COMMISSION NOTICE

Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council

(2016/C 214/04)

1. INTRODUCTION

Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 ([1]) (hereinafter 'the Regulation') entered into force on 17 February 2005. The Regulation sets a minimum level of quality standards for passenger protection, adding an important citizen's dimension to the liberalisation of the aviation market.

The Commission's White Paper on Transport, adopted on 28 March 2011 ([2]), mentioned among its initiatives the need to 'develop a uniform interpretation of EU law on passenger rights and a harmonised and effective enforcement, to ensure both a level playing field for the industry and a European standard of protection for the citizens'.

Further to this White Paper, the Commission has already adopted Interpretative Guidelines on Regulation (EC) No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations ([3]).

With regard to air transport, the Commission Communication of 11 April 2011 ([4]) showed how the provisions of the Regulation were being interpreted in various ways, due to grey zones and gaps in the current text, and that the enforcement varied between Member States. Furthermore, it revealed that it is difficult for passengers to assert their individual rights.

On 29 March 2012, the European Parliament adopted a resolution ([5]) in response to the abovementioned Communication. The Parliament highlighted the measures that it considered essential for regaining passengers' trust, in particular proper application of the existing rules by Member States and air carriers, enforcement of sufficient and simple means of redress, and providing passengers with accurate information on their rights.

In order to clarify rights and ensure better application of the Regulation by air carriers and its enforcement by national enforcement bodies, the Commission has presented a proposal for an amendment of this Regulation ([6]). The proposed changes also take into account the financial impact on the aviation sector and therefore include some measures aimed at capping costs. The proposal is currently being examined by the EU legislature. With these interpretative guidelines, the Commission does not seek to replace or complement its proposal.

The Better Regulation package is one of the ten priority areas of the Juncker Commission and it aims to ensure that EU action is effective at every stage of the policy cycle — from planning to implementation, review and subsequent revision as is the case for the Regulation. Another objective of this Commission is to achieve a deeper and fairer Internal Market. On 11 June 2015 ([7]), the Commission stated that it would consider adopting interpretative guidelines in the short term to facilitate and improve the application of the Regulation and to promote best practices. This is one of the measures proposed in the Communication of 7 December 2015 on 'An aviation strategy for Europe' ([8]).

([1]) OJ L 46, 17.2.2004, p. 1.
([2]) Roadmap to a Single European Transport Area — Towards a competitive and resource efficient transport system COM(2011) 144 final, see page 23: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0144:FIN:EN:PDF
([3]) OJ C 220, 4.7.2015, p. 1.
([4]) Communication from the Commission to the European Parliament and the Council on the application of Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0174:FIN:EN:PDF). COM(2011) 174 final.
([5]) European Parliament resolution on the functioning and application of established rights of people travelling by air, 2011/2150(INI), http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-99
([6]) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of fights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (COM(2013) 130 final of 13.3.2013).
([7]) TTE COUNCIL (TRANSPORT), 11 June 2015, Luxembourg.
([8]) COM(2015) 598 final of 7.12.2015 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — an aviation strategy for Europe'.

Case-law has had a decisive impact on the interpretation of the Regulation. On many occasions, the Court of Justice of the European Union ('the Court') has been requested by national courts to clarify certain provisions, including key aspects of the Regulation. Its interpretative judgments reflect the current state of EU law, which has to be enforced by national authorities. An evaluation conducted in 2010 ([9]) and an impact assessment in 2012 ([10]) both highlighted the abundance of rulings adopted by the Court. It is thus clear that steps need to be taken to ensure a common understanding and proper enforcement of the Regulation across the EU.

With these interpretative guidelines the Commission aims to explain more clearly a number of provisions contained in the Regulation, in particular in the light of the Court's case-law ([11]), so that the current rules can be more effectively and consistently enforced. These guidelines are intended to tackle the issues most frequently raised by national enforcement bodies, passengers and their associations, the European Parliament and industry representatives. They replace previous information such as frequently asked questions and related answers, etc. published on the Commission's website.

