

Air passenger rights: why the revision of Regulation 261/2004 is urgent?

Position of the European Consumer Centres France and Germany

The European Union, with the Regulation 261/2004¹, created in 2005 rights for air passengers and obligations for airlines.

In thirteen years, numerous events and complaints have forced on the one hand the CJEU to interpret the European text in order to provide the necessary details and the airlines on the other hand to adapt their general conditions of transport.

In 2018, air passengers have not been spared: many cancellations or flight delays, strikes of several airlines and French air traffic controllers, change of cabin luggage policy from Ryanair...The European Consumer Centres Network (ECC-Net) is very often requested to inform and help consumers who are victims of these incidents. Air transport, which is by its nature cross-border, is one of the sectors in which the European Consumer Centres receive the most complaints in. In 2017, 33% of the complaints registered by the European Consumer Centre France, 37% of the complaints of the European Consumer Centre Germany, concerned the tourism sector and mostly related to air transport.

Based on their experience, the European Consumer Centres have noticed for several years that despite their efforts, it is becoming increasingly difficult to obtain by amicable agreement the application of the rights foreseen by the European text and case law of the CJEU. **Recourse to justice is no longer the last resort, it is often the only recourse** for consumers. And the development of private claims companies specialised in airline complaints is therefore not surprising².

What are the obstacles for the effective application of air passenger rights? What is the role of other players in this sector (Alternative Dispute Resolution bodies (ADRs), enforcement authorities)? The European Consumer Centres recommend urgently a revision of Regulation 261/2004³.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0261&from=FR>

² see also the [ECC-Net Air Passenger Rights Report: Do consumers get the compensation they are entitled to and at what costs?](#)

³ see also in French [la prise de position du CEC France sur la proposition de révision du règlement 261/2004 de la Commission publiée en 2014 et toujours d'actualité](#)

OBSTACLES TO THE EFFECTIVE APPLICATION OF AIR PASSENGERS' RIGHTS

1) Communication difficulties with airlines

Following a flight cancellation, a significant delay or a loss of luggage, finding a way to effectively contact the company, be it via the proper claim form, the correct contact or simply the customer support service contact, is already a test in itself.

Once the claim is sent, consumers, as well as out of court dispute settlement services (consumer organisations, ADR bodies) notice that delays in response from airlines increase significantly. Consumers often have to wait months for a hypothetical amicable solution. In this area, airlines are not bound by any legal deadline to respond.

Moreover, there is no provision for a consumer protection organisation to have a privileged interlocutor within the airlines or the means to compel the company to respond to their request.

Some ADR bodies or national enforcement authorities (NEBs) end up rendering an opinion in favor of the consumer without being able to take into account the possible elements which the airline would have in support of its refusal of compensation for example. The consumer, based on the opinion given, then tries to assert his rights in court. It is sometimes unfortunate that the company is waiting for a court order to provide the supporting evidence of the incident.

Airlines must cooperate for the application of passengers' rights and put in place internal procedures to deal with complaints quickly and effectively on an amicable level. It is in the interest of consumers as well as airlines to improve their customer relation and avoid costly and public court proceedings.

2) Lack of harmonisation in the tasks of the national enforcement bodies (NEB)

The Regulation 261/2004 obliged each Member State of the European Union to appoint a national enforcement authority with a power of sanction, responsible for ensuring the correct application of the European regulation.

Without a precise definition in the regulation of the outlines of their missions, there is a great disparity between the supervisory authorities of the Member States. While some of them, responding to the administrative requirements of their state, cannot offer individual treatment of passengers' claims, others assume this mission, sometimes playing the role of a mediator.

NEBs have territorial jurisdiction, that is to say, linked to the location of the incident (often the airport of departure) and not to the nationality of the company or the country of residence of the consumer (unlike ADR bodies and mediators whose area of competence is often linked to the nationality of the company). The current operation of NEBs, without apparent cooperation, does not

allow the transfer of consumer claims between NEBs to the competent NEB. In addition, the differences between the treatment of individual and collective claims create a certain legal uncertainty for the consumer who, when approaching the NEB of another country, does not really know what follow-up will be given to his/her request and what steps will be undertaken.

In the general interest of consumers and when observing commercial practices in contravention of the EU regulation, a NEB may take sanctions against an airline. However, these sanctions are not very well known, are unpublished and not harmonised in the EU. Thus, for the same breach by the same company, the sanctions can be very different from one Member State to another.

The NEB, the only authority to be able to estimate, for example, whether the reason put forward by the airline is an extraordinary circumstance, can play an important role in the enforcement of air passenger rights. Their missions should be better defined, harmonised in the different EU countries, to encourage and strengthen the cooperation of these authorities with the bodies specialised in the individual handling of complaints such as the European Consumer Centres, national consumer organisations and ADR bodies.

3) The absence of definition of extraordinary circumstances

Regulation 261/2004 provides that in case of cancellation or delay of flights, the airlines are not liable for the payment of lump sum compensation if they prove that the flight incident was due to "extraordinary circumstances". This concept, which is not defined in the regulation, required a regular interpretation of the CJEU in order to define its contours, especially when the cause is technical, climatic and, more recently, linked to the strikes.

