Council of the European Union
General Secretariat

Interinstitutional files:
2013/0072(COD)

Brussels, 02 April 2020

WK 3082/2020 ADD 8

LIMITE

AVIATION
CONSOM
CODEC

WORKING PAPER

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Aviation
N° prev. doc.:	ST 5123/1/20 REV 1
N° Cion doc.:	7615/13
Subject:	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 revised Presidency compromise

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

Comments from the Polish Delegation to the draft consolidated text of Regulation (EC) No 261/2004 WK 2688/2020 INIT

Art. 2 (b) "operating air carrier"

Definition operating air carrier -"air carrier that performs or intends to perform a flight" makes sense, if there is only one carrier involved in carriage.

PL proposes replacing a term "*operating air carrier*" by an '*actual air carrier*' and '*contracting air carrier*'.

The definition in point (b) is replaced by the following:

Art. 2 (b) 'Actual air carrier' means an air carrier that performs a flight.

Art. 2 (bi) 'The contracting carrier' is this carrier who makes a contract of carriage with a passenger and another contract with an actual carrier.

Justification:

Rationale behind the presented proposal about the presented introduction of terms an "actual air carrier" and a "contracting air carrier".

It would be prudent that the amended regulation was complemented with existing legal regime of the Montreal Convention. In previous documents, FR indicated that it is to precise which air carrier shall be liable for compensation, when the voyage was operated by two or more carriers. This is a case of missed connecting flight. It may be highly accurate to invoke and introduce existing rules as formulated in art. 39 and 40 of the Montreal Convention, for a couple of reasons:

Firstly, meaning of a term "operating carrier", as formulated by existing version of so called Regulation 261/2004, was alternated in light of ruling *C-532/17, Thomson Airways Ltd*, *ECLI:EU:C:2018:527*. This judgment introduced a couple of meanings of the term "operating carrier" blurring them. Since the term "operating carrier" means an "actual carrier" and a "contracting carrier" simultaneously, this situation causes a measure latitude.

Secondly, the already mentioned regulation supposed to act in synergy with an international legal system. Because of reference to existing rules, this aim would be attain.

Thirdly, biding text of the regulation 261/2004 and CJEU judgments accompanied to this regulation was a matter of a severe criticism form air carriers. This criticism was caused by a lack of coherence with the Montreal Convention. The proposed amendment will be a positive turn for carriers. In the same time, the proposed amendment will be in favor of consumers, because of the higher level of clarity.

PL is on the position that we shall refrain from a term 'operating air carrier' as defined by recent CJEU decisions.

After the first 'Open Skies agreements' especially between the Netherlands and the US, the practice of international transport is that small aircraft such as Embraer 175 carries a traffic and feed big aircraft such as Boeing 777-300, and then on the opposite shore of the ocean, the big one feeds Airbus A320-200. Using a term 'feeder' (as same States propose) is confusing in this scenario. It is confusing because it happens all the time that a big machine with big capacity 'feeds' a dozen of small machines. For instance, it may happen when a German/ French/ or non-European machine brings a passengers to small machine operates by Belgian airline.

Whereas, French representation in their comments to art. 6a raised an argument that "Such a right would imply an excessive burden on airlines (especially regional ones)" (*.Brussels, 30 March 2020; WK 3082/2020 ADD 6*). Polish representation emphasizes the fact that using a term 'feeder' may indicate that the "big machine" and the transatlantic flight is the one that has to be protected.

Therefore, PL proposes to use terms as indicated above.

Art. 2 (o)

This provision uses a term "booking". Moreover, the draft uses terms "booking", "reservation", and a "contract". Is there a difference between a booking/reservation and contract of carriage? In PL's view the regulation should use only one term – either booking or reservation or a contract of carriage. Due to the fact that reservation is defined above, this is the one preferred.

Art. 2 (p)

This provision also uses terms booking and a contract. Does term "booking" differ in any way from reservation and contract of carriage? Does it change liability of an operating air carrier? In PL's view the regulation should use only one term – either booking or reservation, or a contract of carriage. Due to the fact that reservation is defined above, this is the one preferred.

Art. 2 (s)

Ticket price definition should be combined with ticket definition (Art.2 f).