They do not seek to cover all provisions in an exhaustive manner, nor do they create any new legal provisions. It should also be noted that interpretative guidelines are without prejudice to the interpretation of Union law provided by the Court ([12]).

These guidelines also relate to Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents ([13]) as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council ([14]), and to the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) ([15]). Regulation (EC) No 889/2002 serves a twofold purpose: firstly, aligning EU legislation on air carriers' liability in respect of passengers and their baggage with the provisions of the Montreal Convention, to which the EU is one of the contracting parties, and secondly, extending the application of the Convention's rules to air services provided within the territory of a Member State.

These interpretative guidelines should help to ensure better application and enforcement of the Regulation.

2. SCOPE OF THE REGULATION

2.1. Territorial scope

2.1.1. *Geographical scope*

Article 3(1) of the Regulation limits its scope to passengers departing from an airport located in the territory of a Member State to which the Treaty applies and to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies if the operating air carrier is an EU carrier.

According to Article 355 of the Treaty on the Functioning of the European Union (TFEU), EU law does not apply to the countries and territories listed in Annex II to the TFEU ([16]). Instead, those countries and territories are subject to the special association arrangements laid down in accordance with Part Four of the TFEU. Moreover, it does not apply to the Faeroe Islands, the Isle of Man and the Channel Islands according to the act of accession of Denmark and the United Kingdom. Therefore, these territories are to be considered as third countries within the meaning of the Regulation ([17]).

On the other hand, under Article 355 of the TFEU, the provisions of the Treaties do apply to French overseas departments, namely Guadeloupe, French Guiana, Martinique, Réunion Island, Mayotte as well as Saint-Martin, the Azores, Madeira and the Canary Islands. Therefore, these territories are part of a Member State to which the Treaty applies within the meaning of the Regulation.

([9]) Evaluation of Regulation (EC) No 261/2004 Final report Main report, By Steer Davies Gleave (February 2010).

([10]) Commission Staff Working Document Impact Assessment accompanying the Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, Brussels, SWD(2013) 62 final of 13.3.2013 and Proposal for a Regulation amending Regulation (EC) No 261/2004 (COM(2013) 130 Final).

([11]) Clear references to the relevant Court cases are systematically mentioned in the text; where there is no such reference, it corresponds to the Commission's interpretation of the Regulation.

([12]) See Article 19(1) of the Treaty on European Union.

([13]) OJ L 285, 17.10.1997, p. 1.

([14]) OJ L 140, 30.5.2002, p. 2.

([15]) OJ L 194, 18.7.2001, p. 39.

([16]) See Annex II to the Treaty on the Functioning of the European Union (TFEU) (http://ec.europa.eu/archives/lisbon_treaty/index_en.htm)

([17]) The Regulation is applicable to Iceland and Norway in accordance with the EEA Agreement and to Switzerland in accordance with the Agreement between the European Community and the Swiss Confederation on Air Transport (1999).

2.1.2. *Concept of a 'flight' in accordance with Article 3(1)(a)*

The Court has found that a journey involving outward and return flights cannot be regarded as a single flight. The concept of 'flight' within the meaning of the Regulation must be interpreted as consisting essentially in an air transport operation, being as it were a 'unit' of such transport, performed by an air carrier which fixes its itinerary ([18]). Consequently, Article 3(1)(a) of the Regulation does not apply to the case of an outbound and return journey in which passengers who have originally departed from an airport located in the territory of a Member State travel back to that airport on a flight operated by a non-EU carrier and departing from an airport located in a non-member country. The fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision ([19]).

2.1.3. *Scope of the Regulation in relation to compensation and/or assistance received in a non-EU country and the effects on the recipients' rights under the Regulation*

Article 3(1)(b) of the Regulation stipulates that it applies to passengers departing from an airport located outside of the EU (i.e. in a third country) and travelling to the EU when the flight is operated by an air carrier licensed in a Member State of the EU (EU carrier), unless they received benefits or compensation and were given assistance in that third country.

