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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Aviation
N° prev. doc.:	ST 5123/20
N° Cion doc.:	ST 7615/13
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 - Comments from Member States on the Presidency compromise

Delegations will find attached comments from Germany on the above mentioned document.

Observations by the German Delegation

on the

Presidency Compromise 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
= ST 5123/20

Germany wishes to express its thanks for the opportunity to submit first observations on the compromise proposed by the Croatian Presidency. However, it would like to emphasize that these observations constitute preliminary comments on the key issues stipulated by the Presidency in its Non-Paper of 30 January 2020 (ST 5581/20), these being compensation thresholds, missed connecting flights and extraordinary circumstances, and it reserves the right to submit additional remarks. On this, Germany will submit a separate working document at the earliest opportunity that will also include specific wording proposals.

Preliminary remarks

The level of protection that is afforded to passengers in accordance with the currently applicable version of Regulation (EC) No 261/2004, and in line with the case law of the European Court of Justice in this regard should be maintained. This means, on the one hand, that the thresholds applying to the compensation to be paid in the event of flights being cancelled or delayed at arrival may not be raised to such an extent that, in the future, passengers will not receive any compensation at all in the majority of cases. Likewise, the future structure for an exoneration from liability, which allows air carriers to invoke extraordinary circumstances and gives them the opportunity, as the Presidency compromise proposes, additionally to invoke unexpected flight safety shortcomings, may not result in lowering the existing level of protection afforded to passengers. An equitable balance must be struck between the interest in obtaining greater legal certainty and clarity of the law by making the necessary amendments, and the detrimental effects such amendments potentially may have on passengers or air carriers.

Art. 5 paragraph 1a (ii) & Art. 6 paragraph 2 (i) – Compensation in the event of cancellations and delays at arrival

Generally, Germany welcomes the fact that the claim to compensation granted by the European Court of Justice for the event of delays at arrival is to be included in the text of the corresponding provision in the Regulation, and that it is harmonized with the pre-requisites applying to such compensation in the event of cancellations.

However, Germany takes a critical view of provisions such as the thresholds applying to the compensation set out in the proposal by the Presidency, which significantly lower the existing level of protection and which in the end have the effect, in derogation from the Regulation currently in force, that compensation no longer will need to be paid in future for a major part of the cancellations and delays at arrival. Provisions of this type are not acceptable to Germany.

The Regulation currently in force stipulates that, in the event of a cancellation, passengers are entitled to compensation – independently of the journey distance – already in those cases in which rerouting will not allow them to reach their final destination with a delay of less than two hours after the scheduled time of arrival [in the event they are informed of the cancellation less than seven days before the scheduled time of departure, Art. 5 paragraph 1 lit. c (iii)], respectively with a delay of less than four hours after the scheduled time of arrival [in the event they are informed of the cancellation between two weeks and seven days before the scheduled time of departure, Art. 5 paragraph 1 lit. c (ii)]. For delays at arrival, there is a claim to compensation – independently of the distance of the flight – for delays of three hours or more after the arrival time originally scheduled, as ruled by European Court of Justice in the *Sturgeon* case.

By contrast, the thresholds now being proposed – which are based on the distance of the flight — are significantly higher and constitute a serious interference with the existing level of protection afforded to passengers. Were such an amendment to be made, most of the passengers who are entitled to claim compensation today would be left without compensation in the future. Germany thus cannot endorse the introduction of thresholds of five, nine and twelve hours, depending on the distance of the flight, neither for cancellations nor for delays at arrival. In the view taken by Germany, the level of protection in place thus far ought to be maintained, while the provisions ought to be simplified and harmonized at the same time. As a consequence, Germany could envisage uniform thresholds of three hours applying to cancellations and delays at arrival.

Art. 5 paragraph 1a (iii) & Art. 6 paragraph 2 (ii) – Extraordinary circumstances / unexpected flight safety shortcomings

In general, Germany endorses the concept of providing detailed definitional examples of circumstances considered as extraordinary and including them in a list. As concerns the question of whether this ought to be an exhaustive list or a non-exhaustive list, Germany basically is flexible. In the end, the substance and scope of the list will be decisive. Germany takes the view that, in this context, particularly the matter of how to deal with strikes both at the operating air carrier and at any essential service providers such as airports and air navigation service providers (ANSPs) will need to be cleared up.