The text should refer to art. 2 f ("(f) "ticket" means a valid document giving entitlement to transport, or something equivalent in paperless form, including electronic form, issued or authorized by the air carrier or its authorized agent;"). PL proposes to replace this provision by:

(s) "ticket price" means the full price paid for a ticket and including the air fare, and all applicable taxes, charges, surcharges and fees, including the management fees charged by the air carrier, paid for all optional and non-optional services included in the ticket. **All these components shall be included in a 'package' tour reservation to insure if a flight could be described as 'free of charge' or not;**

Rationale behind this text is that it may be uncertain if a specific flight was free of charge or not. For instance, it is possible that a 'package' tour was not for free and cost an amount of many which indicated that the travel was in the scope of the regulation; however, the reservation indicated price for accommodation etc. One of component was cost of flights which was for free. Taking into account reality of market, it is a burden to be sure if a flight was free of charge and beyond the scope of the regulation or not.

Art. 2 (v)

"time of arrival" means the time when the aircraft reaches the arrival stand and the parking brakes are engaged (in-block time); PL supports such definition

Art. 3 (5)

"This Regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2. The operating air carrier is responsible for performing the obligations under this Regulation."

PL proposes to replace this provision by:

"This Regulation shall apply to ~~any operating~~ **an actual air carrier providing transport to passengers which transport is covered by paragraphs 1 and 2. When a journey consist of two flights, and only the second is a subject to this regulation, any responsibility of every non-Union carrier does not imply any liability of a Union air carrier, as indicated in paragraphs 1 and 2.** ~~The operating air carrier is responsible for performing the obligations under this Regulation~~."

This provision leads to a lack of legal certainty. Considering the geographical scope of the regulation, there is possible unequal and uncertain outcome - namely, when there is a journey that consist of a flight operated by non-Union carrier to EU, and the second flight is entirely in the EU, there is a measure latitude. Taking into account mentioned principle and a practice of CJEU, it is possible that CJEU may find the Union carrier responsible and liable for a whole journey and not only a flight intra the EU. It is because passengers may be without any care and compensation from non-Union carrier. For example, the beginning of a journey is in a third country such as Canada and the operating air carrier of the first flight is a carrier that is non-Union carrier and then next air carrier is a Union carrier. The first flight is not entirely outside the EU but the air carrier is not a Union Carrier, which means this leg of the journey is outside of the scope of the regulation. The second one is a Union carrier that provides the traffic from Brussels to Berlin. Is the Union carrier responsible for a care and liable for compensation when the non Union carrier was responsible for a missed connecting flight, if there was a single contract? Is a Union carrier liable solely for a distance between Brussels and Berlin or for the whole journey? This question is justified not only on a base of the mentioned principle, but also on the basis of similar question raised: "Can a company which provides air passenger transport and which sells the ticket but which does not

actually operate the flight be considered to come within the concept of "operating air carrier"?". (pending case Air Nostrum C-560/19 – 1).

Art. 4 (1)

PL proposes to replace a term "operating air carrier" by "actual air carrier" or "air carrier that operates it's part of a journey". This proposal is consistent with Polish view that in case of code-share a responsibility and liability of each carrier shall be distinguished.

"When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier."

It ought to be replaced by "When **an actual air carrier that operates the certain flight** reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the actual air carrier."

Art. 4 (3)

In the text:

"If boarding is denied to passengers against their will, the operating air carrier shall ~~immediately~~ **assist them in accordance with Article 8 and offer care in accordance with Article 9. The operating air carrier shall, without a request to that end,** compensate **the passenger** ~~them~~ in accordance with Article 7**(1)** ~~and assist them in accordance with Articles 8 and 9.~~ **By way of derogation of Article 16a(2a), Article 8(1)(a) and 9(1) first indent, such compensation, assistance and care shall be granted immediately."**

PL proposes to include more certain term – "If boarding is denied to passengers against their will, the **actual air carrier that operates the flight** shall immediately assist them".

Rationale of this proposal is the same as indicated above; namely, when a journey originates in a third country, first air carrier is non-Union carrier, second carrier is Union carrier.

Art. 4 (4)

This article uses a term "booking". This term is not defined in the proposal and the regulation; however, this term is used in a case *C-532/17 Wolfgang Wirth and others v Thomson Airways Ltd*. As it was mentioned before, the final text ought to be consistent (please use the term "reservation" instead of "booking" in the whole text).

