Proposed revisions of Regulation 261/2004: Endangering passengers' rights and going against the international trend?

1. Abstract

This paper analyses the 2020 revisions of Regulation 261/2004 published in February from a passenger perspective. While current Regulation 261 is criticised for being too consumer-friendly, the proposal takes the opposite stand. As it now stands, the proposal endangers passengers' rights by increasing delay and cancellation lengths or by excluding delays at non-EU airports. The inclusion of tarmac delay could result in abuses from airlines. While bringing some clarity, the exhaustive list of extraordinary circumstances also creates new questions. The proposal also includes well-overdue changes such as the inclusion of missed connecting flights and a stronger role for National Enforcement Bodies (NEBs). Overall the proposal weakens passenger rights without real justifications.

Keywords: Revised Regulation 261 – Passenger Rights – Reduction of rights – International trend – European law.

2. Introduction

Regulation 261 has always been a very controversial piece of legislation which suffers from significant non-compliance by airlines and ineffective enforcement at national level (Drake, 2020; Garben, 2016). However, from an airline and airline associations perspective, the Regulation is too burdensome and consumer-friendly, especially after its interpretation by the Court of Justice of the European Union (CJEU), resulting in a call for a revision since nearly day one. The need for revisions was also advocated by international organisations, such as IATA (IATA, 2017). The European Commission issued a proposal for reform in 2013, but the revision remained politically deadlocked, mainly due to a dispute between the UK and Spain over the application of the Regulation to Gibraltar (Drake, 2018). The UK's departure in January 2020 has unlocked the process, bringing forth the revision of Regulation 261 back on the agenda. The first step was taken in February 2020 with a revisit of the 2013 Commission proposal launched by the Croatian Presidency. (General Secretariat of the Council, 2020).

The central criticisms of Regulation 261 are its complexity, vague wording and weak decentralised enforcement regime, resulting in an increasing number of CJEU cases to clarify the current legislation (Drake, 2020) While the CJEU tried to best protect passengers' rights, its judgments created two main issues; first, broadly worded judgment requiring further clarifications and second, the discomfort of some national courts in applying such judgments (Garben, 2016). For instance, in *Sturgeon*[1], one of the most criticised cases, the Court ruled that passengers were entitled to compensations for long delays, although the wording of the Regulation excluded such compensations (Balfour, 2010; Leffers, 2010; Garben, 2013; van Dam, 2011). This complexity also leaves some wiggle room for 'rebellious national courts' to divert from the CJEU's case law, which, in turn, maintains existing inconsistencies in the application of the law. These shortfalls, coupled with the non-compliance and ineffective enforcement, have also had an unexpected consequence: a drastic rise of Claims Management Companies (CMCs). Their proliferation is mainly due to the fact that the legislation is complex, inconsistently applied, and often misunderstood. The non-compliance and enforcement problems have been further illustrated with the COVID-19 outbreak requiring the Commission to set in and issue interpretative guidelines (European Commission, 2020). As the Steer Report (2018) noted, "The low intelligibility of Regulation 261/2004 and the related jurisprudence contributes to its complexity, resulting in a lack of trust between passengers and airlines" (p. vii). Consequently, any revision of Regulation 261 should restore the trust between passengers and airlines while reducing the proliferation of claim farms.

While the current version of Regulation 261 has often been criticised for being too passengers-friendly, the proposal seems to take the opposite stand. It drastically shrinks passengers' rights by attacking one of the main areas of contention: the amount compensable. Indeed, the compensation framework has been criticised by airlines, airlines associations, and academics for being overly in favour of passengers (Colangelo & Zeno-Zencovich, 2019; Defossez, 2020). For instance, Andrew Kelly argued that "Regulating for compensation amounts as much as 10 times the paid fare is clearly unbalanced and unfair. It will, and has, put airlines out of business, close down connectivity routes, have a massive impact on regional economies, and most threatening of all, EU261 threatens safety. The future, unless EU261 is revised, will be a consolidated market controlled by a handful of big airlines, low fares, and competition will be gone, and the European project will be fractured irreparably as connectivity is lost" (ERA, 2019,

[1] *Sturgeon e.a.*, Joined cases C-402/07 and C-432/07, ECLI:EU:C:2009:716 [2009]

p. 4). However, the findings of the European Court of Auditors' Report suggest quite the contrary. According to the Report, only around 1/3rd of passengers claim compensation (European Court of Auditors, 2018). It is estimated that more than half of the cases that should be compensated are discarded by airlines on the ground of 'extraordinary circumstances (van Dam, 2011; Morris, 2017). According to the UK Civil Aviation Authority, three out of five claims, which were initially rejected by airlines, were later held to be legitimate (Calder, 2018). Even if one agrees that the Regulation overly favours passengers, airlines have found a way out by extensively relying on the 'extraordinary circumstances' defence (Defossez, 2019). In fact, it seems that airlines took the view that Article 5(3), i.e., exclusion of obligation to compensate, is the rule, and Article 5(1)(c), i.e., compensation, is the derogation. Consequently, the argument that Regulation 261 puts disproportionate costs on airlines does not take the reality into account, namely the difficulties for passengers to get compensated (Drake, 2020). Finally, if Regulation 261 had such a negative impact on low fare and competition, as claimed by Andrew Kelly, such would have been noticed by now.

Even though Regulation 261 failed to ensure legal certainty on both sides, the Regulation still tried to balance both needs. On the contrary, the proposed changes seem to overly favour airlines and exacerbate the existing mistrust towards them. This mistrust can be explained by the difficulties passengers face in enforcing their rights and obtain individual redress (Drake, 2018). Many claims are dropped due to the 'imbalance' between the amounts that could be received and the time required for such action. CMCs are, therefore, viewed by some as a game-changer while they are, in fact, only filling an enforcement gap. As Drake (2020) noted, "the effectiveness of the regime is unlikely to improve without legislative reform" (p. 230). However, the reforms proposed by the Croatian Presidency might not be the most suitable to improve the effectiveness of the regime, quite the contrary. In fact, the suggested changes go against the general trends of increasing passengers' rights, as exemplified by the Canadian Air Passenger Protection Regulations (APPR) or the US Senate Bill 2341.

The picture is not, however, all black and white, as some of the proposed changes are welcomed. For instance, the proposal offers long-awaited clarifications, such as the definition of extraordinary circumstances in Annex 1, reducing the existing uncertainty by providing an exhaustive list of circumstances. Nonetheless, the definitions of some of the circumstances are still vague and might generate as much case-law as it does now. For instance, 'damage to the aircraft caused by third parties for whom the air carrier, in the absence of contractual relations,

is not responsible on the ground prior to departure of the flight and requiring immediate assessment or repair' will allow airlines to easily escape their liability by claiming there are no contractual relations, which will be impossible for the passengers themselves to verify. Moreover, this revision—if implemented—could take some burden off ground handlers vis-à-vis their airline customers.

Although the proposed revisions are unlikely to succeed in their current form[2], as they run contrary to the CJEU case law, the proposed changes demonstrate a bold move from Croatia, and is worrisome for passengers' rights. The disregard to some of the rights granted by the CJEU or even the EU *acquis* is appalling. In fact, some of the changes seem dictated by economic interests on the side of the State, rather than the interest of all parties. This is problematic as any reform of Regulation 261 needs to balance the needs and rights of all the stakeholders involved, especially airlines and passengers. This balancing exercise is rendered difficult due to the different interests at stake which will have different views depending on these interests. Since the passengers' protection is mainly achieved through Regulation 261, because passengers are excluded from the scope of the consumer rights directive (Directive 2011/83)[3], and their protection is paramount, it is important that the revised version maintain a certain level of protection. Moreover, on top of going against the international trend, some proposed provisions are discriminatory. Finally, some provisions disregarded the suggestions made, at first reading, by the European Parliament (EP) on the 2013 proposal. For the sake of clarity, the EP's amendments have never been accepted and are, therefore, only suggestions.

This article analyses, from a passenger's perspective, the major changes proposed by Croatia in light of the international trend, the existing case law, the 2013 proposal and the EP's amendments. Since the 2020 proposal takes a much more airline-friendly approach, and is detrimental to passengers, the benefits of some of the changes for airlines will be discussed. The two major areas of contention have always been extraordinary circumstance and compensation for delays. A great deal of the existing case law relates to delay. Notoriously, the

[2] Any changes to the Commission proposal made by the European Parliament or Council need to be approved.
[3] Article 3(3)(k) of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance. Preamble 27 states that "passenger transport should be excluded from the scope of this Directive as it is already subject to other Union legislation or, in the case of public transport and taxis, to regulation at national level."
However, certain provisions still apply such as Articles 8(2), 19 and 22 (Article 3(3)(k))

CJEU extended the right to compensation to long delay in the *Sturgeon* decision, as this right was not explicitly applicable to delays. This decision significantly extended the scope of the Regulation and was heavily critised (Garben, 2013). Consequently, this article starts with an analysis of the proposed exhaustive list of extraordinary circumstances and the increase in the length of delay. Linked to the change in length of delay is the welcomed new provision on missed connecting flights, which will be analysed. Then the possible negative consequences of the tarmac delays' provision are examined. Another major drawback in consumer protection is the exclusion of compensation if the disrupted flight departed from or arrived at a small airport or at an airport situated in an outermost region of the EU. While the reasoning behind this rule is understandable, it will likely result in this exemption being beneficial to major airlines and detrimental for passengers. Similarly, this article analyses the proposed provision which would exclude compensation if disrupted flight departed from or arrived at an airport hosting government-subsidised flights. Once again, from a passenger point of view, this provision represents a step in the wrong direction. The right to care was criticised as too much in favour of passengers, as a result, the proposal tries to find a better balance. In its current form, however, the provision is discriminatory for both passengers and major airlines. Another welcome change relates to the clarification of the role of the National Enforcement Bodies (NEB) which might help tackled the CMC proliferation by offering a better alternative to passengers. Finally, some minor changes are addressed, such as cancellation and denial of boarding.

3. Exhaustive list of extraordinary circumstances

This is probably one of the longest awaited changes. Article 5(3) establishes that "an operating air carrier shall not be obliged to pay compensation in accordance with Article 7 if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken." There is no exhaustive list of such circumstance but rather some examples are mentioned in Recitals 14 and 15, including "political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier." Since the concept of extraordinary suffers from a lack of clarity, its interpretations by the CJEU has been crucial (Rossi Dal Pozzo, 2014).

The ambiguity in the concept of extraordinary circumstances has fuelled litigation, with airlines relying heavily on this defence to avoid compensation. It is estimated that more than half of the cases that should be compensated are discarded by airlines on the ground of 'extraordinary

circumstances (van Dam, 2011; Morris, 2017). According to the UK Civil Aviation Authority, three out of five claims, which were initially rejected by airlines, were later held to be legitimate (Calder, 2018). In fact, it seems that airlines took the view that Article 5(3), i.e., exclusion of obligation to compensate, is the rule, and Article 5(1)(c), i.e., compensation, is the derogation.

