

Opinion of the European Economic and Social Committee on the 'Functioning and application of established rights of people travelling by air'

(2012/C 24/28)

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On 1 June 2011 the European Parliament decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Functioning and application of established rights of people travelling by air (exploratory opinion).

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 7 October 2011.

At its 475th plenary session, held on 26 and 27 October 2011 (meeting of 27 October), the European Economic and Social Committee adopted the following opinion by 157 votes to one with two abstentions.

1. Conclusions and recommendations

1.1 The EESC considers that there is a need to undertake a legislative reform of Regulation No 261/2004 in order to consolidate all air passenger rights into a single text. This reform should firstly, incorporate the body of case-law laid down by the Court of Justice of the European Union and secondly, attempt to define and identify the practical scope of what is understood by the term 'extraordinary circumstance', determine the precise extent of the right to assistance, and address all other aspects mentioned in the present opinion in order to guarantee a high level of protection for passengers.

1.2 Information to passengers must be improved, so they are clearly notified of their rights. This should be extended to boarding areas and, in any case, greater efforts should be made to publicise passenger rights among other organised civil society actors such as consumers' organisations etc.

1.3 Airlines bear the sole and exclusive responsibility for compliance with the obligations under Article 13 of Regulation 261/2004 with regard to passengers. This means that they may, on occasions, seek compensation from third parties, unconnected with the travel contract, who have caused delay or cancellation. Rapid and effective mechanisms should be put in place for these compensation proceedings.

1.4 The EESC is of the view that transparency must be increased by means of effective instruments for exchanging information, including administrative and judicial decisions, together with publication of any sanctions that are applied and the degree of compliance with Regulation 261/2004 by operators. Moreover, harmonised, accessible and efficient procedures must be introduced, subject to specific deadlines and with binding decisions.

1.5 Regarding persons with reduced mobility (PRM), there are problems with the satisfactory implementation of Regulation 1107/2006. The EESC calls on the Commission to cooperate with the enforcement bodies and the relevant representative

organisations, including organisations of PRM, in drawing up guidelines to clarify the definitions contained in this regulation, and to improve the implementation thereof. In the event that the guidelines fail to resolve existing problems concerning the lack of effective application of PRM rights, the EESC urges that an immediate revision of Regulation 1107/2006 be undertaken.

1.6 As part of the process of revising Regulation 261/2004, the EESC considers that the elements forming the final price of air transport services should be specified and defined.

2. Introduction

2.1 The rules governing air transport are complex and divergent. The effects of this state of affairs are felt most strongly in the rules governing carriers' liability towards passengers.

2.2 The current growth of air transport has had a negative impact on quality. This deterioration is due to a number of causes which are detailed in communication COM(2011) 174 final.

2.3 Passenger transport is moreover a key instrument for implementing and underpinning the European Union principles of free movement of goods and of EU citizens.

2.4 Since publishing the communication, the European Commission has been carrying out an assessment of the impact of Regulation 261/2004, to improve the protection of air passenger rights and to keep pace with evolving socio-economic realities.

The EESC is aware that implementation of *Single European Sky II* throws up a wide range of issues which it has addressed in another opinion ⁽¹⁾.

⁽¹⁾ OJ C 376, 22.12.2011, p. 38.

3. The EP referral to the EESC

3.1 The Chairman of the European Parliament's Committee on Transport and Tourism has addressed the present referral to the EESC President, with the aim of assessing whether the application of the current European rules ensures adequate protection of passenger rights, and of identifying areas in which new measures may be considered necessary. The Parliament has also asked for a reply to the specific questions contained in its letter.

3.2 **Question 1:** What are the main deficiencies identified in the application of the existing rules? What measures could be recommended to tackle those issues, especially whether it is necessary to take some legislative initiative?

