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## **REPORT**

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From:	General Secretariat of the Council
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Subject:	<b><i>Preparation of the Council meeting (<u>Transport</u>, Telecommunications and Energy) on 11 June 2015</i></b>  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  - Progress report
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## **I. INTRODUCTION**

On 13 March 2013, the Commission presented the above proposal in order to revise and improve European legislation on air passenger rights in light of the experience gained in the application of existing rules, and to take into account the implications of the rapidly changing European air transport market.

The proposal's aim is to promote the interest of air passengers by ensuring that air carriers effectively comply with a high level of air passenger protection during travel disruptions. At the same time, the proposal intends to take into account the financial implications that passenger rights create for the air transport sector, and thereby ensure that European air carriers operate under harmonised conditions in a liberalised market.

In particular, it is proposed to couple the clarification of grey areas in existing legislation with the strengthening of the complaint handling mechanisms available to passengers. The Commission also seeks to introduce provisions in order to provide incentives for airlines to quickly reroute passengers, enable them to reach their final destination and minimise the discomfort suffered from long delays at airports. The disproportionate financial costs that some of the obligations imposed by the Regulation may create for the airlines in certain exceptional circumstances are also addressed. Furthermore, the Commission proposes to introduce detailed rules on some of the existing rights, such as the right to information, the right to assistance and compensation, as well as proposing new rights, for example on mobility equipment.

## **II. WORK WITHIN THE EUROPEAN PARLIAMENT AND OTHER INSTITUTIONS**

The European Parliament's Committee on Transport and Tourism appointed Mr George BACH (EPP) as rapporteur, and the European Parliament voted the outcome of its first reading in plenary on 5 February 2014.

The European Economic and Social Committee issued its opinion on the proposed Regulation on 11 July 2013. The Committee of the Regions decided not to deliver an opinion on this file.

## **III. WORK WITHIN THE COUNCIL BODIES**

The Working Party on Aviation examined the Commission proposal and its impact assessment intensively throughout the Lithuanian, Greek and Latvian Presidencies. The Council held a policy debate on the proposed Regulation at the Transport Council on 10 October 2013.

Under the Lithuanian and the Greek Presidencies, both of which presented a progress report, the Council made progress on a number of issues, such as the rules for care and assistance, contingency plans and enforcement and complaint handling. In particular, the overall structure of the text was revised in view of clarifying provisions. Legal issues were discussed and the opinion of the Legal Service was sought in order to ensure the legal consistency of the text.

Building on the progress made by the Lithuanian and the Greek Presidencies, the Latvian Presidency has worked systematically with a view to solving all transport-related issues and get agreement on the proposal on the whole text, with the exception of the provisions concerning the application of the Regulation to Gibraltar Airport.

The Working Party on Aviation has continued to seek solutions to the remaining outstanding issues, while at the same time bearing in mind the overall purpose to clarify the application of the Regulation and to simplify its provisions as much as possible. As a result, solid progress at working party level has been made on the file. In particular, the definition of 'cancellation' has been simplified, while at the same time clarifying which other situations should be considered cancellations or delays in the corresponding articles. More specifically, the rights provided in case of cancelled flights are also applicable for: a) early departures without modification of the check-in and boarding times, if the passenger manages to take the rescheduled flight, and b) diverted flights which are not completed to the airport of destination. On the other hand, the rights applicable in case of diverted flights which are completed to the airport of destination are to be the same as in case of delays.

Furthermore, Article 6b '*Change of schedule*' has been deleted, as it was considered preferable to align rescheduled flights to either cancellations or delays, with the purpose to clarify and simplify the application of the Regulation. Tarmac delays provisions have also been simplified, establishing passengers' rights in such cases while considering at the same time possible safety, immigration or security-related constraints.

Member States have also been keen to introduce more clarity regarding the burden of proof of the operating air carrier as to when and whether passengers have been informed of a cancelled or a delayed flight, as well as concerning any extraordinary circumstances which restrict or exclude its liability.

The time limitation on the possibility to invoke extraordinary circumstances and unexpected flight safety shortcomings affecting a single aircraft has also been repeatedly discussed, also with a view to establishing reasonable and objective limits beyond which airlines are expected to re-establish their normal operations. The current Presidency compromise text proposes a time limit of 24 hours . Although not all delegations are able to accept this solution, it is generally agreed that technical defects should not be abused by airlines in order to refuse the payment of compensations.

Overall, solutions have been found on several technical issues, and during the Latvian Presidency the Working Party on Aviation has been able to identify the main direction of several important political compromises. However, despite the intense work carried out, the compromises on a number of significant outstanding issues need further work.

In addition, the diverging views of Spain and the United Kingdom regarding the scope of the proposal need to be resolved.

Taking into account the above, the Latvian Presidency has decided to submit a progress report to the Transport Council on 11 June 2015.

The compromise proposals were last examined by the Working Party on Aviation on 11 May 2015.

All delegations, as well as the Commission, have a general scrutiny reservation on the latest version of text<sup>1</sup>.

UK has a parliamentary scrutiny reservation on the text.

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<sup>1</sup> See doc. 8695/15 AVIATION 53 CONSOM 76 CODEC 679

#### **IV. MAJOR OUTSTANDING ISSUES**

##### ***Thresholds for compensation***

Under the current Regulation, as interpreted by the European Court of Justice<sup>2</sup>, the passenger has a right to compensation after a delay at arrival at the final destination of more than 3 hours (except for extraordinary circumstances). The Commission proposed to increase this threshold to 5 hours for most journeys, and to 9 or 12 hours for extra-EU journeys of respectively more than 3500 or 6000 km.