The final result will have to be an overall, balanced allocation of risk with a view to the opportunities available to air carriers to be exonerated from the obligation to provide compensation. There are serious doubts that this will be achieved by providing air carriers with the additional means of also invoking unexpected flight safety shortcomings in future. The European Court of Justice has ruled that any technical problems becoming apparent in the course of maintenance work being done on aircraft, or resulting from the failure to perform such maintenance, are not to be interpreted as “extraordinary circumstances.” Accordingly, if air carriers no longer are obligated to pay compensation in the event of unexpected flight safety shortcomings in future, this will lower the current level of protection by expanding the grounds on which they are exonerated from liability. This comes very close to air carriers being liable based on fault, which – for reasons of affording protection to passengers – precisely should not be a pre-requisite for passenger rights. Germany cannot endorse such a lowering of the level of protection: As before, the exoneration from liability should continue to be available only in the event of extraordinary circumstances.

Nor are the exceptions proposed in Art. 5 paragraph 1a (v) and in Art. 6 paragraph 2 (iv) acceptable to Germany: They would result in a difference in treatment for passengers, for which no justification is apparent.

However, air carriers should benefit from the continued opportunity, as stipulated by the Latvian Presidency of 2015, to invoke extraordinary circumstances for the flight concerned in so far as they affect this flight or preceding flights operated or scheduled to be operated by the same aircraft. Limiting this exoneration to the flight directly affected by extraordinary circumstances does not seem to take sufficient account of the airlines’ interests, particularly where short and medium-haul routes are concerned, especially where a single aircraft performs several rotations each day and a flight at the beginning of the day is affected by an

extraordinary circumstance. In these cases, a delay at arrival or a cancellation will result in knock-on effects on the other flights of that same rotation. Inasmuch, efforts should be made to arrive at a more granular provision that has regard to the complexity of the rotation planning performed by air carriers, as had already been envisioned in the proposal by the Latvian Presidency of 2015.

Art. 6a – Missed connecting flights

Generally speaking, it is to be welcomed that a provision will be introduced that governs delays of feeder flights and subsequently missed connecting flights; this could be suited to reduce the issues in dispute arising under applicable law. However, it should be noted that the matter concerns a whole range of diverse and complicated facts and circumstances, which will need to be put to the test under the new Art. 6a to ascertain whether this new provision has created an appropriate solution.

From the perspective of Germany, it would seem preferable to make a distinction – as the Latvian Presidency did – between the feeder flight and the subsequent connecting flight departing from the transfer point. The definition currently provided in Art. 2 (o) combines both of these types of flights (i.e. the feeder flight and the connecting flight) in the general category of "connecting flight," which means that there are inconsistencies in Art. 6a. For this reason, the definition in Art. 2 (o) ought to concern only the connecting flight, and the definition given thus far for the feeder flight in Art. 2 (n) should be reconsidered. Accordingly, the terminology used in Art. 6a should be adjusted ("feeder" instead of "previous flight").

As has been the case thus far, stopovers ought not to be considered connections.

The computation of the duration of the delay based on the scheduled time of arrival at the final destination is problematic for a scenario in which connecting flights are missed, since this subjects to unreasonably high liability risks for those enterprises that primarily perform feeder flights serving long-haul connecting flights. From the perspective of Germany, the minimum transfer times at connecting flights ought to be upheld that the proposal of the Latvian Presidency had provided for: In this way, passengers who opt for a flight allowing for only a short transfer time will do so at their own risk of missing the connecting flight already where the feeder flight is slightly delayed. A provision of this type offers a compromise between the conflicting interests of passengers and airlines.

Art. 7 – Compensation

The provision suggested in Art. 7 paragraph 2 is not acceptable to Germany since, on the one hand, its effect seems to consist of a further lowering of the existing level of protection. On the other hand, there is the danger that there is no longer an economic incentive for airlines – because they are no longer under obligation to provide compensation – to reroute the passengers properly. Thus, Germany regards it to be justified for passengers to be paid compensation both for the cancellation of the flight originally booked as well as for the additional cancellation or delay at arrival while being rerouted to their final destination on an alternative flight.