3.2.1 Airlines represent a strongly liberalised and highly competitive sector, that therefore requires an EU-level regulatory framework capable of ensuring the balanced development of the internal market, guaranteeing airlines' competitiveness, fostering social cohesion and sustainability, monitoring the transparency of airlines' commercial practices and, in consequence, implementing a high level of users' rights.

3.2.2 The key benchmarks in terms of consumer protection policy are the right to protection of health and safety and of economic interests, compensation for loss, information, education and representation. It is crucial for any future amendment or revision of Regulation 261/2004 to take these into account in order to guarantee a high level of protection for passenger rights.

3.2.3 The legislator, aware of the particular nature of the sector, has established that airlines are entitled to seek redress when a loss incurred is due to a third party and the airline, as the party responsible for providing the service, has had to compensate the passenger for the loss. This option has not yet been explored by the airlines in circumstances where the third parties can be identified: these include airport authorities, air traffic control, ground-handling service providers, travel agents and tour operators.

3.2.4 Instances of extraordinary circumstances on account of natural causes, as set out below, are a separate question.

3.2.4.1 A series of cases has arisen in recent years where liability could not be established and which were declared to be 'extraordinary circumstances', such as the volcanic eruptions in Iceland, heavy snow in early 2010 and 2011, etc. They have generated a large number of incidents affecting EU airlines, with the ensuing economic cost and losses to users.

3.2.4.2 The scope, definition and identification of what is covered by the term 'extraordinary circumstance' is one of the areas of disagreement in interpreting the Regulation, since it entails obligations for airlines such as the right to receive assistance.

3.2.4.3 The Court of Justice of the European Union (CJEU) has pointed out that, in addressing the issue of extraordinary circumstances, the list drawn up by the Community legislator is purely indicative. This lack of precision gives rise to confusion and, crucially, legal uncertainty for both airlines and users.

3.2.4.4 It must be made clearer what is understood by an extraordinary circumstance as well how far certain of the airlines' obligations extend. This situation should be made uniform in the next amendment of the Regulation.

3.2.4.5 An alternative approach to the issue might be to draw up an open list by means of which the factors constituting an extraordinary circumstance could be detailed, whenever such problems are caused by events which, by their nature or origin, do not form part of the normal operation of the airline concerned and are not within the effective control of the airline.

3.2.5 Applications for preliminary rulings appearing in recent months before the CJEU suggest that it is now becoming necessary to update the rules.

3.2.5.1 Moreover, in its judgments the CJEU has clarified some important aspects, which should now be unarguable, in order to boost user confidence in the air transport sector and to increase legal certainty for airlines. A number of judgments by national courts also provide clarification, such as the recent judgment by the commercial tribunal of Namur which declared certain general conditions of a travel contract to constitute unfair terms.

3.2.6 The reasons for revising Regulation 261/2004

3.2.6.1 The Communication from the Commission (COM(2011) 174 final) makes a detailed and precise assessment of the application of this Regulation, which was a milestone in the protection of air transport users.

3.2.6.2 Developments in the sector in recent years make a revision of the Regulation necessary. A number of improvements that should be considered in any future modification of the current text are suggested below:

- Incorporating solutions contained in CJEU judgments into the future text.
- Defining the practical scope of the term 'extraordinary circumstance'.
- For certain exceptional cases, establishing the precise extent and limits of the right to assistance, defining how the legitimate rights of passengers may be safeguarded through alternative mechanisms, settling such cases 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 issues arising from missed connecting flights caused by delays to the initial flight provided by a point-to-point only operator.
- Regulating the obligation to provide care at connection points.
- Dealing with the right to compensation, including arrangements for regular updating of the current standardised and immediate compensatory measures, which date from 2004.
- 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.

3.3 **Second question:** On the side of passengers, are the information and services provided to passengers sufficient and adequate? If not, what can be done to improve them?

3.3.1 The EESC considers that information is a vital element in both decision-making and in demanding the rights that are granted to beneficiaries by the rules. The Regulation makes the airline responsible for providing information.

