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From:	General Secretariat of the Council
To:	Working Party on Aviation
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Subject:	Proposal for a regulation 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 Finland on the compromise proposed by the Polish Presidency

Delegations will find, in annex, comments from **Finland** on the compromise proposed by the Polish Presidency.

General comments

We are still going through the compromise text and maintain a scrutiny reservation. We provide here preliminary comments after having a first reading of the draft articles. We might provide additional or corrected comments after we have finalized our national position.

First of all, we wish to thank the presidency for the really hard work on the texts. We also agree with the presidency on the approach of giving particular focus to the rights regarding reimbursement, rerouting and assistance. These are the core provisions of this regulation and very important for passengers. We also stress the need for balance regarding the burden for the airlines and rights of the passengers.

Although there is truly a need to improve the current regulation, it is important that we go through the provisions in detail, with enough time to analyse them. A good quality legislation is needed. We should think fresh and think about solutions beyond codifying the past case law. The number of case law is a consequence of the regulation. We should aim for a clear and unambiguous legislation, which would not require such numbers of case-by-case interpretation.

Article 2 Definitions

(m) and the extraordinary circumstances and the Annex:

In the intro of this compromise text, it is said that similar concepts have been used as in other regulations on passengers' rights. However, this is not the case regarding the exceptional circumstances' definition, which is including the non-exhaustive Annex.

"(m) "extraordinary circumstances" means circumstances which by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned, and are beyond its actual control. For the purposes of this Regulation, a non-exhaustive list of extraordinary circumstances are listed is presented in the Annex;"

In the rail passenger rights regulation, the definition (Art 19 paragraph 10) states specifically that strikes by the personnel of the railway undertaking are not an extraordinary circumstance. According to this annex, the labour disputes could be an extraordinary circumstance. In the rail passengers rights regulation the weather conditions are described to be "extreme" and natural disaster "major", whereas in this annex no such qualifications are required. In the rail passengers rights regulation, the behavior of third party is a very different type of list. It does not include actions or omissions by other railway operators using the same infrastructure, infrastructure manager or station manager, but is referring to e.g. sabotage or terrorism. Whereas here in the Annex the listed third party behaviour includes matters beyond such matters, such as hidden manufacturing defects, partial closure of airport, damage to tyre by a foreign object and unexpected flight safety forthcomings.

We do recognize that the sectors are very different and understandably the concept of extraordinary circumstances might have differences. The lists do not have to be exactly equal considering the differences. Safety is and should be a top priority for airlines. However, based on our estimations if the compensation levels were lower or linked to the price of the ticket, it would be sustainable to consider a shorter, exhaustive list of extraordinary circumstances i.e. increase the airline attributable delays. The economic burden for the airlines would not be necessarily higher. It could be even lower. This way we could diminish the breed of disputes, and we could avoid the need to update the list of extraordinary circumstances frequently. More passengers could receive compensation for their loss of time without the need to turn to claims agencies, dispute resolution bodies or even courts. This way we could improve passengers rights collectively, although the amounts of individual compensation would be lower.

(za) accessible format

Accessible format has not been previously defined in passenger rights legislation. We are wondering how does the reference to Annex I to Directive (EU) 2019/882 work, as the scope of (EU) 2019/882 covers only certain products and digital services, not spoken communication, for example. The article 11 (0) of air passenger rights states that all information provided to passengers under this Regulation shall be provided in accessible format. This regulation includes provisions, for example art 4 paragraph 1, where at least some information could be given to passengers also in spoken, and possibly in other formats. In our understanding, Annex I to Directive (EU) 2019/882 would apply only when communication is done by means within the scope of (EU) 2019/882, is that correct?

Article 3 Scope

Regarding the suggested paragraphs 1a and 1b, we will not provide comments at this point as the Presidency has provided a helpful non-paper regarding these matters, which will be discussed 13.3.

In the Omnibus/enforcement general approach was agreed that the accompanying person shall be exempted from paying the air fare and, where feasible, shall be seated free of charge next to the person with disabilities or to the person with reduced mobility. Regarding paragraph 3, we are not entirely sure how re-routing obligation applies when it comes to PRM and accompanying persons, as the Article 3(3) of the regulation 261 states that the regulation does not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public. The Article 4(1) of the regulation 1107/2006 only applies to cases of denied boarding? Also, article 11 of this text states that in applying rerouting and assistance in accordance with Articles 8 and 9, the operating air carrier shall pay particular attention to the needs of the persons mentioned in paragraph 1 (PRM persons and persons accompanying them). In a case of a need for re-routing, it should be more clearly ensured that the accompanying person stays together with the person needing assistance.

In paragraph 5, the approach make sense regarding assistance. However, we are still thinking whether the right party to reimburse would be the contracting carrier.

In paragraph 6, we suggest maintaining the current wording of the paragraph. The passengers flying should have comparable rights to care and assistance regardless of if their flight is part of the package or not. When people are stranded at the airport, it should not be so that some of the passengers would be assisted and some of them not, or the party in charge of assistance would be different between the passengers on a same plane. We regret a similar rule was removed from the multimodal proposal; however, it should be maintained here.

