



THE EUROPEAN TRAVEL AGENTS'
AND TOUR OPERATORS' ASSOCIATIONS

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ECTAA position on revision of Regulation No 261/2004 and Regulation No 2027/97

Introduction

ECTAA regroups the national associations of travel agents and tour operators of 29 European countries, of which 25 are within the European Union, and represents 80.000 enterprises.

As a general comment, ECTAA supports measures that ensure a seamless travel experience for the customers they serve.

However, **ECTAA considers that to ensure a high level of passenger protection during travel disruptions, a fine balance needs to be found between passenger rights and the cost for airlines to provide these rights.** The more stringent and burdensome the obligations become on airlines, the more airlines will try to escape these obligations.

With this in mind, **ECTAA welcomes the proposed revision of Regulation No 261/2004, which ensures better enforcement of the passenger rights and application of the rights to a wider spectrum of travel disruptions**, such as missed connections, schedule changes and denied boarding where the passenger has not used the outward journey of his/her return trip, **while defining more clearly airlines' obligations in case of travel disruptions**, notably by better defining 'exceptional circumstances' as well as delimiting airlines' obligations to (i) provide care in exceptional circumstances and (ii) to provide compensation in case of long delay. This is also in line with the preferred policy option identified in the impact assessment study accompanying the Regulation proposal¹.

ECTAA also welcomes the proposed revision of Regulation No 2027/97 on air carrier liability in respect of mishandled baggage and **would welcome in particular more transparency with regard to baggage allowances.**

ECTAA regrets very much that the Commission did not use the opportunity of the revision of the air passenger rights legislation to **introduce clear and unequivocal rights for passengers who have been stranded because of an airline failure.** Despite an increasing number of airline failures in the last decade, today there is still no passenger protection.

¹ Commission Staff Working Document – Impact Assessment, SWD (2013) 62 final
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0062:FIN:EN:HTML>

Regulation No 261/2004

Delay compensation & exceptional circumstances

ECTAA regrets that the Commission is proposing to integrate the Sturgeon ruling into Regulation 261/2004. Contrary to the judgment, ECTAA feels that delays are significantly different to cancellations, both in their causes and in their impacts on passengers, and therefore the principle of equal treatment of cancellations and delays should not apply.

Delay compensation is THE biggest issue for the typical package travel operators, which use charter flights. Charter carriers are significantly more likely to suffer long delays than other types of airline operators (scheduled airlines, LCC, regional carriers). Delays can be disruptive for any airline, but whereas other airlines have the choice to cancel a flight and rebook the passengers onto a later flight, charter carriers cannot do so for a number of reasons:

- Tour operators for whom they operate flights have obligations towards their customers under the package travel Directive that extend beyond the air transport to a whole range of holiday services. The charter airline is obliged to transport the passengers to their destination, however late the delay.
- Charter airlines tend to operate on low frequency routes and regional airports. There are usually few alternative options to reroute the charter passengers on other carriers or modes of transport to their destination.
- Charter carriers operate on high load factors². This and the fact that charter passengers typically opt for re-routing rather than a refund, means that they cannot cancel a flight and rebook passengers onto the next flight.
- Charter airlines have more difficulties to recover quickly from operational delays, as they typically have diffuse, non-uniform operations, which means they have less flexibility than other airlines to replace an aircraft and reallocate the crew that can operate that type of aircraft.

Thus, where other carriers have the choice to cancel flights to mitigate the impact of a delay on the subsequent flights scheduled by that aircraft, charter airlines are forced to endure long delays not only for the immediately affected flight but also the subsequent flights scheduled by that aircraft.

Delay compensation represents a very significant cost for airlines. As indicated in the impact assessment study³, assuming a 100% claim rate for compensations, the payment of delay compensations is estimated to be of 1115,5 million euros in incremental economic cost on airlines of Regulation 261/2004. This represents 44% of the total incremental cost. As charter airlines are more prone to reactionary delays than other carriers, they will carry a proportionally higher burden of this cost. This will translate directly into higher prices and the cutting of marginal services, to the detriment of customers, as charter products, i.e. the typical charter holiday packages, offer overall a high level of protection for customers and good value for money.

For this reason, ECTAA welcomes the Commission's proposal to increase the trigger time for delay compensation and to link the compensation amount to the distance of the flight.

² See table 25 'load factor by carrier and route' on page 86 of the impact assessment study

³ See table 40 'incremental economic cost on airlines of Regulation 261/2004 on page 102 of impact assessment study

However, ECTAA does not understand why the Commission has introduced different categories of flight distances triggering compensation in case of delays (proposed article 6§2) and cancellations (article 7§1). Moreover, the categories introduced do not correspond with those used in the impact assessment study.