The unwillingness of airlines to compensate has also fuelled the proliferation of CMCs. Passengers are increasingly likely to receive an email from the booking website they used, inviting them to use a CMC. For instance, AirHelp and Expedia have entered into a partnership, meaning that if a flight is delayed, Expedia sends the passengers a direct link to the AirHelp website (Tims, 2018). Although these companies offer some form of remedy to passengers and make it easy to claim, they also take a cut of passengers' pay-outs. The introduction of an exhaustive list of extraordinary circumstances could, therefore, be beneficial in restoring the trust between passengers and airlines while reducing the number of actors involved.

a. The proposed changes

The 2020 proposal defines extraordinary circumstances very broadly compared to the 2013 revision. Indeed, in the 2013 version, codifying the test in *Wallentin-Hermann*[4], the term was defined as "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, extraordinary circumstances shall include the circumstances set out in the Annex" (European Parliament, 2014). The Parliament already expressed its concerns regarding the use of the word 'inherent' as being unclear and having possibly different meanings in different languages. It also limited the circumstances to the one found in Annex 1 (European Parliament, 2014). While the 2020 version kept the exhaustive list, the definition of extraordinary circumstance was modified to a much shorter definition, namely "circumstances which are beyond its actual control." Given the experience of Regulation 261, it is not clear that this new definition will bring the necessary changes due to vagueness of the wording.

The 2020 version offers a much larger set of circumstances (12) compared to the 2013 version (7). Unlike the 2013 version, Annex 1 does not list circumstances that will not be considered extraordinary, which is understandable as the 2013 version offered a non-exhaustive list.

[4] *Friederike Wallentin-Hermann v. Alitalia*, Case C-549/07, EU:C:2008:771.

Interestingly, the Parliament already deleted the paragraph on the circumstances that were not considered as extraordinary (European Parliament, 2014).

At first glance, the exhaustive list of extraordinary circumstances seems appropriate and helpful. An exhaustive list brings legal certainty to both passengers and airlines by providing a clear framework. The inclusion of this list will also help national courts. While a draft list of extraordinary circumstances was published in 2013, some judges refused to follow it. For instance, Her Honour Judge Melissa Clarke, ruling in favour of the passengers, noted "I give no weight to it [the list]. It is not legally binding. It is clear from its long list of deletions and amendments, arising from changes enforced upon it by decided cases, that the Civil Aviation Authority's view on what should be considered extraordinary circumstances for the purposes of Article 5(3) has often been at odds with that of the courts. I cannot see that it helps me at all."[5] Having an exhaustive list will, therefore, resolve the current controversy surrounding which circumstances are considered extraordinary. It will also remove much of the national courts' discretion, which will increase legal certainty for airlines. The list could also help restore the trust between passengers and airlines, by avoiding long court battles between airlines and delayed passengers as is currently the case.

While the aim of the proposal is to bring clarity and legal certainty, on closer inspection, however, it fails in doing so because the list of circumstances is still broadly phrased and will most certainly require interpretation by the CJEU. In fact, the exhaustive list might generate as many case laws as the current version does. For instance, questions such as what constitutes a natural and/or environmental disaster are left unanswered. The proposal seems to have only displaced the problem rather than cure it. This was already pointed out by the ECC-Net in their 2013 position paper, which stated that "the concept of extraordinary circumstances still described too broadly and that the examples in the Annex are too general" (ECC-Net, s.d., p. 2). As it now stands, the proposal gives the impression that airlines wrote the criteria to escape 80% of root causes for having to compensate customers.

One of the areas of contention has always been 'bad weather'. While the revision lists 'natural and/or environmental disasters' as a circumstance (Article 1(i) of Annex 1), it has not been defined. It, therefore, raises the question as to what is a 'natural disaster' deeming to affect the

[5] *Evans v Monarch Airlines Ltd* [2016] County Court at Luton, 14/01/16, Case No: B33LU039

safe operation of the flight. Does it include similar categories as under paragraph vi of the same Annex, 'meteorological conditions incompatible with the operation of the flight concerned?' Interestingly, paragraph vi was already present in the 2013 revision, and no remarks were made by the Parliament concerning the vagueness of this provision. In fact, the Parliament's suggested amendment 166, "[meteorological conditions] that have damaged the aircraft in flight or on the tarmac after service release and rendering the safe operation of the flight impossible," was rephrased and included in the 2020 draft as a separate circumstance.[6] If the proposal is adopted as it now stands, this new denomination (paragraph xi) will require some clarifications by the CJEU. Indeed, that paragraph gives various examples of what the meteorological events which damaged the aircraft could be. However, the inclusion of an 'etc' at the end of the list of examples makes it is a non-exhaustive list. On a positive note, paragraph xi includes lightning strikes as an example which, therefore, resolves the problems of conflicting judgments at national level. Indeed, two UK County Courts held in 2016[7] that lightning strikes could not constitute extraordinary circumstances while the French Supreme Court reached the opposite decision in 2018.[8] The UK courts both took the view that lightning strikes are part of the day to day running of any airline[9] while the French decision was guided by the importance of passengers' safety. Interestingly, the French court did not make an analogy between bird strikes and lightning strikes. Given the CJEU's conclusion in *Pešková*[10], relating to bird strike, it seems natural that lightning strikes would also amount to extraordinary circumstances. As Advocate General Bot argued although "aircrafts are designed to withstand lightning strikes, the same is true of bird strikes" (Loxton, 2017). Paragraph xi could generate litigation based on the open-ended list of examples.

Annex 1 reflects most of the current case law and codifies latest decisions such as disruptive passenger behaviour (Article 1 (viii))[11] or bird strike (Article 1(ix)).[12] It also adds new headings such as the unscheduled closure of airports (Article 1(v)(c)) or meteorological events affecting

[6] xi "damage to the aircraft which could affect the safety of the flight or the integrity of the aircraft and requires immediate assessment and/or repair and is caused by meteorological events (for example, lightning strikes, hailstones, thunderstorms, severe turbulence etc.)."
[7] *Monarch Airlines v Evans and Lee* (County Court at Luton, 14/01/16); *Tsang v Ryanair* (County Court at Oxford, 4/11/16, unreported).
[8] Cass.1st.Civ., 12 September 2018, No.17-11361
[9] Her Honour Judge Harris QC in Tsang v Ryanair noted "Lightning is a well-known risk to flight in a metal aircraft, which are not infrequently struck and for this reason are invariably designed in order to survive such events. The risk is inherent in normal airline activity." (para 32)
[10] *Marcela Pešková and Jirí Pešká v Travel Service a.s*. Case C-315/15, ECLI:EU:C:2017:342
[11] *LE v Transport Aéreos Portugueses*, Case C-74/2019, ECLI:EU:C:2020:460
[12] *Marcela Pešková and Jirí Pešká v Travel Service a.s*. Case C-315/15, ECLI:EU:C:2017:342

the safety of a flight (Article 1(xi)). While the inclusion of bird strike is long overdue[13], the inclusion of 'disruptive passenger behaviour' is much more problematic due to the lack of definition. Would it only to drug/alcohol intoxication and passengers disobeying safety or security instructions? Or would it also apply to passengers using threatening, abusive or insulting words? This heading requires further clarification even after the recent CJEU ruling in *LE v TAP*.[14] Indeed, the subjectivity required to apply this heading will most probably generate new case-law as there can be a variety of behaviour which might be disruptive for some and not for others. Moreover, it can be wondered whether allowing an obviously drunk passenger to board the plane would defeat the defence or not. Indeed, even if airlines rely successfully on the provisions in Annex 1, they will still have to demonstrate that they took all reasonable measures to be exempted.

Finally, "unexpected flight safety shortcomings," as defined in Article 2 (mm), has been separated from the extraordinary defence. As it stands, the Regulation will provide two main defences, namely extraordinary circumstances and unexpected flight safety shortcomings. This division is not only highlighted by the wording of the cancelation and delay's provisions (Articles 5(1a)(iii) and 6(2)(ii)) but also in the manner the Annexes have been framed. Indeed, the list of criteria for technical defects to be qualified as an "unexpected flight safety shortcoming" is embodied in Annex 2. Except for hidden manufacturing defect, which could amount to extraordinary circumstance according to the ruling in *van der Lans v KLM*[15], and damages to the aircraft by third parties or meteorological events, all other technical defects will fall under this "new" heading. In addition to be vague, the concept of 'unexpected flight safety shortcomings' seems, however, to go against the trend set by the CJEU. Indeed, technical issues rarely qualify as an extraordinary circumstance (ECC-Net, s.d., p. 3; Gates, 2017). The new threshold seems less burdensome than the one established by the Court. Currently, airlines have to show that the technical issue could not have been avoided even if all reasonable measures, including both financial and material, were taken. In other words, only overwhelming technical issues qualify as extraordinary circumstances. According to the proposal, technical problems occur despite proper maintenance. The threshold under Annex 2 seems more restricted than the "all reasonable measures" as established by the CJEU in *Wallentin-Hermann*.

[13] In 2014, the Parliament suggested to add bird strike to the non-exhaustive list of extraordinary circumstances (European Parliament, 2014). Soon after, the CJEU recognised that bird strikes classify as extraordinary circumstance in Marcela Pešková and Jiří Peška v Travel Service

[14] *LE v Transport Aéreos Portugueses*, Case C-74/2019, ECLI:EU:C:2020:460

[15] *van der Lans v. KLM NV*, Case C-257/14, 2015 EU:C:2015:618.

b. The Canadian approach

Looking at other systems recently adopted, the Canadian approach to extraordinary circumstances seems to strike the best balance between passengers' rights and airlines' needs. Indeed, the law was drafted to avoid a similar situation as in Europe (Lexcanada, 2019). The APPR distinguish among three types of situations: those outside the carrier's control; those within the carrier's control but required for safety purposes; and those within the carrier's control (Canadian Transportation Agency, 2019). For instance, Section 10 provides a non-exhaustive list of situations deemed to be outside the carrier's control, such as war or political instability, weather conditions or natural disasters "that make the safe operation of the aircraft impossible," instructions from air traffic control, airport operation issues, a bird strike or other collision with wildlife, labour disruptions "within the carrier or within an essential service provider," and a manufacturing defect in an aircraft that reduces passenger safety, as identified by the manufacturer or competent authority. Airlines are required under Section 10(3) to provide passengers with certain information and, in cases of delay, denial of boarding, or cancellation of three hours or more, passengers are entitled to alternate travel arrangements. Interestingly, most of these situations fall within the new definition of 'extraordinary circumstance' under the revised Regulation. The 'health risk', 'disruptive passenger behaviour' or 'damage to the aircraft caused by third parties', as found in the proposed revision, are not included in the APPR.

While strikes are regarded as an event outside the carrier's control in Canada, they have not been included in the EU proposal. The CJEU has ruled in *TUIfly* that wildcat strikes, namely a strike which is not officially organised by a trade union, are not an extraordinary circumstance because they "cannot be regarded as beyond the actual control of the air carrier concerned."[16] However, other strikes are still considered an extraordinary circumstance under Regulation 261. The lack of inclusion of strikes within the exhaustive list of extraordinary circumstances seems contrary to the established practice and might put airlines in a disadvantageous position.

