for passengers prepared to surrender their reservation in exchange for benefits is defined as volunteer.

2.2. Cancellation

Cancellation means the non-operation of a flight which was previously planned and on which at least one place was reserved (Regulation 261/2004, Art.21)) and does not require an express decision of cancellation by the carrier. Cancellation occurs in principle where the planning of the original flight is abandoned and passengers of that flight join passengers on a flight that was also planned, but independently of the original flight.

In case of cancellation of a flight, the passengers concerned shall be offered assistance by the operating air carrier and in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight and have the right to compensation by the operating air carrier, unless they are informed of the cancellation at least two weeks before the scheduled time of departure or they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival or they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival (Regulation 261/2004, Art.5).

Cancellation also covers the case of an aircraft taking off but, for whatever reason, being subsequently forced to return to the airport of departure where the passengers of the said aircraft are transferred onto other flights.

2.3. Delay

When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure for two hours or more in the case of flights of 1500 kilometres or less, or for three hours or more in the case of all intra-Community flights of more than 1500 kilometres and of all other flights between 1500 and 3500 kilometres, or for four hours or more in the case of all flights not falling under above mentioned condition (Regulation 261/2004, Art.5).

Distinction between cancellation and delay is a challenging issue that should be assessed on a case-by-case basis. In spite of the fact that a flight may generally tend to be considered as cancelled when its flight number changes, this might not always be a determinant criterion. For instance, if a flight may have such a long delay that it departs the day after it was scheduled and may therefore be given an annotated flight number to distinguish it from the flight of the same number on that subsequent day and therefore it could still be considered as a delayed flight and not a cancellation.

2.4. Right to compensation

Passengers shall receive compensation amounting to: EUR 250 for all flights of 1500 kilometres or less, EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 kilometres or EUR 600 for all flights not falling under above mentioned conditions (Regulation 261/2004, Art.7). The same compensation amount is valid for an offered alternative flight.

2.5. Right to care

Passengers shall be offered free of charge meals and refreshments in a reasonable relation to the waiting time, hotel accommodation in cases where a stay of one or more nights becomes necessary, or where a stay additional to that intended by the passenger becomes necessary, as well as transport between the airport and place of accommodation (Regulation 261/2004, Art.9).

2.6. Upgrading and downgrading

If an operating air carrier places a passenger in a class higher than that for which the ticket was purchased, it may not request any supplementary payment. On the other hand, If an operating air carrier places a passenger in a class lower than that for which the ticket was purchased, it shall within seven days, reimburse 30 % of the price of the ticket for all flights of 1500 kilometres or less, or 50 % of the price of the ticket for all intra-Community flights of more than 1500 kilometres, except flights between the European territory of the Member States and the French overseas departments, and for all other flights between 1500 and 3500 kilometres, or 75 % of the price of the ticket for all flights not falling under above mentioned conditions including flights between the European territory of the Member States and the French overseas departments (Regulation 261/2004, Art.10).

2.7. Obligation to inform passengers of their rights

The operating air carrier shall ensure that at check-in a clearly legible notice containing the following text is displayed in a manner clearly visible to passengers: "If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance". An operating air carrier denying boarding or cancelling a flight shall provide each passenger affected with a written notice setting out the rules for compensation and assistance in line with this Regulation. It shall also provide each

passenger affected by a delay of at least two hours with an equivalent notice. The contact details of the national designated body shall also be given to the passenger in written form (Regulation 261/2004, Art.14).

Operating air carrier is defined as an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger, while a community carrier means an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (Regulation 2407/92).

The general right to information is including the text of a notice which must be displayed at check-in in a manner clearly visible to passengers. This notice should be displayed physically or electronically in as many relevant languages as possible. In the case that an air carrier gives partial, misleading or wrong information to passengers on their rights, either individually or on a general basis through media advertisements or publications on its website, this should be considered as an infringement of the Regulation (EC) 261/2004 and may also constitute an unfair or misleading commercial business-to-consumer practice under Directive 2005/29/EC of the European Parliament and of the Council of 15 May 2005 (Directive 2005/29).

3. CHALLENGES IN IMPLEMENTING PASSANGER RIGHT

3.1. Obligations of air carriers

In the research, the author made the analysis of implementing practice of a number of air carrier as a response of their obligation on passangers rights and the implementation proof to be appropriate. Some exemples are given below.

