Revision of EU air passengers’ rights legislation -
European Consumer Centres Network¹ position paper²

Regulation 261/2004 adopted by the EU in 2004, intends to protect air passengers travelling through EU airports or with EU licenced carriers. The need for clear consumer rights and enforcement mechanisms is all the more important, given the difficulty for air passengers to be fully aware of their rights.

The European Consumer Centre Network (“ECC-Net”), welcomes the European Commission’s initiative to revise both 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) 2027/97 on air carrier liability in the event of accidents. It also welcomes the compromise amendments from the European Parliament (EP) Committee on Transport and Tourism (TRAN), the European Parliament (EP) Committee on the Internal Market and Consumer Protection (IMCO) and the opinion of the European Economic and Social Committee³.

ECC-Net encourages policy makers to swiftly agree on a final version balancing both the rights of passengers and the financial and technical difficulties encountered by air carriers. This document outlines the views of ECC-Net on the most relevant provisions of the proposed amendments.

A few words about the ECC-Net

ECC-Net’s main objective is to inform and assist European citizens with their practical cross-border consumer issues. ECC-Net is therefore an important stakeholder in the field of consumer protection in the Single market as it cooperates with the EU Commission, national authorities, traders and business organisations to raise awareness on major cross-border consumer issues.

There is a European Consumer Centre in 30 countries—the 28 EU countries, plus Norway and Iceland. The Centres are co-financed through grants by the European Union (Health and Consumers Directorate-General of the European Commission (DG SANCO)) and the member states.

¹ ECC-Net in this document should be understood as being the entire network with the exception of ECC Hungary, ECC Denmark, ECC Austria, ECC Luxemburg and ECC Ireland, who have already expressed their position within the representation of their member states and cannot therefore support this position paper.

² This document has been written by the working group composed of ECC Belgium, ECC Czech Republic, ECC France and ECC Sweden

³ Opinion of the European Economic and Social Committee on the ‘Common rules on compensation and assistance to air passengers (rolling programme)’ COM(2013) 130 final (2013/C 327/20),
Case law of the Court of Justice of the European Union

ECC-Net has a long experience in handling and resolving complaints related to air passenger rights. The transport sector is regularly the number one source of cross-border complaints. In fact, one third of the complaints received in 2012 related to transport, and the large majority of these complaints involved air passenger rights (more than 20% of all complaints received by ECC-Net).

ECC-Net has already highlighted many law interpretation difficulties showing the need to clarify fundamental aspects of the regulation.

Given the difficulties observed in interpreting certain provisions of the Regulation, and having regard to the rulings of the Court of Justice of the European Union (CJEU) addressing gaps and grey zones in the Regulation, ECC-Net welcomes the Commission’s proposal insofar as it provides for greater legal certainty and further rationalises a number of aspects of the Regulation which had rendered its implementation particularly difficult for passengers, air carriers and enforcement bodies alike. But to ensure its adequate implementation, ECC-Net has the opinion that it is crucial that these rulings are codified in EU law, to avoid discrepancies which would jeopardize legal certainty for both economic operators and consumers.

ECC-Net considers that the revision proposal could have more clearly addressed the similarity in the harm caused to passengers affected by a cancellation or a long flight delay (see also below) and expressly recognise the right compensation in case of long delay as established by the CJEU rulings in the Sturgeon and Nelson cases.

Extraordinary circumstances

One essential aspect of the revision proposal concerns the concept of extraordinary circumstances, as the lack of a clear definition has been prejudicial to both consumers and air carriers. Despite the welcome clarification provided by CJEU rulings on natural disasters, personnel rotation and technical reasons, the term is still difficult to apply in practice. Also it is very difficult for a consumer to verify or understand if the cause of a flight disruption qualifies as an extraordinary circumstance or otherwise.

The current proposal foresees a non-exhaustive list of circumstances to be considered extraordinary.

ECC-Net is in favor of a list of extraordinary circumstances as proposed by the revision proposal, but finds the concept of extraordinary circumstances still described too broadly and that the examples in the Annex are too general. Whether a case falls under extraordinary circumstances must be based on the circumstances of each individual case. It must also be considered whether an air carrier has taken ‘all reasonable measures’ that could have been taken to avoid the delay/cancellation.