Under the APPR, the second major type of situations are those within a carrier's control but required for safety purposes. Section 11 defines "required for safety purposes" as anything "required by law in order to reduce risk to passenger safety" referring specifically to "safety

[16] *Krusemann and Others v. TUIfly GmbH*, Joined Cases C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C286/17 and C-290/17 to C-292/17, EU:C:2018:258

decisions made within the authority of the pilot or any decision made in accordance with the safety management system." The definition explicitly excludes "scheduled maintenance in compliance with legal requirements." In this category, the airline has the same communication obligations as in cases of flight disruptions that are outside its control, and nearly the same obligation to "provide alternate travel arrangements," except that this provision also includes the possibility of a refund (Section 11(3)(c), (4)(c) & (5)(c)). Furthermore, the carrier may have an obligation of care under Section 14, such as the provision of food, drinks, means of communication, accommodation, and transport, if the passengers were informed less than 12 hours before the original departure time in cases of delay or cancellation. This obligation also applies to denial of boarding, but without a minimum time period before the obligation kicks in. These obligations differ from those in the EU. Indeed, mechanical or technical issues preventing the safe operation of the aircraft, which are discovered other than in the course of scheduled maintenance checks, will not result in an obligation to compensate passengers whose flights are delayed or cancelled. This means that a case like *van der Lans v. KLM* would have a totally different outcome in Canada.[17] Under the new version of Regulation 261, it can be wondered whether the CJEU would reach the same conclusion in a case like *van der Lans*. Indeed, the list of criteria to qualify as a technical defect as unexpected flight safety shortcomings is not that straightforward and will require interpretation.

Finally, the third category, namely situations within the carrier's control, is dealt by Section 12. Airlines have the same obligations as under the previous section but may also be required to pay compensation to passengers suffering denial of boarding, delays, or cancellation if they were not informed at least 14 days prior to the original departure time (Section 12(2)(d) & (3)(d)). Passengers are entitled to compensation based on the length of delay at arrival to their final destination.

4. Significant increase in the length of delay

One of the major and most problematic changes in the Croatian proposal is the increase in the delay's length which affects compensation and re-routing. This increase was already proposed back in 2013 and rejected by the Parliament (European Parliament, 2014, amendment 74). As of now, according to Article 6(1) passengers are entitled to compensation after a minimum of two hours for journeys up to 1,500 kilometres or minimum three hours for intra-Community

[17] But not in Brazil, where airlines have extremely restricted defences. *See Ferreira v. Delta Air Lines Inc*.

flights of more than 1,500 kilometres and of all other flights between 1,500 and 3,500 kilometres or for minimum four hours for all other flights. The 2020 proposal suggests an increase to five hours for journeys up to 1,500 kilometres, nine hours for journeys between 1,500 and 3,500 kilometres, and twelve hours for extra-EU journeys of 3,500 kilometres or more. Interestingly, the 2020 changes suggest the same delay duration as the 2013 proposal while maintaining the same distance as in the original Regulation, which was not the case with the 2013 proposal. The Parliament's suggested increase in compensation to €300 was not maintained (Gates, 2017).

a. Going against the general trend: example from Canada

This increase in delay length seems inappropriate on various levels. First, due to its geography, delays in Europe are often not long. It is true that the current system puts smaller operators in a weak position because of their inability to keep an extra aircraft to quickly remedy disruptions. Consequently, any technical failure results in huge costs, such as hotel, transportation and catering. For such companies, the increase in delay length could help them avoid those extra costs. Linked to the previous argument, the new system will most probably benefit major companies to the detriment of passengers rather than these smaller operators. The Canadian system does a better job at protecting smaller carriers by making a distinction in the amount payable to passengers based on the size of the airline. The idea behind this distinction is to avoid overburdening smaller airlines that operate less popular routes and fly to less populated parts of Canada. This approach could be adapted to the European reality as was recommended by the European Regions Airline Association (ERA) based on the Canadian approach (ERA, 2019, p. 9).[18] Accordingly, a "large carrier" is defined in Section 1(2) as one that "has transported a worldwide total of two million passengers or more during each of the two preceding calendar years," while a "small carrier" is one that has transported fewer than two million passengers in the previous two years. However, if a small carrier is carrying passengers "on behalf of a large carrier under a commercial agreement," through codesharing for instance, then it will have the same obligations as a large carrier, according to Section 1(4). As a result of this rule, for delays between three and six hours, a large carrier is liable to pay $400 while a small carrier is liable for $125 (Section 19(1)(a)(i) & (b)(i)). For delay or cancellation between six and nine hours, a large carrier will have to pay $700 in compensation while a smaller carrier must pay only $250 (Section 19(1)(a)(ii) & (b)(ii)). Finally, for delays at arrival destination of

[18]. "Operators with an annual passenger load of 2.5 million or less in the preceding year should be subject to reduced compensation of 50 per cent."

more than nine hours, passengers on a large carrier will receive $1,000 while passengers on a smaller carrier get $500 (Section 19(1)(a)(iii) & (b)(iii)). However, if the passenger on the delayed or cancelled flight accepts a refund,[19] large airlines are only liable for $400 in compensation, and small carriers for $125 (Section 19(2)). In light of the above compensation, it seems that the proposed changes are inappropriate. Even in the US where "airlines don't guarantee their schedules (U.S. Department of Transportation, 2019; U.S. Department of Transportation, 2020; U.S. Department of Transportation, 2020) the Senate Bill 2341 establishes compensation starting after four hours of delay. The EU proposal appears to steer against the general trend.

b. Hardly justifiable

In addition to being against the general trend, the increase in delay time does not reflect the EU reality; most decided cases were based on relatively short delays, especially for flights of 1,500 kilometres or less. For instance, cases such as *Bossen*[20], *Germanwings*[21], *Siewert*[22], *Wegener*[23] or *Wallentin-Hermann* would no longer meet the threshold for flights under 1,500 or up to 3,500 kilometres. Similarly, some of the claimants in the *TUIfly* joined cases would not have been compensated. Under the proposed revisions, the *Folkerts* decision would have also been different as the delay the passengers suffered was 11 hours.[24] Consequently, this increase seems unjustified, even more so as "the relative length of delays between years has remained constant" (Steer, 2020, p. 2.33).

Moreover, the EU Parliament already rejected this increase back in 2014 (Gates, 2017). However, the main difference between the two documents is that in the 2013 proposal, the increase in length only affected delayed flights. For that reason, the Parliament rejected the proposed text as it was contrary to the *Sturgeon* ruling (European Parliament, 2014). In the 2020 version, the same increase in length would apply to cancelled flights. The increase in the flight journey, found in the 2013 proposal, and slightly modified by the Parliament, has not been maintained in the 2020 version.

[19] Section 12(2)(c) or (3)(c).
[20] *Bossen v Brussels Airlines*, Case C-559/16, ECLI:EU:C:2017:644
[21] *Germanwings GmbH v. Ronny Henning*, Case C-452/13, ECLI:EU:C:2014:2141
[22] *Sandy Siewert, Emma Siewert, Nele Siewert v. Condor Flugdienst GmbH*, Case C-394/14, ECLI:EU:C:2014:2377
[23] *Claudia Wegener v Royal Air Maroc SA*, Case C-537/17, ECLI:EU:C:2018:361
[24] *Air France v Folkerts*, Case C-11/11, ECLI:EU:C:2013:106

As the European Consumer Organisation (BEUC) advocated, the increase will "weaken passengers' rights and create more legal uncertainty for them, which is contrary to the objective of the review" (BEUC, 2019). The Commission tries to justify this increase by "assuming that it will encourage industry to better comply with their compensation obligations. However, this is not an acceptable justification" (BEUC, 2019, p. 12). Indeed, it seems unlikely that such increase will prompt airlines to cancel flight rather than to operate the delayed flights because airlines are also required to compensate for cancelations.

The justifiability of the delay's length was questioned by Marc Angel in front of the European Parliament in March 2020. He asked whether any impact assessment has been conducted to prove the necessity of such changes (European Parliament, 2020). Such assessment was partially made by ERA. The outcome of this report demonstrated that by increasing the length of delay to five hours would lead to "a decrease in incurred compensation by 79 per cent. The number of passengers entitled to make a claim also drops by 77,000" (ERA, 2019, p. 17). This report highlights that such increase in length will only benefit airlines while weakening passenger rights. If instead the Canadian regulation was applied, according to the ERA analysis, it would result in "a 37 per cent reduction in incurred compensation and a 45 per cent reduction in the number of passengers who could claim compared with EU261" (ERA, 2019, p. 17). While the Canadian approach will lead to a reduction of claims, it is the lesser evil compared to the Croatian's proposal and might, therefore, be more easily accepted.

c. Will small airlines be better off?

While the delay length increase seems hardly justifiable from a consumer perspective, from an airlines' perspective, these changes are necessary and welcome. For IATA, the advantage of introducing a higher trigger point is "the advantage of all as airlines are given time to fix a problem and operate a flight instead of choosing to cancel it" (IATA, 2017). According to ERA, "For the majority of airlines, trying to rectify a previous delay creates further disruption in the network and accounts for nearly two-thirds of all disruptions (68.43 per cent). In many cases, three hours is not a long enough time period to resolve a problem" (ERA, 2019, p. 14). Indeed, smaller airlines do not have reserve aircrafts at major airports waiting to be called, it is "simply not logistically or financially viable for a small carrier" (ERA, 2019). While the logic behind the proposed revision could help smaller carriers, as it now stands, the change will be beneficial for larger carriers to the detriment of passengers. As major carriers represent the largest chunk of aviation, it seems unfair for passengers to base the revision on the need of smaller airlines.

In fact, to create a fair Regulation, there could be an increase in time only for smaller airlines based on their logistical and financial possibilities. Increasing the length of delay only for smaller carrier might render the Regulation difficult to navigate for passengers. Consequently, a reduced compensation seems more adequate, as applied in Canada.

As stated above, these revisions favour airlines as can be understood from its main aims, which are "take account of the high financial burden for airlines," and to "incentivise airlines to perform their services." Airlines often claimed that the Regulation is too burdensome, resulting in a form of market distortion. Some have argued that four significant European airline bankruptcies (Primera Air, Air Berlin, Alitalia and Monarch) were caused by the Regulation's hidden costs (Callaghan, 2018). However, the EU Commission impact assessment of the Regulation established that the "average cost of the Regulation […] was €1.63 per passenger" (Davies Gleave, 2012). The market distortion arguments and the Regulation's costs simply do not match the reality. Interestingly, paragraph 5 stipulates that passengers are not allowed to claim compensation if they have been informed of the change in the departure time at least 14 days before the departure date. This new provision, while mirroring the current exemption for cancelled flights, also clearly indicates that the burden of proof lays with the operating carrier. Small airlines might benefit from such provision, although the practicality of such provision is questionable.

d. Re-routing: any welcome changes?