The Commission did not propose an adjustment of the delay thresholds for cancellations (Article 5(1)(c)(iii) of the current Regulation) where the passenger has a right to compensation if he arrives at the final destination more than 1 hour earlier or more than 2 hours later than originally scheduled.

However, different thresholds for cancellations and delays may pose a problem of legal consistency in view of the principle of equal treatment: "in its judgments in the *Sturgeon* and *Nelson* cases (...), the Court invoked in its reasoning the principle of equal treatment, a general principle of Union law which is binding on the legislator"<sup>3</sup>. The Court considered that passengers whose flight has been cancelled and those who have been subject to a long delay suffer a similar detriment – loss of time – and that their situations are therefore comparable, for the purposes of applying the right to compensation. More precisely, the Court considered that passengers on flights which have been delayed by three hours or more cannot be treated differently from those who are compensated under Article 5(1)(c)(iii) of the Regulation.

The Presidency text introduces a difference in the time thresholds for cancellation and delays. The discussions on this issue have been intense. Bearing in mind the above legal issues, Member States consider that it is essential to protect passengers against abusive cancellations. Cancellations which are not caused by extraordinary circumstances are not a good business practice and for that reason they should be discouraged. On the other hand, air carriers have less control over delays and have no interest to cause them. Delays create a knock-on effect on the subsequent scheduled flights of the air carrier, with consequences in wasted time and unnecessary expenses both for passengers and the air carriers.

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<sup>2</sup> Cases C-402/07 and C-432/07 *Sturgeon vs Condor* and *Böck/Lepuschitz vs Air France*

<sup>3</sup> See in particular paragraphs 48 to 61 of the judgment in the *Sturgeon* case.

Therefore, the position of several Member States is that, in such a situation, it would be appropriate for the legislator to be more strict with cancellations and impose a shorter time threshold than in a situation of delay. Thus, the current Presidency compromise text provides that a passenger who has been rerouted after a cancelled flight has the right to request compensation for arriving late at destination if the delay at arrival is more than 3 hours, regardless of the length of the journey.

However, regarding delays, many Member States consider that different time thresholds corresponding to different journey lengths would be more appropriate and support the three thresholds of 5, 9 and 12 hours proposed by the Commission, with an adjustment of the distance brackets. Others would prefer a flat 5 hour threshold regardless of distance. Another group of delegations support lowering the thresholds to 3, 5 and 7 (or 9) hours. As a compromise, and with a view to align the lowest threshold to the 3 hours required in case of cancellations, the Presidency compromise text introduces a fourth category, such that for journeys of less than 1500 km, the compensation is EUR 125 for delays of 3-5 hours, and EUR 250 for delays of over 5 hours. The 9 and 12 hour thresholds proposed for medium and long haul journeys are maintained unchanged.

### ***Compensation for connecting flights***

Under the current Regulation, as interpreted by the European Court of Justice, compensation is due when the passenger suffers a delay of more than 3 hours at the final destination, including the case where this delay is caused by a missed connection; the delay of the initial flight that caused the passenger to miss the connection is irrelevant, only the delay at the final destination is considered for the purpose of compensation.

The Commission did not propose a direct change to this measure; however, the Commission proposal aims to clarify the issue indirectly, while softening the impact on the airlines by increasing the threshold at the final destination from 3 hours to 5/9/12 hours.

The Presidency compromise provides a partial exemption to airlines from paying compensation, if the connecting time was relatively short (90 minutes in the current text), and the passenger who purchased the connecting ticket was aware that a short delay of the feeder flight could result in missing the connection. If, however, the originally planned transfer time was more than 90 minutes, the passenger shall receive compensation if his connecting flight is missed due to a delay of the feeder flight.

However, this compromise proposal cannot be accepted by a number of delegations which maintain their serious concerns on the effect of any explicit provision on compensations for connecting flights to regional connectivity and existing arrangements between airlines. These delegations consider that any proposals for compensations for missed connecting flights would be counter-productive and that the focus should be instead on ensuring adequate care and assistance to passengers and on encouraging airline behaviour which would ultimately assist the passenger in pursuing their original objective, i.e. getting to their final destination by requiring rerouting at the earliest opportunity. They argue that focusing on compensations may result in adverse airline behaviour (increased fares, longer transfer times) which would not be in passengers' interest, especially as regards passengers who depend on regional connectivity. They propose the complete deletion of compensation for connecting flights, and consider that such amounts should be paid on the basis of each individual leg of the flight and of the corresponding delay suffered.

Other Member States do not agree with the above-mentioned arguments. In their view, the market will take care of such adverse behaviour, as the passenger will choose those air carriers which do not have increased fares or excessively long transfer times.

Therefore, in order to reflect the divergent views on this issue, the Presidency has decided to place the corresponding provisions in Article 6a '*Missed connecting flights*' in square brackets, in order to indicate that more reflection is necessary in order to find a compromise on this difficult issue.

## **V. CONCLUSION**

Taking into account the above and in order to enable the Council preparatory bodies to continue their work on the above proposal, Coreper and Council are invited to take note of this progress report.