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## **REPORT**

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From: General Secretariat of the Council

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To: Permanent Representatives Committee (Part 1) / Council

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Subject: *Preparation of the Council meeting (Transport, Telecommunications and Energy) on 5 December 2013*

**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 objective 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.

The European Parliament's Committee on Transport and Tourism appointed Mr George BACH (EPP) as rapporteur and is expected to vote on a draft report on 17 December 2013.

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

Under the Irish Presidency, the Commission presented the air passenger rights proposal to transport ministers at the TTE Council on 10 June 2013. On 19 June 2013 the Working Party on Aviation discussed and evaluated the impact assessments accompanying the proposal and started the detailed examination of the proposal under the Lithuanian Presidency, in July 2013. In order to enable the Council preparatory bodies to advance their work on this proposal, the Presidency held an orientation debate at the Transport Council on 10 October 2013.

At the orientation debate ministers expressed their agreement on the objectives of the proposal and the need to revise and improve existing rules. They underlined the importance of clear and simple rules, and agreed with the Commission that the guiding principle of the Regulation should be that the passenger reaches his destination. At the same time, they expressed serious concerns on the new rules on connecting flights. It was also stressed that concerning delays and cancellations, a good balance of the detailed provisions must be found in order to ensure the desired fairness both for passengers and airlines. The majority of Member States were sceptical on introducing provisions on linking the compensation to the ticket price. Some delegations considered that bringing under the scope of the Regulation travel made by other modes of transport goes against the principle of clear and simple legislation.

The Lithuanian Presidency worked hard on this proposal with a view to reaching a general approach at the meeting of the TTE Council in December. However, considering the complexity and the political importance of this file, and the fact that delegations have diverging views on the approach to take on some important issues, despite the shared overall interests it was not possible to reach that objective.

With a view to making progress on this file, the Presidency has drafted several compromise proposals taking into account the guidance received from ministers and the comments made by Member States. In particular, the Presidency concluded not to include provisions on linking to ticket price, and made good progress on the proposal to amend Regulation (EC) 2027/97 on air carrier liability in the event of accidents. In addition, the concept of extraordinary circumstances, as well as the Annex containing a non-exhaustive list of such circumstances was discussed in detail and significant progress was made in accommodating the concerns of delegations. In the current text it is also proposed to delete provisions which would foresee the application of Regulation (EC) 261/2004 to travel carried out by other modes of transport.

The compromise proposals were last examined by the Working Party on Aviation on 26 November, and appear in Addendum 1 to this report. The latest changes appear in **bold** and deletions are marked with ~~striketrough~~.

Taking into account the fact that Member States are still examining the Presidency compromise proposal, they have a general scrutiny reservation on the whole text. The Commission also has a general scrutiny reservation on the different suggestions modifying its initial proposal. UK has a parliamentary scrutiny reservation on the text.

### **III. MAJOR OUTSTANDING ISSUES**

#### *Extraterritoriality and the concept of delay at arrival*

The Commission did not propose any modification in the scope of the Regulation. At the same time, the proposal contains new provisions on delays at arrival, building on the consideration of delay at arrival by the European Court of Justice.<sup>1</sup> Since the beginning of the discussions, several delegations expressed serious concerns on the use of the concept “delay at arrival” and consider that the legal consequences of regulating delay at arrival must be assessed before agreeing on the concerned provisions. In particular, given that Articles 19 and 29 of the Montreal Convention<sup>2</sup> contain related provisions, they question to what extent the new proposals on delay at arrival are compatible these rules at international level. Furthermore, delegations have reservations on how the new provisions on delay at arrival could be applied outside EU territory and if non EU carriers are concerned, raising the question of extraterritoriality. The written opinion of the Legal Service was requested on these issues which will require further detailed examination at Working Party level.

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<sup>1</sup> Sturgeon C-402/07 and C-432/07, Nelson C-581/10 and C-629/10.