Once again, the revision missed the opportunity to extend the right to re-routing to passengers suffering long delays. This difference in treatment is inappropriate and goes against the principle of equality, as reinforced by the *Sturgeon* ruling. Passengers on delayed flights can only claim reimbursement, as it is currently the case Article 6(1)(iii). This is even more of a miss that the proposed provision on re-routing seems to reinforce passengers' rights.

The proposed Article 8 mainly follows the current framework and bring necessary clarifications. For instance, it delineates the circumstances under which passengers are allowed to require re-routing on other airlines, different routing or different transport modes. Airlines are also allowed to re-route on a flight departing earlier than the departure time of the initial flight. However, it is up to the passenger to accept it or not (Article 8(2a)). The clarification that air carriers cannot limit re-routing to their own company is important and welcome (Article 8(4)). Indeed, the current lack of clarity as to when a carrier must allow the passenger to re-

route via another airline has resulted in many disputes between air carriers and passengers (Szakal, 2013). It can be hoped that passengers will be able to be re-routed more easily to avoid long delays. Nonetheless, the term 'comparable comfort conditions' in Article 8(4) requires clarification.

According to paragraph 5, passengers travelling on other carriers or mode of transport should arrive at their final destination within six hours of the initial time of arrival. Initially, the Commission's proposal placed a higher threshold of 12 hours, which the Parliament suggested to amend to eight hours. The six hours seems more reasonable from a passenger's stand but might be too burdensome on smaller airlines which will need to pay for the re-routing via another airline or transport mode. The proposed obligation that the other carrier or transport operator "shall not charge the contracting carrier a price that goes beyond the average price paid by its own passengers for equivalent services in the last three months" was deleted as it attracted considerable criticism. Indeed, the rule was ill-defined, and its practicality was questioned, especially against non-EU carriers operating flights from non-EU airports (Balfour, et al., 2013). Finally, the price cap encouraged the exchange of pricing information between carriers and "could have given rise to potential competition law concerns" (Szakal, 2013).

Sadly, the obligation for airlines to bear the costs of transferring the passengers from an alternative airport to the destination's airport, suggested by the Parliament, has been deleted. This obligation seemed fair as by landing at another airport than the one on the reservation, the airline does not fulfil its side of the contract. For instance, some airlines cannot fly to Florence airport under certain meteorological circumstances and are diverted to Pisa or Bologna, often left to find their way to Florence. This seems especially unfair if such rerouting result in airlines not having to pay compensations for the delay.

Overall, the inclusion of this provision is good news from a passengers' perspective. However, the protection could have been further enhanced by including long-delay passengers and by obliging airlines to bear the cost of transfer to the original destination's airport. Moreover, this provision would require further clarification; indeed, the term "earliest opportunity" found in Article 8(1)(b) and criticised in the Steer report for being ambiguous has not been clarified. The report established that this ambiguity "can lead to divergent interpretations, which give airlines an opportunity to try and interpret it in ways which minimise their obligations" (Steer, 2020, p. 2).

5. Missed connecting flights

On the positive side, the proposal clarifies the situation for missed connecting flights by recognising a right to care if the missing of the flight was caused by a delay at the arrival of the previous flight (Article 6a(1)). This amendment was already part of the 2013 revisions (Mendes de Leon, 2013). However, the amendment made by the Parliament on the 2013 revision, which included an alternative flight in case of a re-routing, were not maintained.

Passengers will also be entitled to compensation, according to the proposed Article 6a(2). While this addition brings more clarity for passengers, it is also a major drawback for smaller carriers operating feeder flights (Balfour, et al., 2013). Indeed, according to the proposed Articles 6a(2) and (3), the carrier operating the feeder service faces exposure to compensation of up to 600 euro. In the case of major carriers which are operating the feeder service, this new rule will not alter the current position. However, it could discourage smaller carriers from continuing to offer feeder services. The exception added by the Parliament, stipulating that the rule would not apply if the transfer time was of less than 90 minutes for journeys of less than 3,500 km or 180 minutes for longer journeys, has been removed. This provision, on top of being superfluous as the Montreal Convention 1999 (MC99) already sets out specific rules on the allocation of liability between carriers, could also be used by airlines to delay compensation. For instance, if the delay occurs on a Brussels Airlines flight but the ticket was issued by British Airways, one airline could reject the fault on the other, leaving the passengers helpless. At the same time, the sentence "without prejudice to any indemnity arrangements made between affected air carriers" in the 2013 revisions would have put passengers in a similar position: in the middle of a ping-pong match.

Interestingly, the 2020 revisions refer to journeys including another mode of transport. In these situations, passengers should be "informed at the time of reservation, of any arrangements or the absence thereof, between the air carrier and the other transport operators in the case of a missed connection, in particular as regards arrangements for providing care and assistance" (Paragraph 4a). This would apply for instance to Air France bookings departing from Brussels and connecting in Paris. However, the practicality of this provision can be questioned as passengers do not always book on the company website directly. In these cases, could the airline escape its obligations or would the CJEU consider that the information was not clear enough; therefore, passengers should be compensated.

The proposal also gives additional rights to passengers, bringing the EU rules more in lines with the other countries. For instance, the revised version requires airlines to give better and timelier information, paragraph 3a. The operating airline of the delayed flight is also obliged to provide passengers "with a written notice setting out the rules for compensation and assistance," as well as the contact details of a national designated body.

a. Delays at non-Eu airport

In the 2013 proposal, it was suggested that Article 6a should also apply to third-country carriers operating a connecting flight to or from a European airport (European Parliament, 2014). This provision was criticised due to difficulties in enforcing it and the enforcement mechanisms found in MC99. It was regarded as going a step too far (Szakal, 2013; Balfour, et al., 2013). Yet, the 2020 revision includes two new articles exempting airlines from their obligation to compensate in case of delays at non-European airports, Articles 5(1a) (iv) and 6(2)(iii). The critics made in 2013 are still valid; it might infringe State sovereignty, and it restricts passengers' right. This provision is problematic in at least two aspects: it conflicts with the Montreal Convention, and it is discriminatory.

This new rule directly conflicts Chapter V of the Montreal Convention. Article 40 clearly stipulates that "If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs." If a passenger buys a ticket from Brussels to Brasilia, part of his journey will not be operated by the contracting carrier (being KLM, Air France, Latam, Lufthansa, British Airways or Alitalia). However, according to the Montreal Convention, the contracting carrier is liable for the whole journey. Therefore, if the passenger encounters a delay in the last leg between Rio and Brasilia, operated by a Brazilian airline (such as Gol, Azul or Latam), he can still complain to the main carrier.

This conflict is also relevant for the proposed new Article 6a, missed connection, which stipulates in paragraph 3 that "the carrier operating the delayed flight shall be responsible for the handling and settlement of claims." This provision goes directly against the framework established by the Montreal Convention and the rulings of the CJEU, stating that the Montreal

Convention prevails.[25] The Court has also always confirmed the compatibility of the Regulation's provisions with the Convention.[26] In this instance, the compatibility is inexistent due to the direct conflict between the two provisions. In *Wirth*[27] the CJEU noted that in case of wet lease with no operational responsibility for the flights on the principal carrier, this carrier cannot be considered as the operating air carrier. Moreover, the CJEU has established that the air carrier paying damages has the right to seek compensation from any person, including third parties, as embodied in Article 13.[28] While the Court has differentiated the scope and rationale of the Regulation from the Montreal Convention in its judgments, it seems unlikely that the Court will uphold a provision that goes against Article 216(2) TFEU and its own judgments.

The enforceability of this provision might be problematic as it contravenes the territorial sovereignty of non-EU countries and interfere with their consumer protection regimes. For instance, in *Lozano* the US courts concluded that Regulation 261 implicitly limits enforcement to EU courts.[29] In another Illinois federal case, *Volodarskiy*[30], the Court confirmed that US courts should refrain from enforcing foreign legal rights unless expressly authorised to do so (Havel & Mulligan, 2016). Consequently, this new provision might be difficult to enforce in non-EU countries.

Additionally, this rule is discriminatory and unduly punishes passengers with connecting flights. There are two broad categories of travellers: the ones that are time-sensitive and the ones that are money-sensitive. Indeed, some travellers prefer opting for longer but less expensive flights, not minding multi-leg journeys which allow for more options that could suit different expectations. Other travellers do not mind paying more to have direct flights (Albers, et al., 2017). The introduction of more option in the market allows for airlines to focus on the type of traffic and passengers they want to service (Volodymyr, 2017, p. 144). Consequently,

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[25] This interpretation is based on Articles 216(2) and 218 TFEU. See: *Emirates Airlines v. Diether Schenkel*, Case C-173/07, EU:C:2008:400 [2008], para 43; *Friederike Wallentin-Hermann v. Alitalia*, Case C-549/07, EU:C:2008:771 [2008], para 28; *International Air Transport Association, European Low Fares Airline Association v. Department for Transport*, Case C-344/04, EU:C:2006:10 [2006], para 35; *Air Baltic Corporation AS v. Lietuvos Respublikos specialiųjų tyrimų tarnyba*, Case C-429/14, EU:C:2016:88 [2016], para 23; *Axel Walz v Clickair SA*, Case C-63/09, EU:C:2010:251 [2010], para 20

[26] IATA and ELFAA, Case C-344/04, EU:C:2006:10 [2006], paras 43, 45, 46 and 47; Sturgeon e.a., Joined cases C-402/07 and C-432/07, ECLI:EU:C:2009:716 [2009], para 51

[27] *Wirth*, Case C-532/17, ECLI:EU:C:2018:527

[28] *International Air Transport Association, European Low Fares Airline Association*, Case C-344/04EU:C:2006:10 [2006], para 90; *Finnair Oyj v.Timy Lassooy*, Case C-22/11, EU:C:2012:604 [2012], para 39

[29] *Lozano v. United Continental Holdings, Inc*, No. 11 C 8258 (N.D. Ill. Sep. 26, 2013)

[30] *Volodarskiy v. Delta Airlines, Inc*, No. 13-3521 (7th Cir. 2015)

the exemption will result in discrimination. Indeed, multi-leg journeys are often cheaper and, thus, fits the need of money-sensitive passengers. This means that if passenger A buys a non-direct flight connecting in Dubai or Abu Dhabi to save money, and encounters a delay, he will not be able to claim compensation. Whereas passenger B having the same final destination, but with a direct flight, will be able to claim compensation.

In addition to this type of discrimination, the provision is also discriminatory towards all passengers going to Australia and New Zealand, as there are no direct flights from major European airports. Therefore, some destinations will be discriminated *per se*. This discrimination will go against the *Sturgeon* judgment, where the CJEU relying on the general principle of equal treatment established that similar situations should be treated in identical manners. Similarly, different situations should not be treated similarly unless this treatment can be justified objectively. The Court established that both passengers of delayed flights and cancelled flights are suffering the same loss, namely loss of time (van Dam, 2011). Since both types of passengers suffer alike, both groups should be offered the same type of redress. If the two types are treated differently, as it was, it would create an unjustifiable difference in treatment and therefore will violate the general principle of equal treatment. By treating the two groups of passengers differently, the proposal increased protection only for the passengers of direct flights or flights connecting in Europe but failed to increase protection for all other air passengers.