Art. 5 (1)

This article is about an operating air carrier- cancellation – where there is a cancellation of the second flight from the two, there shall be indicated that an actual air carrier that operates the first flight is solely liable for the one that is under his control. Instead of:

~~"In case of cancellation of a flight, the passengers concerned shall be offered by the operating air carrier in a clear and reliable manner: (…)"~~

PL proposes:

"In case of cancellation of a flight, the passengers concerned shall be offered by the actual ~~operating~~ air carrier**, which operates this specific flight,** in a clear and reliable manner: (…)"

Art. 5 (1a) (iii)

"the cancellation is caused by extraordinary circumstances and the cancellation could not have been avoided even if the air carrier had taken all reasonable measures. (…)".PL have serious concerns that taking into account a judgment *C-532/17 Wolfgang Wirth and others v Thomson Airways Ltd* and a judgment In *Case C-502/18 CS and Others v České aerolinie a.s.* it is highly probable that Union air carrier will be responsible and liable for all disruptions of a journey made by non-Union carrier even if non-Union carrier were objectively responsible. The fact that the journey may be more profitable for non-Union carrier may not be considered. It is possible when CJEU ruled that Union carrier might be liable for denied boarding done by non-Union air carrier.

Interpretation may be more difficult when given facts are more complex. For instance:

a) reseller sold a contract of carriage operated by two air carriers: non-Union carrier and next flight by Union carrier.
b) Union carrier sold a contract of carriage operated by non-Union carrier and Union carrier.
c) Non-Union carrier sold a contract of carriage operated by non-Union carrier and Union carrier.

Provisions about cancellation, delay and missed connecting flight in light of mentioned rulings and uncertainty of future interpretation may lead to a situation when the equal treatment of passengers will not be preserved. On one hand, protection of passengers is different when there is a cancellation done by non-Union carrier and a second leg of a journey was carried out by a Union carrier. Similarly, if there is a delay, a passenger may be entitled to compensation after a couple of hours delay, whereas in case of connecting flight, the time of delay may be very short. On the other hand, a burden imposed on airlines will differ depending on a passenger. A group of passengers on a certain fight will be entitled to different treatment. This treatment will be irrelevant to profit for an airline.

Art. 5 (4)

"The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier".

For PL this provision in not clear, namely we would like to get clarification as to which operating air carrier does this obligation refers to (there are two operating carriers).

Art. 6 (1) (ii)

The existing text is:

"1. When an operating air carrier expects a flight to be delayed at departure, passengers shall be offered by the operating air carrier in a clear and reliable manner: (…)

(ii) when the delay is of at least five hours, the assistance specified in Article 8(1)(a)."

PL would like to clarify that this provision does not indicate any liability of a contracting carrier. The text would be read as follows:

"1. When an **actual** ~~operating~~ air carrier expects a flight to be delayed at departure, passengers shall be offered by the **actual** ~~operating~~ air carrier in a clear and reliable manner: (…)

(ii) when the delay is of at least five hours, the assistance specified in Article 8(1)(a). **This regulation does not indicate any liability of a contracting carrier. Where a passenger misses a connecting flight as a result of a delay at arrival of a previous flight operating, each actual air carrier is responsible solely for the carriage which it performs. The carrier liable shall offer the passenger assistance with Article 7, 8, and care in accordance with Article 9.**

Justification

As indicated in PL comments to art. Art. 5(1a) (iii), it is highly probable that Union air carrier will be responsible and liable for all disruptions of a journey made by non-Union carrier, or a so called 'feeder' will be found liable for another air carrier. PL proposes to be consistent. Every time when a journey consists of two or more flights operated by two or more air carrier, liability shall be restricted to that flight operated by one air carrier. It is important especially in purely international transportation, as opposed to EU domestic one. Union carriers hall not be liable for parts of journey that are beyond their control, and are outside the EU. It shall be distinguished from flights purely inside the EU. The aim of this regulation is to preserve connectivity of the EU.

Art. 6 (2) (ii)

For PL this provisions in not clear, namely we would like to get clarification about the liability of air carrier in reference to operating air carrier.

Art. 6 (2) (iii)

"the delay is caused by a connecting flight operated entirely outside the EU".

PL would like to refer to the previous comment in Art. 3 (5). In light of the comment shared, there is a measure latitude. It is not certain what "entirely outside the EU" means. For example, non-Union carrier carriages a traffic from the third country to the EU and the second flight is operated by Union carrier entirely in the EU.