The absence of an exhaustive list or clues as to whether a cause is extraordinary or not creates legal uncertainty for the passenger who, very often, suspects the company of willing to make excuses to avoid paying compensation. The passenger feels all the more frustrated that it is very often only in the courts, under long and costly procedures (particularly when the competent court is abroad⁴) that he/she will know if the cause of the incident is really extraordinary.

In 2018, many examples have once again demonstrated the need to define the notion of extraordinary circumstances:

- **The strikes of the air traffic controllers in France.** Beyond disrupting flights departing from or arriving on the French territory, several companies have argued this extraordinary circumstance to explain cancellations or delays of flights which sometimes did not even fly over France. The European Consumer Centre was able to discuss this subject with the French NEB (the DGAC), but the opinion of a single authority does not allow to know if these disruptions justified the cancellation of all the flights.

⁴ https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/219_22_36143.html

- **The strike of Ryanair pilots** in June, July and August 2018. While the CJEU acknowledged in April 2018⁵ that the strikes, even "wildcat", of staff could not be considered as an extraordinary circumstance, the CEO of Ryanair announced to the press this summer his intention not to follow this decision and not to pay compensation to passengers, victims of the cancellation of flights, however related to the strike of its own pilots (see the press release of the European Consumer Centers Network⁶).

NEBs, in charge of ensuring the proper application of Regulation 261/2004, in their "expert" role with technical knowledge and skills, can define, for each delayed or cancelled flight, whether the cause of the incident is extraordinary or not. However, few NEBs do this concretely or at least communicate their analysis to consumers.

In order to offset the legal uncertainty in this area and to strengthen consumers' trust in companies, it is necessary to list clearly the grounds considered as extraordinary circumstances which will exempt companies from the payment of compensation in the event of cancellation or flight delay. The authorities who have the required technical expertise should also be able to play an informative role when a particular event may disrupt traffic.

4) Disparity of the roles and powers of ADR bodies in the EU

The EU has made out of court settlement of disputes in the consumer sector as a preferred alternative to help consumers. Judicial proceedings are often lengthy and costly, especially in cross-border cases and the courts need to be unclogged. The airline industry is no exception: companies must designate or adhere to an ADR body.

However, in some Member States where alternative dispute settlement does not cover all types of sectors and cases, towards airlines established in these countries consumers are deprived of this amicable settlement.

Also, in the majority of Member States, the opinion of the ADR body, based on a strict application of the law or equity, does not have any binding force and cannot be imposed on companies. Consumers are not always well informed about their rights and are therefore not able to make an informed decision whether or not to accept an ADR's proposal if it is inferior to the rights provided by the regulation.

ADR bodies should be a cornerstone of the individual complaint system in the aviation sector and be the last alternative before court proceedings. For this, their designation should be facilitated by

⁵ <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/cp180049fr.pdf>

⁶ https://www.evz.de/fileadmin/user_upload/eu-verbraucher/PDF/Presse/PM_Fluggastrechte-Urteil_mit_Signalwirkung.pdf

the Member States and their role has to be harmonised in the EU. Their cooperation with NEBs should also be strengthened.

5) More transparency and harmonisation in ticket prices

To enable consumers to compare prices and to benefit from competition, Regulation 1008/2008 introduced the principle of transparency in price information.

However, for several years, the price displayed (the cheapest price) of airline tickets covers variable benefits from one company to another, particularly with regard to the transport of luggage. Examples:

- For some companies, the price includes only one carry-on cabin baggage, for others, a handbag and a cabin baggage, with significant differences in weight;
- For some companies, the price includes the possibility to choose the seat, for others this service requires supplementary payment.
- For Ryanair, cabin luggage is a paid option since 1st September 2018. Ryanair applies this new rule also to customers who booked before that date for flights operated after 1st November 2018. The company leaves only two choices to consumers in this case: pay extra to carry their luggage in the cabin or cancel their reservation (and be refunded).

Without a harmonization of services included in the base ticket price, it becomes difficult if not impossible for consumers to easily compare ticket prices between companies and to make an informed choice, particularly if they pass through a price comparator or any booking intermediary site.

In this logic of transparency, it is also necessary **to regulate the size of cabin baggage**, which varies from one company to another, making connecting flights operated by different companies difficult.

OUR RECOMMENDATIONS FOR AN EFFECTIVE APPLICATION OF PASSENGER RIGHTS

- **Require companies to provide their full contact information or claim form on their website** so that they can be easily contacted in the event of a claim.
- **Impose time limits for consumers but also response times for airlines** to encourage companies to develop their efficiency in handling and tracking consumer complaints.
- **Clearly define the role of NEBs towards passengers and involve them in the settlement of disputes**, particularly for their expertise in extraordinary circumstances.

- **Make NEB action more effective by providing a common and dissuasive mechanism for sanctioning companies that do not respect passenger rights and communication about taken sanctions.**
- **Improve communication and cooperation between different actors** (airlines, consumer organisations, ADR bodies and NEBs) to clarify for consumers the role of each of them and facilitate the resolution of the complaint.
- **Define the notion of extraordinary circumstances and list the events that may justify non-payment of compensation by airlines.**
- **Define and harmonise rules on the dimensions and weight of cabin luggage.**
- **To impose more transparency in the price of airline tickets by defining which services are included in the minimum fee**, in order to allow a real comparison of prices for consumers and fair competition between operators.

Most of these measures have already been mentioned in the draft revision of Regulation 261/2004, which was submitted to the vote of the European Parliament in 2013 but has not been finalised to date.

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