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3 Cases C-22/11 Finnair Oyj v Timy Lassooy, C-402/07 Sturgeon v Condor Flugdienst GmbH, C-581/10 Nelson and Others, C-629/10 TUI Travel and Others, C-11/11 Folkerts, C-83/10 Sousa Rodríguez and Others, C-12/11/ Denise McDonagh v Ryanair Ltd.
4 Case C-402/07 Sturgeon v Condor Flugdienst GmbH, Case C-581/10 Nelson and Others
5 Case C-12/11 MacDonagh vs Ryanair, 31 January 2013
6 Case C-549/07 Wallentin-Hermann v Alitalia, f 22 December 2008
It should be underlined that technical reasons do not generally qualify as extraordinary circumstances and that airlines have to clearly justify why they would be extraordinary. This was confirmed by the CJEU in its Wallentin-Hermann judgment where it was held;

“...a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of ‘extraordinary circumstances’ within the meaning of that provision, unless that problem stems from events 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.”

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**Other key issues in the revision proposal**

**Information to consumers**

ECC-Net welcomes all proposals aimed at increasing the information obligations of airlines towards consumers, particularly the setting-up of contact points at airports as agreed in the compromise amendments.

ECC-Net also welcomes the extension of the obligation to provide information to consumers to travel agencies. We would submit that the obligation on travel agencies should be even more extensive in light of their rapid uptake of market share in the sale of tickets, especially on-line.

Various business models could be explicitly referenced in this proposal, in line with the Commission proposal to revise the package travel directive11, such as booking portals and websites.

It is submitted that the information obligation of airports could also be strengthened so as to put in place a coherent passenger information and protection scheme which covers all elements of air passenger rights legislation. Furthermore, the division of responsibility between airlines and all other intermediaries needs to be clarified so that consumers can know their rights, and who to turn to in order to ensure these rights are enforced.

**Partial no show ban**

ECC-Net strongly supports the proposal to introduce a partial ban on airline no show policies. If a consumer books and pays for a flight, a seat should be reserved for him/her regardless of whether the whole or part of the service is used. This is the passenger’s choice and he/she should not face forfeiture or substantial additional fees if he/she chose to exercise it.

**Correction of spelling errors**

ECC-Net welcomes the introduction of a new right allowing the correction of spelling errors in passengers’ names. ECC-Net encourages a detailed definition of this right not only for the benefit of consumers but also for airline companies. The definition should be broad enough to cover mistakes from consumers and changes during booking process by intermediaries.

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10 Ibid at para 34
Denied boarding & re-routing

The duty of care is now foreseen only in case a passenger chooses rerouting and has to wait for it to happen. It should also apply if a passenger chooses to cancel and to return to his/her original place of departure and needs to wait for it to happen.

ECC-Net welcomes the Commission’s intention to clarify under what circumstances passengers are allowed to require re-routing on other airlines or via different transport modes. The clarification that air carriers cannot limit re-routing to their own company is important and welcomed.

However ECC-Net submits that the term "comparable transport conditions" requires further clarification. Passengers need to be effectively informed about their re-routing rights. The air carrier has to offer re-routing on other transport modes (other airline company, train, bus, etc.), under comparable circumstances with regard to comfort and service of the initial ticket purchased. The consumer should be informed that any re-routing proposed is entirely at the cost of the air carrier and that the consumer is in any case entitled to receive food and accommodation if necessary.

ECC-Net considers the maximum time limit of twelve hours, afforded to air carriers to implement a re-routing via its own services, too long and it should be clearly stressed that passengers should be re-routing at the earliest possible opportunity. Taking into account the average length of intra-community flights, the right to use other means of transport should be available right away in order to limit delays.

Right to assistance and compensation in case of cancellation and long delay

From a passenger point of view, the type of flight disruption experienced (whether cancellation or other delay) is irrelevant and the remedies available should be the same in either case, in conformity with CJEU rulings. This would also help to avoid situations in which long delays are transformed into cancellations for example by a change of flight number.

In our experience, assistance for passengers affected by long delays or cancellation is often not provided as envisaged by the Regulation. ECC-Net regularly receives complaints from consumers faced with long delays and cancellations who have no option but to pay themselves for food and drinks and even hotels, because the airline does not provide this assistance automatically. Furthermore, many consumers are not aware that they can claim for reimbursement of these expenses upon presentation of invoices. In some cases consumers even sleep at the airport, as they do not have the means to pay for hotel accommodation themselves, and therefore do not have invoices to enable them to obtain reimbursement from the airline.

ECC-Net is therefore in favour of a flat rate sum to be paid automatically to passengers affected by flight disruption, to cover the expenses linked to the time/night spent awaiting re-routing. The limit of €150 (per night and per person), as mentioned in the proposal from the IMCO Committee, appears to us to be reasonable taking into consideration the variety of hotel prices in the EU.