Air carrier Lufthansa on its website is pointing out its responsibility if the flight has been cancelled or significantly delayed or if passangers have been denied boarding on a flight for which they have a confirmed reservation, according to the rights defined in Regulation (EC) No 261/2004. Moreover, there is a clear indication to fill a justified claim against Lufthansa on line or via postal address (Lufthansa, 2020).

The air carrier Air France has on its website items concerning passengers righths required by Regulation 261/2004 of the European Parliament and the Council of the European Union as expressly mentioned in a subtile followed by the short explanation of rights enacted by the European Union (Air France, 2020).

Also so called low cost air carrier Ryanair on its website is providing information on passengers care entitlements, as well as instructions on how to claim travel expenses and compensation. The elaboration is made if the flight has been delayed or cancelled and passenger may choose to be re-routed as soon as possible, that he/she is entitled to the following meals and refreshments that are reasonable in relation to the waiting time, two telephone calls or e-mails, reasonable hotel accommodation where a stay of one or more nights becomes necessary and transport that is reasonable between the airport and place

of accommodation (hotel or other). After a brief overview of rights there is a user friendly Applying for Compensation form for submitting expenses for travel/transport/or refreshments or a compensation claim following a flight cancellation or delay. Ryanair urges customers with valid Regulation (EC) 261/2004 compensation claims to submit their claims directly to Ryanair and avoid “claims chaser” firms who can deduct over 40% of a €250 claim in fees. Customers with valid claims who claim directly from Ryanair will receive 100% compensation entitlement without the deduction of these excessive “claims chaser” fees (Ryanair, 2020).

On the webpages of the air carrier Croatia Airlines there are Information to Passengers concerning the Regulation 261/2004 and applicable rules of the Law on Obligations and Proprietary Rights in Aviation (Law on Aviation, 2013). The air carrier is calling the passengers to contact the air carrier directly via website. Claimants must supply their name and contact details, the names of other passengers being claimed for and their contact details, correct bank details, booking reference and details of the cancelled flight (Croatia Airlines, 2020).

3.2. Complaints to National Enforcement Bodies (NEB)

In order to ensure that complaint procedures are dealt with efficiently and to provide a secure legal environment for air carriers and other businesses potentially involved, passengers are advised to make complaints with the National Enforcement Body (NEB) of the country where the incident took place, within reasonable time frame, when they consider that an air carrier has infringed their rights.

Passengers' complaints to a national enforcement body should be made only when they have first complained to the air carrier and disagree with the air carrier's reply. In the case of the Republic of Croatia, the national enforcement body is the Croatian Civil Aviation Agency (Law on Air Transport, 2014).

Croatian Civil Aviation Agency is an independent and non-profit legal entity that conducts activities in the interest of the Republic of Croatia. Its jurisdiction includes, among others, air traffic safety related tasks, especially certification, oversight, and supervision with the objective of ensuring continuing compliance with the requirements of the air transportation. It is the competent national enforcement body for air passengers' rights implementing the *acquis communautaire* in the situation of long delay, cancelled flight, denied boarding, downgrading and infringement of the rights of disabled persons and persons with reduced mobility. In any case, passenger first has to contact the air carrier or the airport and if the passenger is not satisfied with the response or has not received any response within 30 days from the appeal, he/she may file complaint with the Croatian Civil Aviation Agency or other competent body of an EU Member State.

3.3. Alternative Dispute Resolution (ADR) Entities

Directive 2013/11/EU of the European Parliament and the of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from

sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an alternative dispute resolution (ADR) entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution (Directive 2013/11).

The aim of ADR is to offer a simple, fast and low-cost out-of-court solution to disputes between consumers and traders, provided that the air carrier is established in the European Union and participates in the ADR scheme. In addition, passengers' resident in the European Union can submit their contractual disputes with air carriers established in the European Union to ADR entities established under the ADR Directive.

Where air carriers are not obliged under national law to participate in procedures before ADR entities, it is desirable that they voluntarily commit to participate in relevant procedures and inform their customers thereof.

3.4. Claims chaser applications

The author made the analysis of a number of offers and implementing practice of website offering compensation scheme. Some cases are presented below.