With this in mind, **ECTAA would strongly welcome the trigger points of 5, 9 and 12 hours for the three categories of flight distances used for cancellation compensation, which are also those reviewed in the impact assessment study**, notably:

- (a) five hours or more after the scheduled time of arrival for all journeys of 1500 km or less;
- (b) nine hours or more after the scheduled time of arrival for all intra-Community journeys of more than 1500 km and for all other journeys to/from third countries between 1500 and 3500 km;
- (c) twelve hours or more after the scheduled time of arrival for journeys to/from third countries of 3500 km or more.

Closely related to the issue of delay compensation is the possibility to invoke extraordinary circumstances to waive compensation. ECTAA welcomes the Commission's proposal that extraordinary circumstances can be invoked in so far as they affect the flight concerned or the previous flight operated by the same aircraft, taking into account that a flight delay (or cancellation) resulting from exceptional circumstances has an impact on the flight programme of that particular aircraft. These so-called reactionary delays are very problematic, as they represent 45,4% of all delays⁴.

Given the fact that charter carriers frequently operate on average three rotations a day, it would be **necessary to extend the possibility to invoke exceptional circumstances to the actual flight and the two previous flights operated by that aircraft** to effectively cover reactionary delays due to exceptional circumstances.

Passenger claims

The Regulation proposal provides a new wording both in the preamble and the article 3 which will entitle passengers the choice of presenting claims under Regulation 261/2004 or under the Package Travel Directive (PTD)⁵, but they may not claim under both for the same rights. The preamble notes that passengers should not be concerned about how airlines and tour operators allocate such claims between themselves.

ECTAA agrees that passengers should not be entitled to make double claims. However **ECTAA would like to stress that the obligations under Regulation 261/2004 must remain with the airlines** (with the exception of the obligation to offer refund, where such right arises under the PTD, in accordance with the current article 8(2) of Regulation 261/2004). **The Regulation 261/2004 and the PTD are two separate legal instruments.** The rights deriving from these two legal instruments are similar but not the same:

- The circumstances triggering the rights under the two legislations are different. By way of an example, Regulation 261/2004 foresees a right to refund in case of a delay or schedule change of more than 5 hours after scheduled departure, whereas the Directive 90/314/ECC only grants such a right if there is a significant change to the contract terms, including change to flight schedule. However, whether a change is considered 'significant' depends on the circumstances of the journey (purpose, length, etc.).

⁴ See table annex 2b 'breakdown of delays by cause' on page 68 of the impact assessment study

⁵ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0314:en:HTML>

- Moreover, the objectives of the rights granted under the two legislation differ: Whereas Regulation 261/2004 should be seen to offer standardized and immediate measures to reduce the trouble and inconvenience caused by the passengers facing a travel disruption (based on case law C-344/04), Directive 90/314/EEC offers assistance and compensatory measures, where applicable, based on the individual damage caused to the traveler, to be assessed on a case-by-case basis. For example, if a flight is delayed by 5 hours, the passengers would be entitled to the standardized compensation of 600€ from the airline for the inconvenience caused by the delay and to compensation from the tour operator for damages (loss of vacation time, services not used, etc.) which are assessed on an individual basis.

Thus, while ECTAA agrees that customers can present a claim for assistance and compensation under Regulation 261/2004 and under the package travel Directive, **it should be clear that customers cannot address a 261/2004 claim to the tour operator or vice-versa a PTD claim to the airline.**

With this in mind, ECTAA strongly calls for the following amendments:

Preamble 6:

Regulation (EC) No 261/2004 also applies to passengers that have booked their air transport as part of a package travel. However, it should be clarified that passengers may not cumulate corresponding rights, in particular under both this Regulation and Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. The passengers should be able to choose under which law they introduce their claims, but should not have the right to cumulate compensation for the same problem under both legal acts. ~~Passengers should not be concerned about how air carriers and tour operators allocate such claims between them.~~

Article 3 § 6 regarding scope:

This Regulation shall also apply to passengers transported according to package travel contracts but shall not affect the rights of passengers under Council Directive 90/314/EEC. The passenger shall be entitled to present claims under this Regulation **to the airline** and under Council Directive 90/314/EEC **to the tour operator**, but may not in relation to the same facts cumulate rights under both legal acts if the rights safeguard the same interest or have the same objective. This Regulation shall not apply in cases where a package tour is cancelled or delayed for reasons other than cancellation or delay of the flight.

Schedule changes

ECTAA agrees with the proposed Article 6 § 3 to bring schedule changes into the scope of the Regulation 261/2004, granting passengers similar rights as in case of a delay. No compensation becomes due where the passenger is informed of the schedule change more than 15 days in advance of the originally scheduled time of departure.