Article 4

Paragraph 1, we wonder if the signed document/email are too limited options. This could be done through other durable medium too, such as mobile app, which would entail possibility to store the confirmation.

In paragraph 2 there are first two wrong references to Articles 16a and 16aa (should it be 15a and 16a?) and in the last sentence a wrong reference to article 16a(1a), which is probably supposed to be referring to Art 7(3) or 15a(2), although it is not clear what is the relationship with Articles 7(3) and 15a.

Article 5 Cancellation

Paragraph 1a and its relation to Art 9(5) is unclear. What is meant with “By way of derogation from Article 9(6)”? First the reference probably is meant to be Art 9(5)? However, art 9(5) does not even include situations where passenger chooses a return flight? And the last line of Art 9(1a) only mentions rerouting, how about assistance before the return flight mentioned in line 4 of the paragraph?

According to paragraph 2, the extraordinary circumstances could be invoked in cancellation also when they are affecting the preceding flight or flights in the rotation sequence. How long is a rotation sequence, how many flights? Considering the broad concept of extraordinary circumstances, from the perspective of the passenger this seems too wide.

Article 6 Long delay

Paragraph 5 together with paragraph 1: does this mean that if the carrier postpones the departure time for up to five hours, the passengers are excepted to just approve the new itinerary without possibility for reimbursement. So even if it is a short trip, the passenger is forced to keep the ticket with new itinerary, although the flight might not be serving its purpose anymore from the passengers perspective? This does not seem a fair solution. The time for the possibility for choosing reimbursement should be shorter.

Art 6-2a Tarmac delay

In paragraph 1, in principle it is good that water needs to be provided. However, we have been advised that in winter conditions 30 minutes is exceeded very easily considering e.g. de-icing, and during that time the cabin crew is ready for take-off. Slight flexibility due to safety might be necessary. In paragraph 2, 3 hours is preferable to the original 5 hours.

Article 7 Right to compensation

Paragraph 1

We refer to our comment above (m) regarding the extraordinary circumstances and the Annex. We do not have specific compensation levels to suggest, considering that the suggested time and distance thresholds and extraordinary circumstances needs to be taken into consideration when thinking about the compensation levels. However, we still suggest reconsidering the whole model concerning compensation e.g. closer to the rail passenger rights regulation. Lower compensation levels or compensation linked to the ticket price, together with limited force majore situations could improve the functioning of the model collectively for the passengers, reduce disputes, and be in balance from the airlines perspective too.

Paragraph 1a

The time thresholds for compensation have been increased significantly from the current regime and due to the new distance limits also from the KOM proposal. The point of the compensation is to cover loss of time, and it is hard to see, how the proposed thresholds are ensuring that. The jump from 5 to 9h threshold for journeys between 1500-3500km is very high. Together with long, non-exhaustive list of exceptional circumstances, these thresholds would lead the obligation to provide compensation applicable in very few occasions.

On the other hand, this text would also mean that in some longer intra-EU flights the compensation amount would be higher than nowadays [from 400->600].

The current provisions on compensation and extraordinary circumstances breed unacceptable number of disputes. Finland strongly wishes to reduce the number of disputes, however, at the same time we wonder, what is the purpose of the compensation in the first place. Is the purpose to

compensate in a form of a “standard” compensation to many passengers experiencing loss of time, or rather is the compensation something activated only in cases of extremely long delays.

If the goal of the proposed thresholds is to avoid disputes, that would surely be reached. These thresholds, taking into consideration the typical length of delays, the successful claim rate (both indicated in the Steer study of 2020), and the suggested long listing of extraordinary circumstances, would mean in practice that the compensation would be very rarely paid.

Paragraph 3

We think that a common DL for submitting the claim for compensation would be a good addition to ensure coherence, and we could preliminarily support 6 months. However, it is unclear to us, what is the relationships with the DL for complaints under art 15a. There is a deadline of three months in paragraph 2. So does this mean that these complaints referred to in art 15a do not include claims for compensation? Are there two different DLs on purpose?

The wording “In case the operating carrier does not pay that compensation or does not provide any justification, the passenger may submit a complaint in accordance with Article 16a” should not be interpreted in a way that any justification provided by the carrier would preclude compensation. Therefore, we would suggest aligning the text towards rail passengers right regulation where it is said that “after complained unsuccessfully to the railway undertaking…”

The wording could be for instance:

“After complaining unsuccessfully to the air carrier or not receiving a reply within the 30 days deadline, the passenger may submit a complaint…”

Article 8 Right to reimbursement and re-routing

There are now two paragraphs 3, the latter should be either c) or paragraph 4. Regarding this said paragraph or subparagraph, we are asking, is it sufficiently clear that the starting point is that the carrier should take care of the rerouting? Giving a possibility for a passenger to do it by himself, could be an option. However, this should not lead to a practice where in a difficult situation the airline would just leave it to the passengers to organize the rerouting/alternative transport. Therefore, the possibility for the passenger should not perhaps be grouped as one “alternative” for the airline under paragraph 3, but in its own paragraph, in paragraph 4.