Art. 6 (2) (iii)

This provision:

"Passengers shall have the right to receive, on request, compensation from the operating air carrier in accordance with Article 7(1) unless: (…)

~~(iii) the delay is caused by a connecting flight operated entirely outside the EU."~~

shall be replaced by

"Passengers shall have the right to receive, on request, compensation from the **actual** ~~operating~~ **air carrier that operated delayed flight** in accordance with Article 7(1) unless: (…)

(iii) the delay is caused by a connecting flight operated entirely outside the EU."

Justification

Nevertheless the drafted provisions may have an effect the same or similar to the effect that would the Polish provisions have. It must be mentioned that the non-including of the Polish definition of „actual" and „contracting" air carrier may cause the following questions: can the definition that was adopted (at the beginning of the project) be applied to the code-sharing, to the alliances. What about the situation when the delay was an effect of a bad route planning and changes. Who is responsible for the airport changes flexibility? What if the first flight was allowed boarding and the second flight was denied boarding, because the first air carrier did not test travel documentation? These questions are the result of non-including of the Polish proposal. And so, the project refers only to the latest court decision in a casuistic way.

Art. 6a

This article shall be replaced. Instead of:

~~1. Where a passenger misses a connecting flight as a result of a delay at arrival of a previous flight, the air carrier operating the delayed flight shall offer the passenger assistance in accordance with Article 8, and care in accordance with Article 9.~~

~~2. Where a passenger misses a connecting flight as a result of a delay to a previous flight, the passenger shall have a right to receive, on request, compensation in accordance with Article 6(2) and Article 7(1).~~

~~3. The air carrier operating the delayed flight shall be responsible for the handling and settlement of claims, including payment of compensation where applicable.~~

~~3a. Passengers shall be informed of the delay by the operating air carrier of the delayed flight as soon as possible. The operating air carrier of the delayed flight shall provide each passenger affected with a written notice setting out the rules for compensation and assistance in line with this Regulation. The~~

~~contact details of the national designated body referred to in Article 16 shall also be given to the passenger in written form.~~

~~4a. Where a passenger, on a journey falling within the scope of this Regulation, misses a connecting flight as a result of a cancellation, or delay at arrival, of another mode of transport stipulated in its single booking sold by an air carrier, that air carrier shall offer the passenger assistance in accordance with Article 8 and care in accordance with Article 9.~~

it shall be:

1. This regulation does not indicate any liability of a contracting carrier. Where a passenger misses a connecting flight as a result of a delay at arrival of a previous flight operating by an actual air carrier, the actual air carrier is responsible solely for the carriage which it performs. The carrier liable shall offer the passenger assistance with Article 7, 8, and care in accordance with Article 9, and 14.

2. Where a passenger misses a connecting flight as a result of a delay to a previous flight, the passenger shall have a right to receive, on request, compensation in accordance with Article 6(2) and Article 7(1) **from an actual air carrier that operated delayed flight.**

3. The **actual air carrier that operates** ~~air carrier operating~~ the delayed flight shall be responsible for the handling and settlement of claims, including payment of compensation where applicable.

3a. Passengers shall be informed by the **actual** ~~operating~~ air carrier of the delayed flight as soon as possible. The **actual** ~~operating~~ air carrier of the delayed flight shall provide each passenger affected with a written notice setting out the rules for compensation and assistance in line with this Regulation. The contact details of the national designated body referred to in Article 16 shall also be given to the passenger in written form.

Justification

PL proposes to divide a journey into flight, especially when it comes to code sharing and other market practices. It is because other approach would be inconsistent for presented bellow reasons:

When previous light operated by one of two carriers there should be made a reference to the Minimal Connecting Time – MCT. Referring to MCT when it comes to connecting many flights in distant terminals, it is an enormous burden imposed on air carriers. Moreover, it is against a policy of equal treatment to distinguish passengers on the basis of importance of their flights. It is also irrational to introduce to this regulation a unified connecting time. This problem emphasizes the fact, that it is better to refer to thresholds as in art. 6(2) 5/9/12 hours of delay. For this reason, in art. 6a it should be clearly indicated that the actual air carrier operating on a given flight is responsible for the irregularity of the flight for the obligations arising from Articles 7, 8, 9, 14.