3.3.2 Although the right to information is apparently upheld, airlines do not always comply with the existing obligations.

3.3.3 The current text does not include an obligation for air carriers to inform passengers in the event of arrival at the final destination with a delay of three hours or more, as in the CJEU judgment in the *Sturgeon* case.

3.3.4 Quite apart from resolving inconsistencies and introducing some novelties, the Regulation should also extend the obligations under Article 14 to the boarding area, and not only the check-in area.

3.3.5 Efforts to publicise passengers' rights could be extended and shared with other actors in the chain, by means of cooperation with national airport authorities, consumers' organisations, travel agencies and tour operators, European Consumer Centres and the authorities responsible for enforcing the Regulation, in addition to the work already being carried out by the Commission.

3.4 **Third question:** On the side of industry, it might be valuable to assess proportionality of some current obligations, like the unlimited liability regarding the right to care under extraordinary circumstances beyond the carrier's control such as major natural disasters or extreme weather conditions.

3.4.1 The Regulation gives no role to any actor other than the airlines, as they are ultimately responsible for providing the service and subject to contractual obligations. There are however other actors who have an impact on airlines: some of them could contribute to improving service and others to notifying air transport users of their rights.

3.4.2 The first group includes airport managers, who are involved in circulating operational information from the airlines. They can provide advice and receive complaints in the absence of airline representatives and help, through their facilities, to provide assistance in situations of *force majeure* or extraordinary circumstances. They bear responsibilities concerning luggage logistics, and could use their own means to provide information in emergencies in order to prevent congestion or public order difficulties in their installations, etc.

3.4.3 Those in charge of air traffic control also have a key role. Their work is important in keeping to the slots allocated to airlines and traffic management, among other aspects.

3.4.4 The second group includes travel agencies and tour operators, who could assist in publicising passenger rights and circulating messages communicated to them by the airlines in the event of flight cancellations or rescheduling.

3.4.5 The possible role of ground-handling companies in terms of passenger protection should be highlighted. The Regulation allocates no role to these companies, but they should be legally involved in the area of passenger care. Their role could be incorporated either through the present Regulation or by revising Directive 96/67/EC on access to the ground-handling market at Community airports.

3.4.5.1 Ground-handling companies, who in practice provide passenger care, should be under an obligation to do so. In addition, the application of the Regulation should be improved by imposing an obligation on companies to have contingency plans and procedures in place – via the local agent – in the event of flight disruptions, that ensure that assistance and re-routing are offered. This could be done by means of an obligation to grant them the legal and financial capacity to provide this service, making them the company's 'voice' vis-à-vis airport managers and national authorities.

3.4.5.2 This measure would apply only in airports with annual passenger throughput of more than two million. Each carrier would have to have a representative, or arrange to be legally represented by its handling company. This assistant would have to be empowered to enter into financial and legal commitments on the airline's behalf insofar as necessary for the proper application of Articles 8 and 9 of the Regulation.

3.4.5.3 Airlines bear the sole and exclusive responsibility for compliance with the obligations under Article 13 of Regulation 261/2004 with regard to passengers. This means that they may, on occasions, seek compensation from third parties, unconnected with the travel contract, who have caused delay or cancellation. The compensation may consequently partly or even fully offset the financial cost to airlines resulting from such obligations.

3.4.5.4 Consideration should be given to an *actio in rem verso* introducing a European procedure to simplify, accelerate and reduce the costs of proceedings in cross-border cases concerning payments arising from actions for recovery. Another possible solution would be to include this type of claim within the scope of Regulation No 1896/2006⁽²⁾ creating a European order for payment procedure.

3.5 **Fourth question:** Concerning cooperation among national enforcement authorities, what can be done to ensure more uniform interpretation and application of passengers' rights throughout the European Union? Do you believe the CJEU rulings on Regulation 261/2004 should be incorporated into legislation?

3.5.1 The Communication from the Commission has much to say on the need to improve cooperation between the national authorities in order to ensure uniform interpretation and application of the Regulation.