We wonder if the wording of the passenger’s responsibility to limit the expenses is too vague and might lead to more disputes.

Article 9 Right to assistance

In paragraph 2b: The same question than in rerouting, is it clear that the starting point is that the assistance is a duty of a carrier to organise. If the carrier for some reason does not take care of its duty, the passenger should be reimbursed but this should not lead to a practice where assistance is left for the passenger to arrange. Passengers have variable capabilities to help themselves and this could lead to difficult situations.

In paragraph 3: In principle we understand the justification for the limitation of obligation to provide accommodation to three nights in extraordinary circumstances. However, we should bear in mind that the definition and list of exceptional circumstances will affect this provision too. We anticipate invoking exceptional circumstances very often under the current text, which could leave passengers in a difficult situation being stranded somewhere without having the funds to accommodation.

In paragraph 6 the wording concerning passenger's responsibility to limit the expenses is too vague and might lead to more disputes. What is meant with cooperation in this regard? In other paragraphs than 2b, the carrier is supposed to take care of the assistance. In paragraph 2b there is already a requirement of expenses being reasonable and proportionate. Therefore, is this paragraph necessary?

In paragraph 7, what is intended with "persons in need of specific medical assistance", -does it differ from the definitions of ' "person with disabilities" and "person with reduced mobility", or does it include those persons as well? Also, the reference should be to paragraphs 3 and 4 [not 4 and 5] meaning that e.g. the limitation of obligation to provide accommodation to 3 nights in exceptional circumstances would not apply to PRM passengers. At least those were the corresponding paragraphs in the earlier texts [KOM proposal 2013 and LV compromise 2015, some confusion of paragraphs in text of 2020].

Article 10a Airport contingency plans

In paragraph 1a, is it on purpose that all the groups referred to in Article 9 paragraph 7 are not included here?

In paragraph 6. the definition of airport was removed from this compromise text. It was rather wide in the KOM proposal. We should bear in mind that there are plenty of small aerodromes in the Union and it would not be necessary to include all these in the requirement. Perhaps e.g. EASA -regulation's definition could be useful in this regard.

Article 14 Obligations to inform passengers

We are still in a process of reviewing these information obligations. Couple of points here at this stage:

Paragraph 2(e)

Directive on unfair terms in consumer contracts is a minimum harmonization directive and therefore some MS go beyond others in defining/listing contract terms considered unfair. Therefore, in paragraph 2(e), the reference to compliance with UTCD -directive has to be reconsidered.

There seems to be some paragraph numbering missing. In the text regarding informing about separate tickets, it now reads that "An intermediary or an air carrier which sells tickets that are covered by separate air transport contracts shall inform the passenger prior to the purchase, that the tickets are covered by separate transport contracts…" and so on. This seems wide in the sense that the information would have to be given always when selling tickets. Perhaps it would help to add something in the wording that would indicate that separate tickets are sold together or at the same time. This information duty should not lead to a situation in which by solely informing, the obligations under the provisions regarding missed connections could be avoided. The text requires some further thinking.

Art 16 Enforcement

In principle we agree with the approach of paragraph 2a, according to which the NEBs may handle individual complaints but do not necessarily have to do so. However, this paragraph should not be interpreted in a way that if the NEB is not handling individual complaints e.g. by giving recommendation or a decision, it could not be taking enforcement actions based on individual contacts. In our system the passengers are contacting consumer advisory services, and it is possible that the NEBs would use the information stemming from consumer contacts as an impulse to start actions. Or the same should be possible when the ADR body is handling individual

complaints. In paragraph 3 of art 16a there is a cooperation and exchange of information duty for the NEBs and complaint handling bodies.

Art 16a Complaint handling by NEBs or other bodies

In paragraph 1, we support the addition of MS being able to decide to apply the paragraph to disputes between air carriers and consumer only.

In paragraph 2, we support aligning the provisions as much as possible with the ADR-directive. Specific DL in complex cases is not included in the ADR-directive, and therefore we do not support adding a specific 6 months DL for complex cases. A reference to ADR-directive regarding the DLs should be enough.

Art 16b Cooperation between the MS and the Commission

What is the relationship of these provisions, and the mechanism based on the CPC-regulation? The strengthened CPC regulation is from 2017, i.e. after this KOM proposal was given. Air passenger rights regulation was included in the annex of the CPC -regulation and therefore our understanding is that the CPC-mechanism could be used. We are questioning the need for another mechanism.

Secondly, the Commission should not limit the discretion of national authorities in how they allocate their resources and how they prioritise issues. In countries where the national authority has wide competence in consumer-related matters, the prioritisation of one issue will lead to problems for the fulfilment of the authority's other obligations.

Article 19 Entry into force

A sufficient period is needed before application starts. There are some national measures needed, and the stakeholders need time to adjust to the new rules. For example in the Omnibus general approach it was agreed that it shall apply from 2 years from the date of entry into force.

Annex 1

We refer to our comments to definition (m) above.