The application AirHelp is pointing out its commitment to serve the travel community and air passengers at large with crucial, up-to-date information regarding travelers' rights. In its mission, they refer to help novice and expert travelers alike to understand decisive details on flight delays, flight cancellations, denied boarding, baggage problems, and missed connections. It is of utmost importance that this service includes price list with service fee. If AirHelp is successful with providing justice as a service and the client receives flight compensation, AirHelp is entitled to its service fee, which will be deducted from flight compensation. For all claims, the service fee is 35% of the received flight compensation, including applicable VAT. The legal action fee is only charged, if legal action was necessary to provide successful justice as a service and will be deducted from your flight compensation in addition to the service fee. The legal action fee is 15% of the received flight compensation, including applicable VAT (AirHelp, 2020).

ClaimCompass is a platform, which helps passengers to file a claim against air carrier speculating on passengers' lack of awareness and legal knowledge on disrupted flights. Submitting a claim is free because they work on a no win - no fee but if the claim is successful, ClaimCompass has a 25% commission (ClaimsCompass, 2020).

A platform AirClaim is pointing out that according to the EU Regulations 261/2004 all passengers have the right for compensation during some special circumstances AirClaim states that in a case passengers win a case their fee will be deducted from the compensated claim (AirClaim, 2020).

4. FUTHER DEVELOPMENT OF LEGAL FRAMEWORK

In the past the Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport (Regulation 295/91) created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delay (Luttenberger, 2004).

The present legal instrument covering disruption compensation and expense claim is 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 (EEC) No 295/91. While ensuring a high level of passenger protection, Regulation (EC) No 261/2004 is at the same time a constant source of many discussions, doubts, disputes and arguments that create legal uncertainty.

Public consultation on the possible revision of Regulation (EC) 261/2004 on passenger rights in the period 19 December 2011 – 11 March 2012 summarized the stakeholder views. In brief, the representatives of the operators of air services were not supportive of the proposed amendments, particularly where it was clear from the wording of the question that these were likely to incur additional costs for the industry. In contrast, operators did express support for amendments to limit their liability to pay compensation and clarify extraordinary circumstances. Consumer associations and public authorities agreed in most cases that change was desirable and expressed support for many of the options proposed in the consultation, where they provided for additional passenger redress, or entailed more stringent enforcement activities by the National Enforcement Bodies (NEB). Airports expressed particularly strong opposition towards the options that they be given responsibilities under the Regulation, or that airlines be explicitly given the right to claim compliance costs from responsible third parties (Consultation, 2012).

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 is comprehensive. Concisely, in the proposal some of the definition are replaced (e.i. community air carrier, organizer) and some definition are added (e.i. cancellation, connecting flight). The scope of the legal instrument concerning passengers is amended, amendment is made on cancellation, the wording dealing with long delays is replaced with the elaboration of missed flight, the definition dealing with the right to compensation is replaced as well as wording dealing with the right to reimbursement or re-routing. On right to care and person with reduced mobility there are improvements, the diction on obligation to inform passengers is replaced, while the wording covering infringement is replaced with the enforcement issues and passenger claims and complaints (Proposal, 2013).

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 of the European Parliament and of the Council (2016/C 214/04) aims to explain more clearly a number of provisions contained in the Regulation, in particular in the light of the court's case-law, so that the current rules can be more effectively and consistently enforced. These guidelines are intended to tackle the issues most frequently raised by national enforcement bodies, passengers and their associations, the European Parliament and industry representatives (Guidelines, 2016).

CONCLUSION

Regulation (EC) 261/2004 is a source of European Union law that favors the passenger and in comparison to other laws on passenger rights is one of the most comprehensive. It holds airlines financially accountable when air travel takes an unexpected turn, so long as the disruption was not caused by circumstances outside of the airline's control. Although ensuring a high level of passenger protection, it is at the same time a constant source of many discussions, doubts, disputes and arguments that create legal uncertainty that undermines the rights of passengers in air transport.

As a response the proposed new legislation on passenger rights aims to clarify a number of issues (e.g. delays, rights in case of missed connection), regulates a functional separation of general enforcement and individual complaint handling where the latter may be taken charge of by alternative dispute resolution bodies (ADR). There is an option for the recourse of airlines against third parties responsible for disruptions, additionally setting up of contingency plans among airport users.

The author is advocating for stricter enforcement of existing law and the sanctioning policy to comply with consumer rights of air passengers. Fair implementing practice of a number of air carrier on passengers care entitlements is a solid ground for improving complaint procedures and certainty for passengers in the aviation sector. In any case, passengers should present claims directly to the air carrier, avoiding the deductions from claims chaser application.

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