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**NOTE**

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From:	General Secretariat of the Council
To:	Delegations
Subject:	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 - Presidency non-paper

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In view of the informal videoconference of the members of the Aviation Working Party on 8 October 2020, delegations may find attached a non-paper prepared by the **German Presidency** on the impact of the COVID-19 pandemic on the rights of air passengers.

**Impact of the COVID-19 pandemic on the rights of air passengers****Background**

Consumer protection has long been a firmly established principle in the EU aviation sector. At the beginning of the 1990s, passengers were for the first time protected by European law in the event of being denied boarding by Regulation (EEC) No 295/91; in 2004, this protection was significantly broadened by Regulation (EC) No 261/2004, which additionally incorporated cancellation or long delays of departure. In 2009, the so-called Sturgeon ruling of the European Court of Justice further extended the scope of application of this Regulation by entitling passengers to claim compensation if they arrive at their final destination with a delay of more than three hours.

On 13 March 2013, the European Commission presented a proposal for amending Regulations (EC) No 261/2004 and No 2027/97. In February 2014, the European Parliament adopted its position on this proposal at first reading. From 2013 to 2015, the file was also the subject of intense deliberations in the Council. However, it was not possible to reach an agreement; numerous key issues remained controversial. The last progress report dates back to 2015.

On the basis of a study commissioned by the European Commission in 2018 on the current level of protection of air passenger rights in the European Union, Finland's Presidency seized the opportunity to put this file back on the agenda. The Croatian Presidency resumed the deliberations on the Commission's proposal, but suspended them in April 2020 due to the COVID-19 pandemic.

In the wake of the pandemic, intra-European and international passenger air transport has practically come to a standstill. It is becoming increasingly apparent that this situation will affect the whole aviation industry for several years to come and that passengers' confidence in the aviation sector must be regained. Against this background, it is necessary to analyse how the pandemic and its consequences for the aviation market affect the rights of air passengers pursuant to Regulations (EC) No 261/2004 and No 2027/97. Apart from the sectoral issues and measures already described here, consideration should also be given to the question of how to strengthen aspects of consumer protection. In this respect, this paper addresses the issue of advance payments for the purchase of tickets. Further deliberations on this subject are necessary.

Of course, it will only be possible to conduct a full analysis and draw final conclusions when the end of the crisis is in sight and its impact on the aviation market can be conclusively assessed. However, some problems and issues in connection with air passenger rights that are attributable to the pandemic might have already emerged at this point in time, requiring short-term solutions. These current issues in connection with the pandemic should be identified and discussed at an early stage and, where possible and appropriate, resolved, or the relevant approaches towards solving these issues should be initiated.

The objective remains to strike a fair balance between a high level of consumer protection and the operational interests of the airlines (see above with regard to consumer rights).

As long as the crisis lasts, it cannot be determined with certainty whether, and if so to what extent, the Commission's proposal dating from 2013 still provides an appropriate basis for further deliberations on a revision of the air passenger rights regulations. Furthermore, the ongoing crisis is not a good benchmark for defining consumer protection provisions that will apply after the crisis in a normalised aviation market. However, issues and problems of topical interest might have emerged – especially due to the crisis – which can already be identified and discussed, and solutions to them should be considered now in order to remove legal obstacles in this exceptional situation.

## Impact of the pandemic

Due to the pandemic, questions and problems in connection with the application, exercise and enforcement of the air passengers' rights, which have become evident, are currently not or not satisfactorily solved by Regulations (EC) No 261/2004 and No 2027/97. Appropriate solutions should be found in order to prevent such problems arising in the future. The following questions are designed to identify problems to be addressed and to serve as a basis for discussion in the Council Working Party on Aviation.

- At the time when the air passenger rights regulations were adopted, the EU legislator did not foresee a long-term collapse of the market (due to a pandemic) as likely. For this reason, the air passenger rights regulations focused only on the cancellation of individual flights and not on the cancellation of all or most flights in the long run, at regional and global levels. Therefore, should structural amendments to the rights of air passengers be envisaged in view of the lessons continuously being learned from the crisis in the aviation market caused by the pandemic? Is a single liability regime sufficient for both times of crisis and normal business operations, or should a special regime be adopted for times of crisis? Does the system set out in ICAO conventions on liability for third-party damage caused by aircraft of 2 May 2009 concluded following the events of 11 September 2001 provide an example of good practice here?
- What types of crisis might require the application of a special liability regime? What scope (with regard to its nature, duration, geographical extent, etc.) should a crisis and its impact on the aviation market have in order to trigger the application of such a regime? How and by whom will such a crisis that might lead to the application of the special regime be identified?

- What issues should be subject to special rules in times of crisis?
  - What can be done to counteract the liquidity outflow due to the mass filing of refund claims that is threatening the viability of airlines? Is it appropriate even in times of crisis to make the issuing of vouchers subject to the consent of passengers?
  - Is the seven-day period applicable for the reimbursement of the full cost of the ticket appropriate in times of crisis?
  - Should consumer-oriented measures, such as the exclusion of advance payment for the purchase of flight tickets, be provided in order to improve the protection of consumers against the consequences of a crisis and to strengthen their confidence in air transport?
  - Is the protection of vouchers against insolvency of airlines a suitable measure to enhance their attractiveness? At what regulatory level (Union law or law of the Member States) should such protection be implemented?
  - What protective measures could be envisaged to ensure consumer protection during an ongoing crisis or after overcoming such a crisis: insurance, fund-based solution, state-backed solution?
  - What problems might emerge at the beginning of and during a crisis in connection with the information of air passengers and the filing of claims pursuant to Regulation No 261/2004, and what improvement options are conceivable?
  - What problems might emerge at the beginning of and during a crisis in connection with the enforcement of Regulation No 261/2004, and what improvement options are conceivable?

- Should air carriers be exempted from their obligation to compensate air passengers who are denied boarding due to a flight ban or prevention measures adopted by national authorities, even though ‘extraordinary circumstances’ exonerating the air carrier from liability are not applicable in the case of denied boarding?
  - In the wake of the pandemic, national authorities have introduced different rules for the entry and exit of air passengers into and out of the country. How should the situation of passengers who are denied boarding or denied entering or leaving a country on the basis of an official entry or exit ban (e.g. after temperature checks or due to recently changed risk ratings) be handled?
  - Beyond the current scope of Regulation (EC) No 261/2004: during the crisis, many passengers have cancelled flights on their own initiative in the light of official travel warnings or out of fear of an increased risk of infection in the country of destination without these flights having been cancelled by the airlines. Should reimbursement of the fare in such cases continue to be subject to the general provisions applicable in the Member States or is a uniform regulatory framework at Union level necessary in this respect ?
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