The question may arise as to whether passengers flying to the EU from a third country airport are entitled to rights under the Regulation where the following entitlements were already given under a third country's passenger rights legislation:

(1) Benefits (for instance a travel voucher) or compensation (the amount of which may differ from that stipulated in the Regulation), and

(2) Care (such as meals, drinks, hotel accommodation and communication facilities).

In this context, the word 'and' is important. For example, where passengers have only been provided with one of these two entitlements (for instance benefits and compensation under (1)), they can still claim the other one (in this case care under (2)).

Where both these entitlements were given at the point of departure either on the basis of local legislation or on a voluntary basis, passengers cannot claim any further rights under the Regulation. However, the Court ([20]) has found that it cannot be accepted that a passenger may be deprived of the protection granted by the Regulation solely on the ground that he may benefit from *some* compensation in the third country. In this regard, it should be evidenced by the operating air carrier that the compensation granted in the third country corresponds to the purpose of the compensation guaranteed by the Regulation or that the conditions to which the compensation and assistance are subject and the various means of implementing them are equivalent to those provided for by the Regulation.

2.2. **Material scope**

2.2.1. *Non-application of the Regulation to passengers travelling by helicopter*

According to Article 3(4), the Regulation applies only to fixed wing aircrafts operated by a licensed air carrier and hence, it does not apply to helicopter services.

2.2.2. *Non-application of the Regulation to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public*

According to Article 3(3), the Regulation is not applicable to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public. Special fares offered by air carriers to their staff fall under this provision. By contrast, the Regulation is applicable, according to Article 3(3), to passengers who travel on tickets issued as awards for a frequent flyer programme or other commercial programme.

2.2.3. *Application to operating air carriers*

In accordance with Article 3(5), the operating air carrier is always responsible for the obligations under the Regulation and not, for example, another air carrier which may have sold the ticket. The notion of operating air carrier is presented in recital 7.

2.2.4. *Events to which the Regulation applies*

The Regulation protects passengers against denied boarding, cancellation, delay, upgrading and downgrading. These events as well as the rights granted to passengers when they materialise are described in the sections below.

([18]) Case C-173/07, Emirates Airlines, ECLI:EU:C:2008:400, paragraph 40.
([19]) Case C-173/07, Emirates Airlines, ECLI:EU:C:2008:400, paragraph 53.
([20]) Case C-257/14, van der Lans, ECLI:EU:C:2015:618, paragraph 28.

2.2.5. *Non-application of the Regulation to multimodal journeys*

Multimodal journeys involving more than one mode of transport under a single transport contract are not covered as such by the Regulation. More information in this respect is provided in Section 6.

2.2.6. *Scope of the Regulation in relation to the Package Travel Directive*

Article 3(6) and recital 16 of the Regulation stipulate that it also applies to flights within a package tour, except where a package tour is cancelled for reasons other than cancellation of the flight. It is also stated that the rights granted under the Regulation do not affect the rights granted to passengers under the Package Travel Directive ([21]). Travellers thus have, in principle, rights in relation to both the package organiser under the Package Travel Directive and the operating air carrier under the Regulation. Article 14(5) of Directive (EU) 2015/2302 on package travel and linked travel arrangements, which will become fully applicable on 1 July 2018, also provides that any right to compensation or price reduction under that Directive does not affect the rights of travellers under the Regulation, but specifies that compensation or price reduction granted under passenger rights regulations and under that Directive shall be deducted from each other in order to avoid overcompensation.

However, neither the Regulation nor the Directive deals with the question of whether the package organiser or the operating air carrier ultimately has to bear the cost of their overlapping obligations ([22]). Resolving such a matter will thus depend on the contractual provisions between organisers and carriers and the applicable national law. Any arrangements made in this regard (including practical arrangements to avoid overcompensation) must not impact negatively on the passenger's ability to address his claim to either the package organiser or the air carrier and to obtain the appropriate entitlements.

3. EVENTS GIVING RIGHTS UNDER THE REGULATION

3.1. Denied boarding

3.1.1. *Concept of 'denied boarding'*

In accordance with Article 2(j) of the Regulation, 'denied boarding' does not cover a situation where there are reasonable grounds for refusing to carry passengers on a flight even though they presented themselves on time for the flight, such as for reasons of health, safety or security, or inadequate travel documentation. However, the concept of 'denied boarding' relates not only to cases of overbooking but also to those where boarding is denied on other grounds, such as operational reasons ([23]).