<sup>2</sup> Convention for the Unification of Certain Rules for International Carriage by Air (OJ L 194, 18.07.2001)

### ***Equal treatment in case of cancellation and long delay***

The Commission proposal aims at ensuring the equal treatment of passengers whose flights are cancelled and of those who suffer long delays. This follows up on judgements given by the European Court of Justice, ruling that these passengers must be considered as being in comparable conditions, on the basis that they suffer similar inconvenience. Delegations are generally satisfied with the 5-9-12 hour trigger points proposed on compensation for delay, and expressed openness to align the distances on delay to the distances on cancellation, in a way that respects the principle of equal treatment and results in a simpler text. However, several delegations consider that further detailed examination, including case-law, is needed in order to find the right balance of provisions which also serve the interest of passengers. They also warned that careful analysis is needed in respect of adjustments to be made in certain articles, which may have a significant impact elsewhere, with a potential impact on the underlying principle of equal treatment.

### ***Missed connections***

The new article proposed by the Commission on missed connections is a key concern for delegations. While they all recognise the need to assist passengers with missed connections, the majority of delegations expressed concerns on the impact of such new provisions on already existing cooperation arrangements between airlines, and on regional connectivity. The Presidency compromise proposal places the responsibility for assistance and compensation on the first air carrier, which was considered as a step forward. However, some delegations are of the view that in the interest of simplification the article could be deleted in its entirety, since passengers with missed connections should already be covered by the provisions on delay or would fall under the case of change of schedule. At the same time, many delegations see missed connections closely linked to the problem of "delay at arrival", and maintain their reserves until a common approach is taken on delays at arrival and the applicability of the Regulation in case third-country carriers are involved. Furthermore, delegations which have the view that the right to compensation can occur per flight also have reservations on this article.

### *Extraordinary circumstances*

In case of extraordinary circumstances, the Regulation foresees that air carriers are exempted from the obligation to pay compensation, if they have taken all reasonable measures to avoid that such circumstances would cause the cancellation or delay of flights. The lack of precision on extraordinary circumstances in the Regulation in force has caused many difficulties in legal disputes. Therefore, the Commission proposed to add a definition of extraordinary circumstances, accompanied by a non-exhaustive list of such circumstances. All delegations agree on the approach taken and welcome the idea of legal clarity. The Presidency compromise proposals have improved the text in this direction, in particular as regards the consideration of technical failures as extraordinary circumstances. However, some delegations still have reservations on the text and continue to have difficulties on the inclusion of some cases in the Annex, and also on the fully binding nature of the Annex. They would prefer to give the possibility to National Enforcement Bodies and national courts to deviate from the list in exceptional, duly justified cases. The Commission is reluctant to make any such major change in the text which would reintroduce uncertainties in the Regulation. Some delegations also share these concerns and maintain their ambition to reach legal certainty.

### *Other concerns*

In addition to the major concerns described above, delegations have differing views on how to address several other issues in the Regulation. On one hand, the majority of delegations advocate legal certainty and clarity. On the other hand, simplicity and easily applicable legislation is also a priority for delegations. Against this background, further discussions are needed to strike the right balance on issues such as reducing the number of definitions, and having explicit or complementary provisions on scenarios (e.g. change of schedule, landing at an alternative airport) which may be considered as variations of the existing rules on cancellation and delay.

Regarding hand luggage, some delegations see the need to have specific provisions on the so called "one bag rule", while other delegations consider a separate provision as overregulation, and are of the view that information to passengers, as proposed by the Commission, should be sufficient. In the case of exemptions from the obligation to provide accommodation, several delegations question the fairness of the 100 EUR per night limitation, taking into account the diverging hotel prices around airports. They would prefer to explore other, more practical ways of introducing this limitation in the text. In cases where the scope of the two Regulations in the proposal concerns third-country carriers, delegations expressed the need to examine in detail the effective applicability of those provisions. The majority of delegations also expressed the need to further clarify the rules on passenger complaint handling, including ways of alternative dispute resolution. This should be coupled with real and efficient enforcement by national authorities, however with a strong emphasis on avoiding the creation of additional administrative burden.

#### **IV. CONCLUSION**

Taking into account what is said 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 and the document in Addendum 1.