It should be noted that when airlines sell only a few seats on certain flights, they will try to consolidate them, i.e. cancel a service and transfer the passengers onto the other flight. This will avoid flying out two half empty planes. Often these consolidations are done up to 10 days before departure. Thus, **for economic but also environmental reasons, ECTAA considers that schedule changes due to consolidation of flights should be allowed up to 10 days before flight departure without triggering any compensation**, instead of the currently proposed 15 days.

Schedule changes should also include changes where the flight time has been brought forward.

Denied boarding where the passenger has not used his outward journey

ECTAA very much welcomes the new paragraph 4 of Article 4 which extends the rights granted in case of denied boarding due to overbooking (care, assistance and compensation) to passengers who are denied boarding on grounds that the passenger has not taken the outbound journey of his/her round trip or did not pay an additional charge for this purpose (so-called 'no-show' of the passenger).

ECTAA would support an extension of this right to passengers denied boarding on the grounds that they did not use all the legs of a multi-coupon ticket in sequential order. Today airlines oblige passengers to accept the terms and conditions of carriage, which stipulate that the passenger must use all coupons of a multi-coupon ticket in sequential order. They also prohibit travel agents / intermediaries from selling customers multi-coupon tickets but with the aim of only using certain segments of the ticket. However, often a multi-coupon ticket, for example Frankfurt – London – New York, is cheaper than just the segment London – New York. If the customer decides to use only some segments of a ticket, then the airlines reserve the right to invoice the travel agent the difference between the fare applicable to the multi-coupon ticket and the more expensive fare applicable to the actual segments used by the passenger, or to deny the passenger boarding unless he pays the fare difference.

It should be noted that this is not in line with Article 23§2 of Regulation 1008/2008, which stipulates that air fares must be granted to the public without any discrimination based on the nationality or the place of residence of the customer or on the place of establishment of the air carrier's agent or other ticket seller within the Community. Today a resident in London cannot buy the ticket Frankfurt – London – New York and only use the London – New York segment, otherwise he risks being denied boarding or being required to pay the difference in fare.

Thus, ECTAA would welcome if airlines would be discouraged from applying such unfair conditions on passengers by bringing such types of denied boarding into the scope of Regulation 261/2004 and prohibiting airlines to raise an additional charge for this purpose, in line with the new Article 4§4. Moreover, travel agents / intermediaries should not be required to pay a penalty or the fare difference when passengers decide to use only certain segments of a multi-coupon ticket, as this is not under their control.

Information on travel disruptions

ECTAA supports the provision requiring intermediaries to either provide airlines with the passengers' contact details or otherwise put in place a system to transmit information on travel disruptions from the airline to the passenger, so that the passenger is informed of travel disruptions before departure. This provision provides a certain flexibility for intermediaries.

However, the requirement of the intermediary to obtain the passenger's written authorisation to transfer the passenger's contact details to the air carrier is very burdensome for intermediaries, especially where reservations are done face to face, i.e. not on a website

where authorisation is obtained by ticking a box. **ECTAA suggests that passenger's consent should be acquired in accordance with applicable data protection legislation, which does not specify the precise form of consent ('written').**

Moreover, Article 14 should be modified to the effect **that intermediaries should only provide the contact details to the airline or pass on information from the airline to the customer, if the customer has chosen to provide his contact details.** There are many cases where the passenger does not provide his contact details.

Right to care in exceptional circumstances

ECTAA strongly supports the capping of airlines' obligations to provide care in exceptional circumstances. The impact assessment study indicated that the cost of complying with the Regulation under 261/2004 can quickly take disproportionate dimensions when an event takes place that causes mass disruption, such as the ash cloud crisis in 2010. The cost of the right to care, especially the accommodation costs for several nights, and the cost of rerouting via alternative transport modes have been significant. If the Regulation had been fully complied with during the crisis, it would have increased airlines' combined costs by an estimated €960 million, which is roughly 1.5 times the expenses for care and assistance in a "regular" year, and this within a period of less than a week⁶.

In addition, **ECTAA calls for more consistency between the passenger rights in the various modes of transport in terms of the capping and the exceptions that apply to the obligation to provide care.** In the bus/coach passenger rights legislation and the maritime passenger rights legislation, the carriers' obligations are limited to:

- Cost of accommodation up to 80€ per passenger per night for a maximum of 2 and 3 nights respectively;
- No restrictions apply to this capping in respect of persons with reduced mobility and the persons accompanying them as well as unaccompanied children, pregnant women or persons in need of specific medical assistance (if they have notified);
- No obligation to provide accommodation where delay / cancellation is due to severe weather conditions and in the case of bus and coach passengers also where they are due to natural disasters.

Right to re-routing

ECTAA supports the new paragraph 5 of Article 8, which provides for the right to re-routing on other carriers or mode of transport if the air carrier cannot reroute the passenger on its own services to arrive at final destination within 12 hours, but only under the condition that reasonable & comparable alternatives exist.