With regard to travel by disabled persons or persons with reduced mobility reference is made to Article 4 of Regulation (EC) No 1107/2006 of the European Parliament and of the Council ([24]) and the relevant guidelines ([25]) which precisely address such cases in 'Answer to question 4'.

If the passenger is refused carriage on the return flight due to the fact that the operating air carrier has cancelled the outbound flight and rerouted the passenger on another flight, this would constitute denied boarding and give rise to additional compensation from the operating air carrier.

When a passenger who holds a reservation including an outbound and a return flight is not allowed to board on the return flight because he or she did not take the outbound flight (so-called 'no-show'), this does not constitute denied boarding within the meaning of Article 2(j). The same is true when a passenger who holds a reservation including consecutive flights is not allowed to board a flight because he did not take the previous flight(s). These two situations are usually based on the terms and conditions linked to the ticket purchased. Such a practice might however be prohibited by national law. When the original flight of a passenger who holds a confirmed reservation is delayed and the passenger is re-routed on another flight, this does not constitute denied boarding within the meaning of Article 2(j).

([21]) Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59). That Directive is replealed with effect from 1 July 2018, when the Member States have to apply the national measures transposing Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ L 326, 11.12.2015, p. 1). The reference to Directive 90/314/EEC in Article 3(6) of the Regulation is to be read as a reference also to Directive (EU) 2015/2302 according to Article 29 of the latter Directive.

([22]) However, see as regard 'right of redress' Article 13 of the Regulation and Article 22 of Directive (EU) 2015/2302.

([23]) Case C-22/11, Finnair, ECLI:EU:C:2012:604, paragraph 26.

([24]) Regulation (EC) No 1107/2006 of 5 July 2006 of the European Parliament and of the Council concerning the rights of disabled persons and persons with reduced mobility when travelling by air (OJ L 204, 26.7.2006, p. 1).

([25]) Commission Staff Working Document, Interpretative Guidelines on the application of Regulation (EC) No 1107/2006 of 5 July 2006 of the European Parliament and of the Council concerning the rights of disabled persons and persons with reduced mobility when travelling by air, Brussels 11.6.2012, SWD(2012) 171 final.

When a passenger travelling with a pet is not in a position to proceed because he or she does not hold the relevant pet documentation, that cannot constitute denied boarding either. However, where passengers are denied boarding due to a mistake made by ground staff when checking their travel documents (including visas), that constitutes denial of boarding within the meaning of Article 2(j). That is however not the case when in accordance with Article 2(j), the air carrier and its crew refuse a passenger to board due to security concerns based on reasonable grounds. Air carriers should make full use of IATA's Timatic database and consult the public authorities (embassies and Ministries of Foreign Affairs) of the countries concerned to verify travel documents and (entry) visa requirements for countries of destination to prevent that passengers are incorrectly denied boarding. Member States should make sure that they provide comprehensive and up-to-date information to IATA/Timatic regarding travel documentation, notably in relation to visa requirements or exemption from this requirement.

3.1.2. *Rights associated with denied boarding*

Denial of boarding against the passenger's will gives a right to 'compensation' as defined in Article 7 of the Regulation, a right to choose between reimbursement, re-routing or rebooking at a later stage as provided in Article 8, and a right to 'care' according to Article 9.

3.2. **Cancellation**

3.2.1. *Definition of cancellation*

Article 2(l) of the Regulation defines 'cancellation' as the non-operation of a flight which was previously planned and on which at least one place was reserved.

Cancellation occurs in principle where the planning of the original flight is abandoned and passengers of that flight join passengers on a flight which was also planned, but independently of the original flight. Article 2(l) does not require an express decision of cancellation by the carrier ([26]).