ECC-Net is disappointed to note that the proposal increases the time threshold for delay compensation from 3 to 5 hours. It is our strongly held view that passengers who experience a delay of 3 hours or more in reaching their final destination should be entitled to claim compensation as set out in the
Sturgeon and Nelson case law. Unlike in case of cancellation, regulation 261/2004 does not foresee a right for compensation in case of delay. This causes many consumer complaints, that flights are exuberantly delayed instead of cancelled in order to avoid having to pay compensation.

ECC-Net supports the compromise amendments of EP TRAN, to article 7 (3), which proposes the requirement that compensation should be paid in agreement with the passenger. This new approach would avoid difficulties and extra costs to consumers in instances where an air carrier pays by cheque.

ECC-Net emphasises that the regulation should not allow airline companies to deviate from their obligations by concluding voluntary agreements with passengers as proposed by article 7 (5) There is a great risk that this provision would be systematically exploited in a way that would significantly erode the rights of passengers under the regulation. The proposal is contrary to the fundamental principle of non-derogation from consumer protection rules.

The proposal to classify a flight schedule modification notified less than 15 days prior to departure as a delay is a step forward for consumers.

However, the proposed text does not specifically address flight schedule changes in which the departure time has been brought forward by the airline. Due to the severe impact that such a schedule change may have on passengers, particularly to the extent that they miss their flight, ECC-Net calls for greater protection for passengers faced with flight schedule changes regardless of whether the departure time is brought forward or postponed. Passengers should be immediately informed of the rescheduled departure time and have the express right to cancel their ticket if required. Both the EP TRAN and IMCO reports proposed amendments extending protection to passengers whose departure times have been brought forward by an airline. ECC-Net fully supports this inclusion.

Booking intermediaries, such as online travel agents, should also have an explicit obligation to inform passengers immediately when they are made aware of a schedule change/cancellation/long delay. Consumers have reported instances in which they were only informed of the changes at very short notice, in circumstances where the carrier had passed the relevant information to the intermediary months previously. This greatly limits a passenger’s ability to cancel and search for affordable alternatives, and make the necessary arrangements for other contracts connected with their trip.

In case of tarmac delays, we believe that the 5 hour threshold proposed is too long. ECC-Net strongly supports the compromise amendments from EP TRAN Committee and submits that passengers should be allowed to disembark and to benefit from the assistance foreseen for long delays after a 2 hours delay.

The requirement for contingency planning should also include smaller airports. The proposed restriction to major airports overrides the interests of the consumer.

Persons with reduced mobility or special needs

ECC-Net fully supports the proposition of EP TRAN Committee regarding the amendment of article 11(2) to better reflect the provisions of Regulation 1107/2006. It is important to provide the information on

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12 Case C-402/07 Sturgeon v Condor Flugdienst GmbH, Case C-581/10 Nelson and Others
these specific passenger rights by means of communication adapted to the needs of passengers with reduced mobility. It is important to point out that the accommodation provided as well as the information given through different means should be accessible.

ECC-Net opposes the obligation placed on passengers with reduced mobility, unaccompanied children and pregnant women to report any special needs requirements 48 hours before departure time in order to receive assistance. ECC-Net fully supports the amendment of the EP IMCO Committee which states that notification should not be of any significance as such persons should always receive special protection. This statement is in line with Regulation (EC) 1107/2006\textsuperscript{13} art. 7(3) which provides that although a person with a disability did not notify the airline/airport of their requirement for assistance 48 hours before departure, all reasonable efforts shall be made to ensure that the assistance is provided to the passenger to enable them to take their flight. This provision and its spirit should be integrated into the Commission’s proposal.

**Complaint handling**

The new proposal requires that passengers should be informed during the booking process about possible recourse in case of a complaint, the airline’s complaint handling procedure and any applicable deadlines for submitting their complaints. Information regarding the contact details of where to file the complaint, the procedure and any applicable charges should be given in advance.

However the revised regulation should also include an obligation on all those who sell and market flights and other travel services, to provide information on whether the consumer has entered into one agreement or several agreements with different providers and the resulting impact on their passenger rights under the Regulation. A clear division of responsibility between the air carrier and any other intermediaries is important so that the consumer explicitly knows who is responsible for what.