Finally, this provision creates an unfair prejudice to non-EU airlines as some passengers might be reluctant to use their service, knowing that they would not get compensations in case of delays. For instance, although Regulation 261 will still apply in the UK (European Union (Withdrawal) Act 2018) (Gov.uk, 2018), it might be very confusing for passengers who might prefer booking a flight with connection in another Member States. This provision will place foreign companies in an unfair disadvantage and might impact their competitiveness. It could lead to a form of retaliation by these companies or their governments towards EU airlines.

The current version of the Regulation seems more adequate, as it covers flights within the EU, departing from or arriving in the EU, operated by Community carriers. This protection could be extended to include all airlines flying within, from or to the EU, in order to encompass more carriers such as Emirates, Etihad or Latam. This approach was taken in the APPR which apply

to all flights within, from, or to Canada, irrespective of the nationality of the carrier. However, this approach could create enforcement issues.

6. Tarmac delay

Tarmac delays will be regulated by Article 6-2a of the 2020 proposal. While the concept of tarmac delay can be found in the 2013 proposal, no specific article was dedicated to such circumstance (Rossi Dal Pozzo, 2014). Tarmac delay refers to the time at departure, after the aircraft doors have closed, that an aircraft remains on the ground before the actual take-off time or "at arrival, the time between the touch-down of the aircraft and the start of disembarkation of the passengers" (Article 1 (w)).

The new proposal grants new rights to passengers by requiring the operating carrier "to ensure adequate heating or cooling" and access to toilet facilities. After 30 minutes, the carrier must provide water free of charge. The new threshold is an improvement compared to the 2013 revision, which was set to start after one hour (European Commission, 2013). However, BEUC's recommendations to include a snack has not been taken into consideration (BEUC, 2019, p. 17). Unlike the EU proposal, the APPR does not set a minimum amount of time to define a "tarmac delay," stipulating instead that: "If a flight is delayed on the tarmac after the doors of the aircraft are closed for take-off or after the flight has landed" (Section 8(1)). In addition to the obligation to provide means to communicate with people outside the aircraft free of charge, if feasible (Section 8(1)(c)).

The proposal establishes that after three hours, passengers have the right to disembark unless there are "safety, immigration or security-related reasons why the aircraft cannot leave its position on the tarmac" (Article 6-2a (2)). While the three-hour threshold is already an improvement compared to the initial five hours, the proposal did not follow ECC-Net nor Parliament recommendation to set the threshold at two hours (ECC-Net, s.d., p. 5). As it now stands, the proposal is in line with the Canadian regulations, which also grant the right to disembark after three hours (Section 9). However, there is an exception if it is likely that take-off will occur fewer than three hours and 45 minutes after the doors are closed, or after landing, provided that the airline can maintain the standard of treatment discussed in the previous paragraph (Section 9(2)). Airlines are not obliged to comply if disembarking would not be safe or for reasons relating "to air traffic or customs control" (Section 9(4)).

A similar rule was adopted by the U.S. Department of Transportation (US DOT), after repeated media attention regarding long tarmac delays. Much like the new Canadian rule and the EU proposal, it stipulates that airlines must disembark passengers after more than three hours on the tarmac for domestic flights and four hours for international flights. Similarly to the Canadian and EU regulations, this rule only applies to tarmac delays occurring at U.S. airports and does not apply where the safety or security of the passengers is in jeopardy or if air traffic control instructs the carrier not to return to the gate (U.S. Department of Transportation, 2020). This rule only applies to a "covered carrier," meaning airlines operating flights to, from, or within the United States, with a minimum capacity of 30 passengers (U.S. Department of Transportation, 2020)

Compared to the other jurisdiction, the US rule is more detailed. Indeed, the US DOT has established that if passengers decide to exit the plane during a tarmac delay, the airline is not required to allow them back in, nor is it obliged to disembark the passengers' luggage before the plane takes off to the original destination (U.S. Department of Transportation, 2020). Since tarmac delays were not included in Regulation 261 and passengers might not be aware of their rights, it might be interesting to add such clarification. Another major difference is that the length of time before the airlines' obligations kick in is much longer. Airlines are required to provide access to water, bathrooms, and necessary medical care while passengers are on the tarmac for more than two hours unless serving food is not deemed safe by the pilot. Airlines are not obliged to serve a full meal, even during lengthy delays, but they must have enough food and water to serve all passengers.

As the US example has demonstrated, tarmac delays are complex situations that can be abused by airlines to avoid compensation. For that reason, the US DOT introduced the tarmac delay rule back in 2010. This rule decreased the number of tarmac delays, but because the exceptions for safety and security are relatively vague, some delays still occurred. JetBlue and American Eagle were heavily fined under this rule for keeping passengers on the tarmac longer than three hours without informing them of their rights (Forgione, 2011; Isidore, 2012). Consequently, it is crucial that the proposed revisions are clear as to passengers' rights in case of a tarmac delay. Looking at the US example, it becomes clear that National Enforcement Bodies (NEBs) must have a strong mandate to fine airlines when necessary. Otherwise, the tarmac delays provision will be abused in the same manner as the 'extraordinary circumstances' defence is.

7. Small airports and outermost region exemption

No compensation for delays or cancellation is granted if disrupted flight departed from or arrived at a "small airport" defined as less than 1 million passengers per year, or at an airport situated in an outermost region of the EU (Article 6 (iv) (a) and (b)). This provision was not present in the 2013 version.

The small airport exemption has been advocated by Finland, Latvia and now Croatia. It is interesting to note that three out of seven Croatian airports[31] fall under this exemption (Naletina, et al., 2018, p. 298; Fabinger, 2019). In Finland, only two airports will not meet the small airport threshold (Finavia, 2020, p. 11), while in Latvia, only the Riga International Airport will not be considered a small airport (Kristaps, 2015). This demonstrates that the proposal is biased towards the main needs of the country advocating for the reforms instead of trying to strike a better balance between passengers' rights and airlines' needs.

This exemption is unfair on passengers as they might not know that the Regulation does not apply due to the size or location of the airport they use. Nothing in the Regulation requires airlines to inform the passengers, at the time of booking, that the Regulation will not apply. It is likely that passengers will find that information out after a delay has occurred and try to claim compensation.

Although the reason behind this exemption is understandable -regional airports play a significant role in the promotion of connectivity and regional development- it might, in fact, have a negative effect on smaller airports. Indeed, if going to major airports is not much burdensome, passengers might decide to fly from a major airport and be certain to be protected by the Regulation. For instance, passengers living in Tampere could decide to start their trip in Helsinki and be protected by the Regulation. As mentioned, regional airports play a significant role in the promotion of connectivity and regional development; it is, therefore, crucial to keep them active and promote them. However, this rule has a great potential to create adverse effect on smaller airlines.

[31] Zagreb, Split and Dubrovnik are primary Croatian airports, while Osijek, Rijeka, Pula and Zadar are secondary airports.
Jakov Fabinger found nine airports, including Brac and Losinj.

The exemption will profit major airlines; for instance, airlines, such as Ryanair, EasyJet, Lufthansa and Iberia are flying to Zadar or Pula, which are small airports (Flightconnection, 2020; Pula airport, 2020).[32] Therefore, while the reason behind such exemption is to promote connectivity for remote region, it will also result in major airlines gaining from such exemption, which might not benefit smaller airlines due to the competition for such route. According to a Transport & Environment study, almost one-quarter of airports, most of them being under the 1-million threshold served by Ryanair are likely to be receiving state aid (Transport & Environment, 2019). While the aid is given to the struggling airports, the authors of the report argue that it is essentially a subsidy to airlines like Ryanair that can then benefit from lower landing and airport charges. Based on these findings and the discussion above, it seems quite obvious that this exemption will benefit larger airlines to the detriment of passengers and smaller airlines that will still face a great deal of competition. Consequently, a reduced compensation for small airlines seems more adequate as advocated by ERA, the regional airlines association, and implemented in the APPR (ERA, 2019, p. 9). By reducing compensation for smaller airlines, the Regulation will protect the companies that need protection. At the same time, the protection of smaller airlines could encourage traffic at smaller airports.

The outermost region of the EU refers to regions that are part of a Member State territory but located in remote areas. There are nine outermost regions: "Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthelemy, Saint-Martin, the Azores, Madeira and the Canary Islands" (Article 349 TFEU). "These regions, known as the outermost regions (ORs), have to deal with a number of difficulties related to their geographical characteristics, in particular: remoteness, insularity, small size, difficult topography, and climate" (Kołodziejski, 2020). Once again, the proposed revision is discriminatory by excluding compensation for delays of flights departing or arriving from these regions. It is worth mentioning that some of these destinations, such as the Canary Islands or Martinique and Réunion, are highly touristic places. On top of that, some of these destinations will fall under the small airport exemption, such as Saint-Barthelemy. The proposal could have found a better balance than a simple exclusion of this region due to the popularity of some of the destinations. The adoption of such provision could be detrimental for this region as passengers might decide to fly to another destination and be covered by the Regulation.

[32] For the number of passengers see: (Zadar airport, 2020; Zadar airport, 2016)

8. Government-subsidised flights

This addition is probably the most interesting one. Passengers will not be entitled to compensation, if disrupted flight departed from or arrived at an airport hosting government-subsidised flights (Article 6(iv)(c)). This change was advocated by ERA (ERA, 2019). Many Member States are providing Public Service Obligations (PSOs) air services, based on the requirements of Articles 16, 17 and 18 of Regulation No 1008/2008.[33] For a route to fall under PSO, "the route should be vital for the economic and social development of the region served by the airport" (Bråthen & Sandberg Eriksen, 2018, p. 248).

While the connectivity of remote regions is important and established through PSOs, it raises the question on how this provision would be applied in practice. Indeed, passengers are usually unaware that their flight is subsidised and might still claim for compensation. Moreover, some airlines might be tempted to use this excuse to avoid paying compensation on non-subsidised flights, if they also operate subsidised flights. Since the information is not readily available for passengers, this exclusion might be the new 'extraordinary circumstance' defence, whereby airlines abuse this exception, resulting in passengers dropping lawful claims, as occurring with the extraordinary circumstance defence (European Court of Auditors, 2018). Since it is left to the Member States to decide which routes are 'essential air services', in countries where the state is the flag carrier's main shareholder, the governments might take a lenient approach to PSO.

Similarly to delays at non-European airports, this provision is *per se* discriminatory; passengers having no other option but to fly with a subsidised flight are automatically not qualified to get compensation. This exemption is, therefore, introduced to profit governments but not passengers as subsidised flights are often as expensive as normal flights. At the same time, argued in the Era report, "the compensation payable pursuant to EU261 in relation to cancellation of a flight of less than 1,500km is €250, which significantly exceeds the maximum fare permitted to be charged in relation to the overwhelming majority of PSO flights operated within Europe" (ERA, 2019, p. 43). The Regulation might have a negative impact on the "appetite of operators to bid for PSO contracts" (ERA, 2019, p. 43).