⁶ See page 17 of the impact assessment study

Transparency of baggage allowances

Airlines have in the recent years put in place a plethora of different baggage policies. As maximum baggage allowances, allowed number of items and dimensions, as well as possible extra charges differ by airlines, passengers are not able to compare airlines' offers in a transparent manner. The problem is further complicated by some airlines' distribution practices, whereby baggage fees are charged only for passengers that do not hold a frequent flyer card, or where passengers are not able to pay for the baggage fee through their travel agent.

To further increase transparency in baggage fees, ECTAA proposes to introduce the following amendments in the 1st paragraph of Article 6 (d), creating a level playing field for all passengers using different distribution channels to book their flights and baggage allocations (changes in bold):

Article 6d

1. Whilst air carriers have full commercial freedom to establish the conditions under which they permit baggage to be carried, they shall clearly indicate, at booking and at the check-in desks (including at self-service check-in machines), the maximum baggage allowance passengers are permitted to carry within the cabin and hold of the aircraft on each of the flights included within a passenger's reservation, including any restrictions on the number of items that would be applied within a given maximum baggage allowance. **Air carriers shall make such information available through all their distribution channels.** Where additional charges are applied for the carriage of baggage air carriers shall clearly indicate details of those charges at booking and on request at the airport, **and make those charges available through any of its distribution channels.**

Communication on Passenger Protection in the event of Airline Insolvency

Regardless of the strong political support from the European Parliament for a legal framework protecting passengers' against airline insolvencies, expressed inter alia in the report of MEP Georges Bach of 26 September 2012, the European Commission has not addressed the issue in its proposal for the revision of the Air Passengers' Rights Regulation.

As the critical need for legislation to protect passengers in case of airline insolvency is unfortunately confirmed every time an airline goes bankrupt, ECTAA regrets the Commission's decision to neglect this concern in its proposal.

Airline insolvencies in the last decade have affected some 1.8 million people in Europe, among which the vast majority did not have any protection, with an average cost per passenger up to €800.

The situation has worsened in the last months with already 9 European airlines having gone into bankruptcy since the beginning of 2012, including large airlines such as Spanair, Malev and Windjet. The airline industry is casting a loss of €1.1 billion for European airlines in 2012. When an airline ceases operating, many passengers have no recourse against the airline to recover the money of their unused ticket or to obtain repatriation if they are stranded abroad.

We stress that passengers are today subject to totally unequal protection depending whether their flight is part of a package travel as defined in the EC Directive 90/314 on Package Travels, or whether it is a seat only ticket, possibly combined by the consumer itself with other travel services. The Directive on Package Travels ensures full protection of travellers by travel agents or tour operators, in case the airline, the travel agent or the tour operator goes bankrupt. On the contrary, a passenger with a seat only air ticket is left unprotected.

This discrepancy is illogical, considering that in both cases, consumers are required to pay in advance and often use the same flights. This is also creating an unlevel playing field between airlines and tour operators which are both selling holiday arrangements to consumers.

Instead of proposing legislative measures, the European Commission merely adopted a Communication on Passenger Protection in the event of Airline Insolvency (COM(2013) 129 final) on 18 March 2013. In the Communication, the Commission laid out a number of recommendations and soft policy initiatives aiming to protect passengers. While ECTAA generally welcomes any efforts to protect passengers against airline insolvencies, ECTAA considers that the proposed measures are not sufficient – legislative action is therefore needed.

Moreover, ECTAA is seriously concerned by the Commission's commitment to "Encourage the wider and more systematic availability of information about credit card refund schemes or similar products in a Member State to allow passengers to protect themselves against the risk of insolvency under national law."

As many Travel Agents act as merchants for most passenger transactions, encouraging the use of credit card refund schemes or similar products to protect passengers from airline insolvencies would mean that in fact Travel Agents would in the end need to cover the refund to the passenger.

Merchant agreements between Travel Agents and banks are very harsh for the travel agents. The customer who has paid his air ticket with a charge card (invoiced in arrears) and even

debit cards (bank cards charged directly to your bank account) turns to the bank when he has not received the service paid for. According to the merchant agreement the bank then in its turn charges the account of the travel agent, even though the agent has already paid the amount to the airline through the Billing and Settlement Plan. ECTAA considers this unfair.

In the light of the above, **ECTAA calls on the European Parliament to fill the gap in passenger protection by adopting legislative amendments to offer passengers better protection in the event of the insolvency of airlines. This could be introduced for example through mandatory insurance for airlines or the establishment of a guarantee fund, in similar vein to the regime in the EU Package Travel Directive:**

Consumer Protection in case of Airline Insolvency

Airlines shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.