Although a harmonised complaint procedure is foreseen in the new proposal, it differs from the complaint rules foreseen in the Montreal Convention (Art. 45) applicable to luggage problems. Luggage claims can be addressed to the operating air carrier and also the contractual party, but under the proposed Regulation passengers can only complain to the air carrier performing the flight. Many carriers hire other airlines for flights or have code share agreements with other carriers. Even if passengers are informed about which airline operates the flight, it often creates difficulties when problems arise. It is submitted that this would be a good opportunity to harmonise both regulations.

**Alternative dispute resolution (ADR) & enforcement**

ECC-Net is very active when it comes to promotion of Alternative dispute resolution (ADR) in Europe (see the report on ADR in the Air passenger rights sector\textsuperscript{14}) and therefore welcomes the inclusion of ADR measures in the current proposal.


ECC-Net strongly supports the amendments made by the EP TRAN Committee to introduce clear reference to the ADR/ODR legislations.

It should be underlined that this proposal comes at a time when ADR has become an EU priority\textsuperscript{15}, and it is important that any ADR entities established as a result of this proposal, should be in accordance with Directive 2013/11/EU and Regulation 524/2013.

Airline companies, intermediaries and other relevant parties should be encouraged to adhere to an ADR scheme and to inform passengers about available ADR procedures.

The information about the possibilities for complaints and enforcement should be part of the obligatory information requirements for air carriers as foreseen in art. 14.

The National Enforcement Bodies (NEBs) fulfill a clear and important enforcement task and they should be provided with the impartiality and power to do so. ECC-Net strongly supports the amendments made by EP TRAN Committee. But there should be a strict separation of tasks between the NEB enforcement and the ADR functions as the tasks are not compatible according to ECC-Net.

ECC-Net also wants to underline that not all NEBs intervene in individual complaints to obtain a result for an individual consumer. Most NEBs intervene and sanction airlines in a collective interest but the sanctions are very seldom publically available. There is a need for improved cooperation between the NEBs.

Throughout the EU, collaboration should be improved between the NEB’s, the Consumer Protection Cooperation Network (CPC-Net) and ECC-Net in order to provide sound advice and efficient help to consumers.

Luggage (Regulation 2027/97)

ECC-Net calls for a uniform means of handling cases concerning air passenger rights and luggage cases. Luggage disputes form a significant portion of the complaints received by ECC-Net complaints and the area need thorough attention as it can provoke a lot of problems for consumers.

ECC-Net welcomes the formalisation of the Property Irregularity Report (PIR), used for reporting lost/damaged luggage at an airport, as official complaint document\textsuperscript{16}. It is submitted that airline companies and airports should be obliged to make this document available for consumers. Consumers have reported being unable to access the PIR document when complaining at the airport and later found that the airline refused to take the complaint into account as the PIR was missing.


\textsuperscript{16}Article 31(2) of the Montreal Convention.
Passengers’ rights have been identified as one of the challenges for the future.17 “Despite EU efforts to inform passengers about their rights and to monitor enforcement, passengers’ rights are often not well respected.”18

The 2011 quantitative Eurobarometer survey on the Internal Market showed that almost half of EU citizens having tried to obtain redress after a problem travelling by plane, bus or train consider this as particularly difficult.

Now we have the opportunity to improve conditions for air passenger and it is important to implement changes that lead to improved rights for air passengers.

Consumer cases that demonstrate that improvements to air passengers’ rights are required

After suffering denied boarding, passengers were asked to accept vouchers as compensation. In other cases, consumers were required to go to an office (even in a different country) to pick up their compensation payment in cash.

A consumer bought a return flight, but cancelled the outbound ticket due to death of a relative. The consumer was denied boarding on the inbound flight since it was automatically cancelled as she didn’t take the outbound flight.

A married couple of 70 years of age experienced a flight delay due to technical defect discovered just before the departure. The passengers were stuck inside the plane for 10 hours.

Due to some technical issues, a consumer’s flight did not depart until 30 hours after the estimated departure. The consumer needed overnight accommodation while waiting. The airline insisted that she share a hotel room with 3 other passengers she didn’t know. After she complained, the airline sent her a voucher for a future flight with the company.

A group of travellers reserved their tickets on the website of an intermediary travel agency. At check-in they found out that their flight had left 2 hours earlier. The agency and the air carrier had failed to inform them about the change. The consumers contacted the airline who confirmed that it informed the travel agency more than 15 days before the scheduled departure. The travel agency denied its responsibility and argued that as it is only an intermediary it is therefore not responsible for changes to the flight schedule.