3.5.2 The Commission has a crucial guiding and driving role to play. The legislator has chosen to use the legal instrument represented by a regulation, which is directly applicable in all EU Member States by any authority or private individual: there is no need for internal transposing legislation to make it fully effective. Similarly, private individuals may claim legal protection before national or Community courts.

3.5.3 Not all existing instruments to improve consumer and user protection in the field of air transport have been employed, such as Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

3.5.4 Regulation 2006/2004 could be extremely useful for aspects lying outside the strict scope of Regulation 261/2004, and in particular issues that concern the notification of unfair commercial practices or breach of contractual terms on the part of companies.

3.5.5 The problem with the applicability of the former instrument lies in the fragmented nature of consumer protection bodies concerning air passenger rights in the different Member States.

3.5.6 There should be no doubt regarding the last question as to whether CJEU case-law should be incorporated into Regulation 261/2004, since the Court guarantees compliance with law in interpreting and applying the Treaties and secondary law. Evidence of the lack of precision in certain aspects lies in the excessive number of preliminary rulings concerning Regulation 261/2004.

3.6 **Fifth question:** Are there any issues relating to interpretation of some definitions that should be addressed by the legislators (e.g. interpretation of a definition of persons with reduced mobility (PRM), or the right of an air carrier to deny PRM access on board for safety reasons)? Also is there a need to revisit who is responsible for the provision of PRM services, the airports, the airlines or the ground-handling agents?

3.6.1 Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air is a benchmark for social integration, aimed at ensuring that disabled persons or PRM have the right to travel by air in a similar way to other citizens. However, the regulation is not being applied as it should by airport managers or airlines in terms of the assistance to be rendered to such persons from the moment they enter the airport until the moment they leave. This may be due to the lack of a description of the full package of appropriate services, which should be provided to disabled persons and PRM, in Annex II. Furthermore, the lack of implementation of strict quality standards in the area is jeopardising equal treatment.

⁽²⁾ OJ L 399, 30.12.2006, p. 1.

3.6.2 It lacks, however, a sufficiently clear definition of what is understood by a disabled person or a person with reduced mobility, as its purpose is to provide broad assistance to the relevant groups requiring special assistance.

3.6.3 Given the possible difficulty of introducing a definition of disabled persons or PRM into legislation, the Commission should draw up defining guides to interpretation or guidelines in cooperation with the authorities responsible for enforcing the Regulation and with organisations representing stakeholders, including representative organisations of disabled people. Common European standards should be established to ensure that the security checks applicable to air passengers who use mobility equipment or medical devices are clear and comprehensive, and that the personal dignity of the passengers in question is respected.

3.6.3.1 These guides should cover areas such as the quality of service and information provided by ground-handling services and should seek consistency between Regulations 261/2004 and 1107/2006. In any case, in the event that the guidelines do not lead to the effective application of PRM rights, the EESC would advocate an immediate revision of Regulation 1107/2006.

3.6.4 The Regulation establishes that boarding may not be denied on the grounds of a passenger's disability or reduced mobility, but the following 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.

3.6.5 The preceding question is neither impartial nor neutral, since it is the air operators, on the basis of their risk analyses, who propose operational safety rules, which are generally accepted by the relevant aviation authority. The principle of non-discrimination is, in consequence, subject to the criteria of one of the parties. Airlines must be required to explain the denied boarding of disabled persons of PRM, including internal policies dealing with this issue, with reference to concrete evidence. This evidence should be scrutinised by the relevant aviation authority on the basis of the principle that it is up to the airline to demonstrate the concrete safety risk, and not the responsibility of disabled persons to demonstrate the opposite.

3.6.6 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.

3.6.7 One of the most controversial aspects is compensation for mobility equipment in the event of damage or loss. Under the present Montreal Convention this is not enough to offset the loss incurred by persons with reduced mobility, not to mention the moral damage which may be caused by the

resulting loss of autonomy. Hence, sufficient compensation levels must be guaranteed by the airline policies, and ultimately by revision of legislation.