[33] Articles 16, 17 and 18 of Regulation 1008/2008 define how PSOs can be imposed on carriers operating on designated routes within the EU

Third, governments compensate the carrier in return for running the PSO (Forum, 2018, p. 63; Bråthen & Sandberg Eriksen, 2018, p.248). Even though airlines must abide by the terms of the PSO, this means that airlines are twice winners in this case: first, they are compensated by the government, and second, a big expense is removed, namely passengers' compensation. Some airlines might, therefore, advocate for a route to retain its PSO status even though the route evolved into a fully commercial one. As reported by the table in the ITF Report, some PSO routes are either already commercially operated or have the potential to do so (International Transport Forum, 2018, p. 71).

Finally, this provision, coupled with the small airport exemption, will benefit some airlines while leaving passengers with no recourses. A solution is necessary to balance the need for passengers and airlines, by still making it attractive for airlines to operate PSO routes. A better approach might be the Canadian one which differentiates the amount compensable on the basis of the size of the airline. Indeed, smaller airlines are often providing services to remote regions. Therefore, the compensation was adapted to "their unique operating circumstances" (Canadian Transportation Agency, 2019).

Interestingly, these revisions have been proposed by three countries, which are all the main shareholder in their flagship carriers and have some airports that will fall within the small airport exemption. For instance, the Croatian Government is the main shareholder of Croatia Airlines. While this provision would give a significant boost to the company itself, it will also noticeably restrict passengers' rights all across Europe. Moreover, several Croatian airports will fall under the small airport exemption, protecting airlines operating these flights twice.

9. Right to care

The right to care in Article 9 is also modified to apply after two hours. Unfortunately, the amendments made by the Parliament on the 2013 version, which would have resulted in an automatic obligation to provide meals and refreshments, have not been maintained. While Canada offers the same rights under Section 14(1) APPR, Brazil offers a better protection by granting passengers the right to access to communication means after any delay of one hour or more (Article 27, Resolution 400/2016). The US has taken a slightly different approach by providing the reimbursement of a meal after at least 4 hours delay, according to Section 103(2)(D). This might be explained by the fact that under the US Bill, passengers will be

entitled to an automatic refund of their tickets for any delay equal or exceeding one hour. Brazil provides exactly the same rules (Defossez, 2019).

The 2020 revision maintains the wording of the amendments by the Parliament on the 2013 revision by stipulating that passengers are entitled to transport to and from the place of accommodation (European Parliament, 2014). Interestingly, the proposed Article 9(3) would limit the number of hotel nights to three "if the delay, missed connection or cancellation is caused by extraordinary circumstances, and the cancellation or delay could not have been avoided even if all reasonable measures had been taken." Thus, a case such as *Denise McDonagh v Ryanair Ltd* would have a totally different outcome.[34] This change was already present in the 2013 revision alongside with a price limit, which has been removed (Balfour, et al., 2013). The amendments by the Parliament, which increased the maximum nights to five and raised the 100-euro threshold to 125 in case the passenger decided to arrange his own accommodation, were not taken into consideration (European Parliament, 2014). Price limitation or flat rate sum, as mentioned in the IMCO Committee's proposal, is not adequate because of the variation in hotel prices across Europe. Moreover, some hotels might raise their prices to meet this threshold without guaranteeing an increase in customer service.

The proposed Article 9(5) would allow Member States to exempt air carriers from the obligation to offer accommodation "where the flight concerned departs from an airport in its territory, is of 250km or less and scheduled to be operated by an aircraft with a maximum capacity of 80 seats or less, except where the flight is a feeder or a connecting flight." This provision was already criticised by the Parliament in 2014 and possesses three major problems; first, it puts harmonisation at stake by leaving the decision to each Member States. Second, similarly to the subsidised flights, it makes it difficult and unfair for passengers. Finally, it might lead to different treatments within the same flight.

Flights delays are often viewed by passengers as stressful situations, so the current form of the Regulation gives passengers some certainty that if something happens, they will at least be entitled to accommodation. As the Parliament noted "it is not apparent why the distance or the size of the aircraft should be regarded as relevant here. Passengers have no influence over the size of the aircraft. Even a short flight may end at night. This does not mean that a passenger

[34] *Denise McDonagh v Ryanair Ltd*, Case C-12/1, ECLI:EU:C:2013:43

should have to spend the night on a bench" (European Parliament, 2014, Amendment 68). In addition of being hardly justifiable, this provision can be abused by airlines as passengers will most probably not be aware of the Member States' decision nor about the size of the plane or the distance.

Moreover, this provision could lead to divergent treatments; indeed, the flight could be a connecting or feeder flight for some passengers while for others, it might be a normal flight. It could also result in differences in treatment between airlines. For instance, the route Brussels-Amsterdam, which is less than 250km, is flown by either KLM or more recently, APG airlines. While KLM will not meet the 80 seats maximum threshold, APG will, putting the latter in a more advantageous position. This provision could lead to absurd outcomes if one of the governments decides to implement that exemption but not the other. For instance, if Belgium implemented such exemption but not The Netherlands, it would mean that passengers departing from Brussels would not be entitled to an overnight stay while passengers departing from The Netherlands would.

10. The more active role of National Enforcement Bodies (NEB)

The role of National Enforcement Bodies (NEB) is "to verify that transport operators are treating all passengers in accordance with their rights" (European Commission, 2020). Article 16(1) stipulates that Member States must designate a NEB responsible for the enforcement of the Regulation.

While NEBs clearly have a monitoring role, the Regulation does not require them to force airline to compensate passengers, resulting in an enforcement gap (Drake, 2020, p. 234). In fact, such enforcement role can only be granted by national law which undermines harmonisation and leads to significant variations in the sanctions.[35] In 2016, the Commission published Interpretative Guidelines recognised that enforcement and sanctions for non-compliance varied across Member States and that some passengers encountered difficulty in asserting their individual rights (European Commission, 2016). The European Court of Auditors reached a similar conclusion in its Special Report on passenger rights: "The procedures applied by carriers and NEBs in responding to individual claims are not transparent. Passengers on the same journey affected by a travel disruption can be treated differently"

[35] K. Ruijssenaars and Others v. Staatssecretaris van Infrastructuur en Milieu, Joined Cases C-145/15 and C-146/15, EU:C:2016:187

(European Court of Auditors, 2018). Moreover, many NEBs "do not have the power to deal with individual claims" (BEUC, 2019, p. 5). Enforcement can be rendered further complicated when it comes to non-EU airlines. This lack of enforcement undermines the efficiency of the whole NEB system.

The system seems unduly complicated for average passengers who will prefer on an easier option, such as CMCs. For instance, a Belgian passenger who, due to a cancellation, was stuck in Greece, must file his complaint with the Greek NEB instead of the Belgian one. The system can, therefore, be discriminatory as it requires the passengers to communicate in the national language or in English, which he or she might not master enough to file a successful complaint (Defossez, 2020). According to Ison, Budd and Timmis, "unlike some other European NEBs, the UK will accept complaints in all major languages providing they are professionally translated into English" (Ison, et al., 2018). This requirement greatly limits passengers' ability to complain to the NEB due to language barrier issues.

Furthermore, compared to CMCs, NEBs are much less visible. As Defossez noted "the chances are that the passengers do not even know the name of their National Enforcement Body. For instance, the Ryanair complaint [a collective action for the massive flight cancellations in 2017-2018] was filed by *Test-Achat*, a consumer NGO, and not by the National Enforcement Body, *SPF Mobilité & Transport*" (Defossez, 2020). The Ryanair complaint highlights the deficiencies of the current system.

In addition to the lack of visibility and the possible lack of power to deal individual claims, NEBs' opinions are not legally binding. Passengers might, therefore, "lose his/her right to launch a court case, since in some countries, transcription periods can be quite short (e.g., only one year for this type of case in Belgium)" (BEUC, 2019, p. 5). The lack of enforcement role results in NEBs having a peripherical role.

The proposal clarifies the role of the National Enforcement Bodies (Article 16). Article 16(2a) also grants NEB the power "to investigate and decide on enforcement actions based on information contained in individual complaint." This is a positive development as NEBs are now allowed to take enforcement actions. It is, however, unclear whether such enforcement action can force carriers to pay compensation or not. If this provision means that NEBs can compel airlines to pay compensation, it will be in direct conflict with the CJEU decision in

Ruijssenaars. Once again, while trying to clarify a provision, the proposal brings vagueness instead.

One of the most criticised aspects of the current system, namely the sanctions, are still left to Member States. Article 16(3) uses the same wording; the sanction must be "effective, proportionate and dissuasive." Such a vague provision results in a fragmented landscape and sanctions being rarely imposed (BEUC, 2019, p. 10). The Parliament suggested some clarifications in 2014, which were taken on board by the 2020 proposal. The proposal, therefore, stipulates that "such sanction shall be sufficient to provide carriers with a financial incentive to comply consistently with the Regulation." This addition cures some of the problems mentioned in the European Court of Auditors' report, such as the transparency issue, or by Drake, namely that some legislations are "too weak to deter non-compliance" (European Court of Auditors, 2018, p. VIII; Drake, 2020). Passengers on the same journey might still be treated differently, but at least the procedure might become clearer. Unfortunately, the proposal does not address the problem of non-bindingness.

It also gives a greater monitoring power to the Commission. For instance, Article 16 stipulates that NEBs are required to publish yearly reports which must be submitted to the Commission and available on the website of the NEBs. Article 16b(3) allows the Commission to request information concerning the national interpretation and application of the Regulation to the NEBs. The Commission can also issue recommendation regarding the application and enforcement of any provision of the Regulation, especially the interpretation of extraordinary circumstances and unexpected flight safety shortcomings, Article 16b(4). This positive suggestion might improve consistency and promote harmonisation. Paragraph 5 stipulates that "in case of a specific suspected practice by one or several air carriers simultaneously in several Member States, the Commission may request the Member States concerned to investigate this specific practice and report the findings to the Commission." That power could avoid the heavy reliance that the current system has on the interpretation by the CJEU, especially because the Commission is required to coordinate its recommendation with a passengers rights committee, Article 16c.

Article 16a(2) also contains a strict time limitation to bring a claim of six months to National Enforcement Body, which is already the case in Romania. Article 16a offers a better protection than under the APPR, which set an even shorter period of 120 days. Article 16a (6) makes it

clear that the procedures are without prejudice to the right to seek redress through court proceedings, subject to time limit established under national law. The proposal does not provide any harmonisation for time limitation, which would have been a good improvement. Indeed, as it now stands, the time-limit depends on the legislation of each Member States, ranging from one to ten years (Claimcompass blog, 2019).[36] Instead, most Member States have extended the Montreal Convention time-limitation in Article 35 by one year, resulting in claims being time-barred after three years.[37] An harmonisation of the time limit would bring more legal certainty to airlines as under the current systems, and airlines could receive claims up to ten years after the flight disruption occurred.