This regulation does not indicate any liability of a contracting carrier. Where a passenger misses a connecting flight as a result of a delay at arrival of a previous flight operating by an actual air carrier, the actual air carrier is responsible solely for the carriage which it performs. The carrier liable shall offer the passenger assistance with Article 7, 8, and care in accordance with Article 9.

More specifically the text: "(…) the air carrier operating the delayed flight shall offer the passenger assistance (…)" (Art. 6a (1)), attracts attention. Since legal interpretation mentioned above may arise doubts in reference to the scope of this regulation, it is desirable to refrain from existing wording that impose single liability only on one air carrier when there are two air carriers. It is extremely unjustifiable in case of Union and non-Union carrier operating one journey. For this reason, Polish proposal that actual air carrier shall be liable only for the flight that performs is more than required.

Why in art. **6a (1)** we have a term 'delay at arrival' and in point 2 'delay to a previous flight' what is a difference?

Art. 6a (3)

Referring to art. 6a (3) PL proposes to use a term 'actual air carrier' or 'air carrier that operates the flight', or "an actual air carrier that operates the delayed flight".

Rationale behind terminology was given in PL comments to Art. 2 (b).

Art. 7 (1)

„Where reference is made to this paragraph, the following compensation amounts shall apply:

(a) 250 EUR for journeys of 1500 kilometers or less, as well as for intra-EU journeys over 1500 kilometers;
(b) 400 EUR for extra-EU journeys between 1500 and 3500 kilometers;
(c) 600 EUR for extra-EU journeys of 3500 kilometers or more."

Polish position is that the amount of compensation must depend on the ticket price only. In particular in current economic situation, it should be considered to change compensations rules as follows:

1. Where reference is made to this paragraph, as regards cancellation and denied boarding, the following compensation amounts shall apply:
(a) 25% of ticket price for journeys of 1500 kilometers or less;
(b) 35% of ticket price for journeys between 1500 and 3500 kilometers, as well as for intra-EU journeys over 3500 km;
(c) 50% of ticket price for extra-EU journeys of 3500 kilometers or more."

PL firmly insist on rephrasing an existing text of the amendment, and to include given the above thresholds.

Art. 11 (1)

In reference to PL comment on definition 2b, the text should be amended as follows: "**Actual** ~~Operating~~ air carriers shall give priority to (…)"

Art. 14 (1).

The Polish proposal:

"The **actual air carrier and the contractual air carrier** ~~operating air carrier~~ shall include on its website an information notice specifying rights under this Regulation, including complaint handling process. The **both** ~~operating~~ air carrier shall also provide this information in paper or in the electronic form during the reservation"

Justification: PL comment on definition 2b.

Art. 16 a

PL is in favour of adding extra paragraph on Claiming agencies:

"**1 b. Any activity of third parties to the particular flight that is taken at the airport, whereby the third party strives to make agreements with passengers of assignment or representation before the appropriate body or the court to achieve compensation, are forbidden. Member States should actively counteract such activities**."

Justification:

Whereas traditional legal services provided by acknowledged advocates or legal counsels are based on individual relations, claim agencies acts in a way that may indicate protection of their clients in same cases. For instance, claim agency may sometime advertise services that are not provided. Agencies may promise to examine a passenger's case, whereas no service provided. Passengers may send complaints to an agency, agency without any examination and advice, and then the agency may sue an airline for a flight which was, for instance, beyond the scope of the Regulation. This system may work on a mass scale of claims. It may be easy for a company – claim agency; however, a percentage of passengers unaware may be still liable for paying fee to the agency. In a light on this example only, it is obvious that claim agencies may be also a subject of consumer protection. PL indicates that traditional services provided by advocates, legal counsels and based on individual relations are better for passengers.

art. 16a (2a)

Why the regulation distinguishes the situation in point 2 and in point 2a? Why when it comes to compensation, passenger has to submit it on the different basis than the right to care in art. 2? PL proposed that point 2a is deleted.

PL proposes in art. 16a point 2. following change "Complaints, **including claims for payment of compensation under Article 7** shall be submitted…"

Annex 1.

In PL's view the list should be not exhaustive.

In PL opinion "vii. labour disputes" does not cover strikes. That is why PL suggests inclusion in vii **"all kind of strikes including strikes of Pilots and Crew Members**".