3.7 **Sixth question:** Is there a need in the area of passenger rights for a more transparent system of charging for a ticket including the issue of add-on charges?

3.7.1 Regulation 1008/2008 on common rules for the operation of air services in the Community stipulates that the final price must be indicated to the users of air services.

3.7.2 The Community legislator's intention has not produced the expected results, leading to frustration on the part of users who are unable to compare the prices of these services.

3.7.3 Air transport users are currently faced with a series of commercial practices that often make it impossible to understand all the elements forming the final price of an air service.

3.7.4 The above-mentioned Regulation enshrines the principle that air carriers shall freely set fares and rates. The principle is unchallengeable, but it is not a reason for failing to provide information that can be compared.

3.7.5 An earlier EESC opinion on consumer information⁽³⁾ laid down a number of criteria for information to consumers and users: it must be reliable, topical, impartial, precise, relevant, succinct, comprehensible, clear, readable and easily accessible. Without prejudice to the freedom of all airlines in terms of commercial policy, it is crucial to know what elements and components make up their rates, together with the taxes, airport fees and other charges or duties that result in the final price.

3.7.6 In conclusion, the legislator should specify the components of the final cost of air transport prices and define them⁽⁴⁾. A further aspect for consideration is that the fact that at present, travel contracts are taken out some time before actually travelling. Operators should be obliged to maintain these prices for a period of at least three months.

3.7.7 As pointed out in communication COM(2011) 174 final, there is a lack of transparency concerning the information that consumers need, such as publication of data on issues such as punctuality, the number of flights affected by disruption, the passenger protection measures applied and the decisions made by the NEBs in application of the Regulation, together with any sanctions that may be applied to airlines for non-compliance.

⁽³⁾ OJ C 44, 11.2.2011, p. 62.

⁽⁴⁾ OJ C 128, 18.5.2010, p. 142.

3.8 *Towards enhanced implementation of out-of-court settlement of disputes*

3.8.1 The NEBs' out-of-court system of complaints should be based on uniform, effective and rapidly enforceable rules, guided by the recognised principles of out-of-court consumer complaints, using a common standard multilingual form, in keeping with the 'harmonised methodology' adopted by the Commission Recommendation of 12 May 2010. In any case, decisions must be taken within a reasonable period of time and must be binding upon the parties.

3.8.2 The deadlines for the procedure must be set uniformly, in the following cases at least:

- for the response that airlines must give to consumer complaints – a maximum of one month;
- for the enforcement bodies responsible for applying Regulation 261/2004 – two months to settle claims against airlines by consumers;
- for enforcement bodies to publish the content of the sanctions applied to airlines – two months from when they are determined.

3.8.3 All decisions in application of Regulation 261/2004 should be notified by the NEBs or Member State courts to the Commission, in the same way as under Regulation 1/2003, with the Commission being responsible for disseminating this information.

3.8.4 For collective disputes, which frequently occur in connection with issues arising from the provision of air services, collective legal protection must be ensured by representative consumer protection associations. The EESC would once again point to the need for legal proceedings of this kind to be regulated at Community level, and for a compensation fund to be set up to cover the costs of such proceedings for consumer organisations, as air passengers represent one of the groups with the greatest need for this type of protection.

3.8.5 Punitive civil sanctions may prove to be dissuasive, proportional and effective, combined with compensation for damage and loss incurred by groups of passengers as a result of non-compliance with consumer protection legislation, as pointed out by the EESC in previous opinions.

3.8.6 Any revision of Regulation 261/2004 must be carried out in such a way as to maintain the necessary consistency with other existing consumer protection laws, such as the Package Travel Directive and the Unfair Commercial Practices Directive.

Brussels, 27 October 2011.

The President
of the European Economic and Social Committee
Staffan NILSSON