The major improvement, which was present in the 2014 Parliament suggestions, is the introduction of out-of-court mechanisms in Article 16a. Unlike the Parliament suggestions to introduce of a different body (amendment 129), the 2020 proposal makes it clear that NEBs can be designated as the "national body responsible for out-of-court resolution of disputes" (Article 16a(3)). If another body is designated, such body must cooperate with the NEB (Article 16a(5)). While these inclusions are important, passengers might be confused by multiplicity of bodies in charge and still prefer using CMCs. Such confusion could have been avoided by either defining NEBs as out-of-court bodies or requiring the creation of a new body. Moreover, the decision of these bodies should be legally binding on airlines. Otherwise, the creation of such new entity would be pointless.

11. Other minor changes

    a. Cancellation

Article 5(c) establishes that passengers have the right to compensation in case of cancellation unless they have been informed of the cancellation: (a) two weeks in advance, (b) between two weeks and seven days and "offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival" or (c) less than seven days and "re-offered re-routing,

[36] *Joan Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV*, Case C-139/11, ECLI:EU:C:2012:74
Two countries offer a one-year time limitation; Belgium and Poland.
Seven countries have a two-year time limitation: Croatia, Italy, Latvia, Malta, Slovakia, Slovenia and The Netherlands.
Five countries have a five-year time limitation: France, Greece, Hungary, Scotland, and Spain.
Three countries have a six-year time limitation: Cyprus, Ireland and The United Kingdom.
Two countries offer a ten-year time limitation: Luxembourg and Sweden.

[37] Austria, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Lithuania, Norway, Portugal, Romania for court action only,

allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival."

The 2020 revision contains a drastic change; the only exclusion of liability is if the passenger was informed at least 14 days before the departure time, maintaining the current paragraph (c)(a). The reduction in the amount of compensation depending on the delay upon arrival has not been kept (Article 7). Instead, the new proposed Article 5 includes as exception to compensation any re-routing arriving within the new time frame (five, nine and twelve hours). The exceptions have also been increased to include not only extraordinary circumstances but also unexpected flight safety shortcomings (Article 5(1a)(iii)). As discussed above, if cancellation occurred on a connecting flight operated entirely outside the EU, the passenger would have no right to compensation (Article 5(1a)(iv)). Similarly, if the cancelled flight arrives or departs from a small airport, passengers are not entitled to any compensation (Article 5(1a)(v)).

Unfortunately, the proposal did not take the findings of the Steer report into consideration. In the report it is clearly stipulated that "although the low proportion of commercial cancellations could suggest the Regulation has been effective in reducing airline-attributable cancellations, the high proportion of unplanned airline-attributable cancellations (i.e. crew shortages and technical faults) suggests the Regulation has not been sufficiently effective in incentivising airlines to completely mitigate the risk of these types of cancellations occurring" (Steer, 2020, p. 2.23) With the increased delay time, airlines will have even less incentives to "completely mitigate the risk of these types of cancellations occurring." These changes are, therefore, contrary to the report's recommendations.

b. Passenger claims

While the main rights of reimbursement have not changed, some minor changes can be noted. For instance, currently, Article 10(2) stipulates that in case of downgrading, the passenger must be reimbursed, according to the distance of the flight, within seven days. The 2020 proposal grants a bit more time for airlines to reimburse passengers if they are booked on a lower class than that for which the ticket was purchased. This change will not put passengers' right at risks. The additional provision in paragraph 3 is an important addition to facilitate the calculation in case the price of the concerned flight is not indicated.

Article 10a introduces a welcome obligation for airports having over five million passengers for at least three consecutive years to adopt a contingency plan in case of "multiple cancellations and/or delays leading to a considerable number of passengers stranded at the airport." The contingency planning obligation could have also been extended to smaller airports to protect a large number of consumers. Another welcomed change is the extension in the protection of disabled persons and persons with reduced mobility or special needs (Article 11).

Another addition is the requirement for carriers to inform passengers, at the time of reservation, about their claim and complaint handling procedures and to provide an electronic means to submit complaints in all languages which may be used for reservation (Article 16a). This obligation should have been extended to all companies selling tickets and other travel services to avoid major partnership disputes between travel sites and claim management companies, such as the AirHelp/Expedia agreement. As advocated by ECC-Net, "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" (ECC-Net, s.d., p. 6). Although Article 16a(1a) brings welcomed changes, it seems unlikely that passengers will stop using CMCs and complain directly to the airlines. Indeed, most airlines already have such online complaints mechanisms; however, due to the recurrent refusal to compensate, passengers tend to trust CMC more than airlines themselves. This provision will not restore the trust of passengers in airlines, at least compensation-wise.

Additionally, in case of delayed flights, airlines are still required to provide the passengers with a written notice of their rights but also the contact details of the NEB (Article 6(3a)). These provisions seem to try to reduce the proliferation of claim management companies, by stating the exact procedure and timeframe to be followed by airlines and obliging them to give details answer as well as the relevant contact details of bodies for out-of-court dispute resolution (Article 16a (2)). Member States must also "ensure that the out-of-court dispute resolution is available free of charge or at a nominal fee to passengers" (Article 16a (4)). This requirement is nowhere to be found in the current version. This is probably one of the most ground-breaking changes in the 2020 revisions as it could result in passengers trusting airlines more. Indeed, a

detailed answer for negating a claim would help passengers understand the airline's position better and maybe restoring their trust.

Unfortunately, the recommendation made by the European Court of Auditors obliging airlines to publish a note explaining the cause of the disruption has not been included (European Court of Auditors, 2018). Instead, airlines must provide the reasons for the cancellation or delay in writing if the passengers so request within ten days (Article 15(5)).

c. Denial of boarding

The protection against denial of boarding is much broader and clearer. In the proposal, it has been added that for the right to compensation being waived for volunteers is only available if it has been signed and the passengers have received information in accordance with Article 14(2). Moreover, the right to care embodied in Article 9 is also available. This approach is much closer to the approach taken in the APPR, which sets a similar procedure in Section 19(1), except for the requirement of written proof of the reason of the denial of boarding. However, under the APPR, it is clear that passengers are entitled to immediate compensation for denial of boarding and compensation in case of delayed and cancelled flights. If the arrival time at the destination is delayed less than six hours, the passengers have a right to $900, while if the arrival time is delayed by between six and nine hours, the compensation rises to $1,800. Finally, if the arrival time is delayed by more than nine hours, the compensation is $2,400. The proposal could have included protection against situations like as occurred in the US where a man was dragged out a plane. For instance, the APPR makes it clear that airlines cannot deny boarding to anyone who has already boarded the plane (Section 15(2)). Under the proposal and in principle, it will be forbidden for airlines to deny boarding to passengers who do not take the outward journey of a return flight.

In case of a spelling mistake in a name or given names, the carrier is obliged to "correct it at least once up until 72 hours before departure without any additional charge to the passenger or the organiser, except where it is prevented from doing so by applicable national or international law regarding security." It seems from this provision that denial of boarding due to a mistake in the passenger's name will not be accepted if the airline was made aware of the mistake in advance. This addition was already praised by ECC-Net, but as they rightly pointed out, a detailed definition of this right is important as it benefits both passengers and airlines (ECC-Net, s.d.).

12. Conclusion

Regulation 261 is a very controversial piece of legislation which has been criticised since the beginning. From an airline perspective, the Regulation is too passenger-friendly and burdensome whereas from a passenger and consumer organisation perspective, it is still not ambitious enough. As BEUC (2019) highlighted "the enforcement of air passenger rights is the Achilles heel of air passenger rights" (p. 2). Representative from both sides can agree that reforms are necessary. After the failed 2013 attempt, there were high expectations for the 2020 proposal.

While the proposal brings some significant changes, it fails to bring clarity and resolve the major problems of the current system. In fact, some of the proposed provisions will generate as much or even more case-law than currently. For instance, while an exhaustive list of defences is welcome, the wording of the provisions is still relatively vague and would require interpretation by the CJEU. If the list was introduced to prevent the Court to extend passengers' rights, then in its present state, it fails to do so. Additionally, the proposal goes against some of the judgments of the Court. All of these will not help restore the trust between passengers and airlines.

The proposal also fails to cure the other main problems; the significant non-compliance by airlines and ineffective enforcement at national level (Drake, 2020; Garben, 2016). For years, passengers have struggled to obtain timely compensation, which resulted in a proliferation of case-laws and CMCs. In fact, passengers even have difficulties to obtain responses from airlines on their complaints, leading in some case to time-barred claims. This last defect is cured in the 2020 proposal which includes a clear and strict deadline (Article 16a).

More importantly, the proposal endangers passenger rights by attacking one of the main areas of contention; the amount compensable. The new proposal greatly limits the impact of potential cost for airlines. This is not only a step backward in passenger protection, but it also goes against the general trend set by Canada and the US. At the same time, €250 compensation for three hours delay does not seem so fair when the ticket cost €20, for instance. However, an increase in delay length might only result in more distrust by passengers and a fierce 'war.' While it is undeniable that the current system puts smaller operators in a weak position because they are not able to pay for keeping an extra aircraft to secure quick corrections to disruptions resulting

in any technical failure results in huge costs such hotel, catering and transportation, the solution proposed is not adequate. Indeed, major airlines will also benefit from the changes in delay's length, resulting in small airlines not gaining any competitive advantage. Instead, the Canadian approach, namely that smaller carriers pay half of the amount, will better solve the current problem. Moreover, the increase in delay would lead to a large number of passengers being left without recourses. Similarly, the addition of a provision on tarmac delay could lead to abuse by airlines to avoid compensation. The tarmac delay provision could become as widely use as the extraordinary circumstance defence.

The obligation to file claims to the actual carrier is another example of how passenger rights are limited. Under the Montreal Convention, it is clearly stated that passengers can go against either the contracting or actual carrier. Moreover, the right of redress against third parties, found in Article 13 and CJEU rulings, is maintained in the proposal. Therefore, it seems unjustified to limit passenger rights to claim when there is an explicit provision granting airlines a right of redress.

Finally, the proposal embodies various discriminatory provisions that are directly conflicting with the core principle of the EU set in the TFEU. While these provisions do not discriminate on the basis of nationality, they do, based on destination. For instance, the inclusion of a provision on missed connecting flights is good news but the exemption for delays at non-EU airports is a drawback. Indeed, this rule is discriminatory and unduly punishes passengers with connecting flights. In addition of being discriminatory, it goes against the *Sturgeon* judgment, where the CJEU established that similar situations should be treated in identical manners. This new approach also goes against the general trend. The small airport exemption seems more guided by economic consideration from the State proposing it than real necessity. The proposal in its current stand will most probably not restore trust between passengers and airlines.

Although the proposed revisions are unlikely to succeed in their current form, as they run contrary to the CJEU case law, the proposed changes demonstrate a bold move from Croatia, and is worrisome for passengers' rights. The disregard to some of the rights granted by the CJEU or even the EU *acquis* is appalling.

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Article	Regulation 261	2013 Proposal	Parliament Amendments	2020 Proposal
Extraordinary circumstances: definition		Article 2(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, extraordinary circumstances shall include the circumstances set out in the Annex;	Article 2(m) "extraordinary circumstances" means circumstances beyond the control of the air carrier concerned in the normal exercise of its activity and outside the obligations imposed by the relevant safety and security rules to be observed. For the purposes of this Regulation, extraordinary circumstances are limited to the circumstances set out in Annex 1	Article 2(m) "extraordinary circumstances" means circumstances which are beyond its actual control. For the purpose of this Regulation, extraordinary circumstances are listed in Annex 1
Extraordinary circumstances	(14) Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an	1. The following circumstances shall be considered as extraordinary: i. natural disasters; ii. technical problems; iii. security risks, acts of sabotage or terrorism; iv. life-threatening health risks or medical emergencies; v. air traffic management restrictions or	exhaustive list of circumstances considered as extraordinary circumstances: i. natural disasters; ii. technical problems; **iia. damage caused by bird strike** iii. **war, political unrest**, acts of sabotage or terrorism; iv. health risks or medical emergencies; v. **unforeseen** air traffic management	i. natural **and/or environmental** disasters; ii. **hidden manufacturing defect revealed by the manufacturer or a competent authority**; iii. security risks, acts of sabotage or **unlawful acts**; **iii(a) war or political instability**; iv. health risks or medical emergencies; v. air traffic management

	operating air carrier. (15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations	closure of airspace or an airport; vi. meteorological conditions incompatible with flight safety; and vii. labour disputes at the operating air carrier or at essential service providers such as airports and Air Navigation Service Providers. 2. The following circumstances shall not be considered as extraordinary: i. technical problems inherent in the normal operation of the aircraft; and ii. unavailability of flight crew or cabin crew (unless caused by labour disputes).	restrictions or the unforeseen closure of the airspace, **including runway closures by the authorities**; vi. meteorological conditions incompatible with flight safety **or that have damaged the aircraft in flight or on the tarmac after service release and rendering the safe operation of the flight impossible**; and vii. **unforeseen** labour disputes at the operating air carrier or at essential service providers such as airports and Air Navigation Service Providers.	restrictions or closure of the airspace; **v(c). unscheduled closure of an airport**; vi. meteorological conditions incompatible with the safe operation of the flight or resulting in capacity restrictions at the airport of departure or of arrival; and viii. **disruptive passenger behaviour endangering the safe operation of the flight**; **ix. collision of birds or other animals with the aircraft during a flight which may cause damage that requires immediate and compulsory checks and possible repair**; x. **damage to the aircraft caused by third parties from whom the air carrier, in the absence of contractual relations, is not responsible on the ground**

				prior to departure of the flight and requiring immediate assessment or repair; xi. **damage to the aircraft which could affect the safety of the flight and requires immediate assessment and/or repair and is caused by meteorological events (for example: lightning strikes, hailstones, thunderstorms, severe turbulence etc.)**
Article 5: cancellation	(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless: (i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or (ii) they are informed of the cancellation between two weeks and seven days			1a. Passengers shall have the right to receive, on request, compensation by the operating air carrier in accordance with Article 7(1), unless: (i) they are informed of the cancellation at least 14 days before the time of departure indicated in their reservation; Or

	before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or (iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.			(ii) they are offered re-routing allowing them to reach their final destination with a delay at arrival after the time of arrival indicated in their reservation of no more than: (a) five hours for journeys of 1500 kilometers or less; (b) nine hours for journeys between 1500 and 3500 kilometres, as well as for intra-EU journeys over 3500 kilometres; (c) twelve hours for extra-EU journeys of 3500 kilometres or more. (iii) the cancellation is caused by extraordinary circumstances or unexpected flight safety shortcomings and the delay could not have been avoided even if the air carrier had taken all reasonable measures or (iv) the cancellation occurs on the

				connecting flight operated entirely outside the EU or (v) the cancelled flight arrives at/ departs from an airport: (a) with an average passenger traffic less than 1 million per year, or (b) situated in an outermost region of the EU, or (c) served on the basis of public service obligation as prescribed by Article 16 of Regulation (EC) 1008/2008
Article 6: Delay	(a) for two hours or more in the case of flights of 1500 kilometres or less; or (b) for three hours or more in the case of all intra-Community flights of more than 1500 kilometres and of all other flights between 1500 and 3500 kilometres; or (c) for four hours or more	(a) **five hours** or more after the scheduled time of arrival for all intra-Community journeys and for journeys to/from third countries of 3500 kilometres or less; (b) **nine hours** or more after the scheduled time of arrival for journeys to/from third countries between 3500	(a) **three hours** or more after the scheduled time of arrival for all journeys of **2 500** kilometres or less; (b) **five hours** or more after the scheduled time of arrival for **intra-Community journeys of more than 2500 km or for journeys to/or from third-countries between 2500 and 6000 km**;	(a) **five hours** for journeys of 1500 kilometres or less; or (b) **nine hours** for journeys between 1500 and 3500 kilometres, as well as for intra-EU journeys over 3500 kilometres; (c) **twelve hours** for extra-EU journeys of 3500 kilometres or more

	in the case of all flights not falling under (a) or (b)	and 6000 kilometres; (c) **twelve hours** or more after the scheduled time of arrival for journeys to/from third countries of 6000 kilometres or more.	(c) **seven hours** or more after the scheduled time of arrival for journeys to/from third countries of more than 6000 kilometres.	
Defenses in case of delay	Article 5(3) and Sturgeon case; extraordinary circumstance	Article 5(4) An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the delay or change of schedule is caused by extraordinary circumstances and that the delay or change of schedule could not have been avoided even if all reasonable measures had been taken. Such extraordinary circumstances can only be invoked insofar they affect the flight concerned or the previous flight operated by the same aircraft.	N/A	Article 6(2) (ii) the delay is caused by extraordinary circumstances or unexpected flight safety shortcomings and the delay could not have been avoided even if the air carrier had taken all reasonable measures Or (iii) the delay is caused by a connecting flight operated entirely outside the EU Or (iv) the delayed flight arrives at/ departs from an airport: (a) with an average passenger traffic less than 1 million per year, or (b) situated in an outermost

				region of the EU, or (c) served on the basis of public service obligation as prescribed by Article 16 of Regulation (EC) 1008/2008
Tarmac delay	N/A	Article 6(5) Subject to safety constraints, where a tarmac delay exceeds one hour, the operating air carrier shall provide free of charge access to toilet facilities and drinking water, shall ensure adequate heating or cooling of the passenger cabin, and shall ensure that adequate medical attention is available if needed. Where a tarmac delay reaches a maximum of five hours, the aircraft shall return to the gate or another suitable disembarkation point where passengers shall be allowed to disembark and to	5. Subject to safety constraints, where a tarmac delay exceeds one hour, the operating air carrier shall provide free of charge access to toilet facilities and drinking water, shall ensure adequate heating or cooling of the passenger cabin, and shall ensure that adequate medical attention is available if needed. Where a tarmac delay reaches a maximum of **two** hours, the aircraft shall return to the gate or another suitable disembarkation point where passengers shall be allowed to disembark, **unless there are safety-related or security-related reasons**	Article 6-2a 1. Subject to safety constraints, where a tarmac delay occurs, the operating air carrier shall ensure adequate heating or cooling of the passenger cabin, free of charge access to toilet facilities and that adequate medical attention is available if needed. If the Tarmac delay is longer than **30 minutes**, the operating air carrier shall provide free of charge drinking water on board. 2. Where a tarmac delay reaches a maximum of **three hours**, the aircraft shall proceed to the gate or another suitable disembarkation

		benefit from the same assistance as specified in paragraph 1, unless there are safetyrelated or security-related reasons why the aircraft cannot leave its position on the tarmac.	**why the aircraft cannot leave its position on the tarmac. After a total delay of more than three hours from the initial departing time, passengers benefit from the same assistance as specified in paragraph 1, including the option of reimbursement, return flight and rerouting, as specified in Article 8(1) and they shall be informed accordingly.**	point where passengers shall be allowed to disembark. Beyond this deadline, a tarmac delay can only be prolonged if there are safety, immigration or security-related reasons why the aircraft cannot leave its position on the tarmac.
Missed connecting flights	N/A	Article 6a 1. Where a passenger misses a connecting flight as a result of a delay or change of schedule to a preceding flight, the Community air carrier operating the onward connecting flight shall offer the passenger: (i) the assistance specified in Article 9(1)(a) and 9(2) if the	Where a passenger misses a connecting flight for which he has a reservation, including when he has been booked on an alternative flight in case of a re-routing, as a result of a delay or change of schedule to a preceding flight, the Union air carrier operating that preceding flight which is responsible for that delay or that change of schedule shall	Article 6a 1. Where a passenger misses a connecting flight as a result of a delay at arrival of a previous flight, the air carrier operating that 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

		passenger's waiting time for the connection is prolonged by at least two hours; and (ii) re-routing as specified in Article 8(1)(b); and (iii) when the scheduled time of departure of the alternative flight or other transport offered under Article 8 is at least 5 hours after the scheduled time of departure of the flight missed and the delay includes one or several nights, the assistance specified in Article 9(1)(b) and 9(1)(c). 2. Where a passenger misses a connecting flight as a result of a delay to a preceding connecting flight, the passenger shall have a right to compensation by the Community air carrier operating that preceding flight	offer the passenger: (iii) when the scheduled time of departure of the alternative flight or other transport offered under Article 8 is at least 3 hours after the scheduled time of departure of the flight missed and the delay includes night-time hours, the assistance specified in points (b) and (c) of Article 9(1). 2. Where a passenger misses a connecting flight as a result of a change of schedule or a delay to a preceding connecting flight of 90 minutes or more calculated by reference to the time of arrival at the transfer point, the passenger shall have a right to compensation by the Union air carrier operating that preceding flight in accordance with Article 6(2). For these purposes, the overall delay	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 7(1) 3a. Passengers shall be informed by the operating air carrier of the delayed flight as soon as possible. Operating air carrier of the delayed flight shall provide each passenger 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 the passenger in written form. 4a.Where, in accordance with a single contract of carriage, a passenger is carried on a part of the journey by another mode of transport stipulated in the

		in accordance with Article 6(2). For these purposes, the delay shall be calculated by reference to the scheduled time of arrival at the final destination. 3. Paragraph 2 shall be without prejudice to any indemnity arrangements made between affected air carriers. 4. Paragraphs 1 and 2 apply also to third country air carriers operating a connecting flight to or from an EU airport.'	shall be calculated by reference to the scheduled time of arrival at the final destination. 4. Paragraphs 1 and 2 also apply to third-country air carriers operating a connecting flight from an airport within the Union to another airport within the Union, or from an airport within the Union to an airport outside the Union.'	contract of carriage, the passenger shall be informed at the time of reservation, of any arrangements or the absence thereof, between the air carrier and the other transport operators in the case of missed connection, in particular as regards arrangements for providing care and assistance.