By contrast, the Court ([27]) considers that it cannot, as a rule, be concluded that there is a flight delay or cancellation on the basis of a 'delay' or a 'cancellation' being shown on the airport departures board or announced by the air carrier's staff. Similarly, the fact that passengers recover their luggage or obtain new boarding cards is not, as a rule, a deciding factor to ascertain that a flight has been cancelled. Those circumstances are not connected with the objective characteristics of the flight as such and may arise from different factors. The Court highlighted concrete cases whereby the announcement of a flight as being 'delayed' or 'cancelled' can 'be attributable to inaccurate classifications or to factors obtaining in the airport concerned or, yet again, they may be unavoidable given the waiting time and the fact that it is necessary for the passengers concerned to spend the night in a hotel'.

3.2.2. *Distinction between cancellation and delay*

Without prejudice to paragraph 3.3.1 below and in order to avoid that air carriers present a flight as continuously 'delayed' instead of 'cancelled' it was considered useful to highlight the distinction to be made between a 'cancellation' and a 'delay'. In practice, although a flight may generally tend to be considered as cancelled when its flight number changes, this might not always be a determinant criterion. Indeed, a flight may experience such a long delay that it departs the day after it was scheduled and may therefore be given an annotated flight number (e.g. XX 1234a instead of XX 1234) to distinguish it from the flight of the same number on that subsequent day. However, in this case, it could still be considered as a delayed flight and not a cancellation. This should be assessed on a case-by-case basis.

3.2.3. *Case of an aircraft which returns to its point of departure*

The concept of 'cancellation' as stipulated in Article 2(l) of the Regulation also covers the case of an aircraft taking off but, for whatever reason, being subsequently forced to return to the airport of departure where the passengers of the said aircraft are transferred onto other flights. Indeed, the fact that take-off occurred but that the aeroplane then returned to the airport of departure without having reached the destination appearing in its itinerary means that the flight, as initially scheduled, cannot be considered as having been operated ([28]).

3.2.4. *Diverted flight*

A diverted flight by which a passenger finally arrives at an airport which does not correspond to the airport indicated as the final destination in accordance with the passenger's original travel plan is to be treated in the same way as a cancellation unless:

— The passenger is proposed re-routing under comparable transport conditions at the earliest opportunity by the air carrier to the airport of original final destination or to any destination agreed with the passenger and in that case, may finally be considered as delayed,

([26]) Case C-83/10, Sousa Rodríguez e.a., ECLI:EU:C:2011:652 paragraph 29.
([27]) Joined cases C-402/07 and C-432/07, Sturgeon e.a., ECLI:EU:C:2009:716, paragraphs 37 and 38.
([28]) Case C-83/10, Sousa Rodríguez e.a. ECLI:EU:C:2011:652, paragraph 28.

— The airport of arrival and the airport of the original final destination serve the same town, city or region, in which case, it may finally be treated as a delay. In such case, by analogy, Article 8(3) applies.

3.2.5. *Burden of proof in the event of cancellation*

Article 5(4) of the Regulation imposes on air carriers the burden of proof as regards whether and when the passengers have been individually informed about the cancellation of their flight.

3.2.6. *Rights associated with cancellation*

Cancellation of a flight gives a right to reimbursement, re-routing or return as defined in Article 8 of the Regulation, a right to 'care' as defined in Article 9 and, under Article 5(1)(c), a right to 'compensation' as defined in Article 7. The underlying principle of Article 5(1)(c) is that compensation is to be paid if the passenger has not been informed of the cancellation sufficiently in advance.

However, compensation does not have to be paid if the carrier can prove, in accordance with Article 5(3), that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken ([29]).

3.3. **Delay**

3.3.1. *Delay at departure*

Under Article 6(1) of the Regulation, where the departure of a flight is delayed, passengers affected by this delay have the right to 'care' according to Article 9, and to reimbursement and a return flight according to Article 8(1)(a). The underlying principle of Article 6(1) is that the rights depend on the duration of the delay and the distance of the flight. In this regard, it should be noted that right to re-routing as laid down under Article 8(1)(b) is not covered under Article 6(1) as it can be considered that the air carrier is trying in a first place to address the cause of the delay in order to minimise the inconvenience to the passengers.

3.3.2. *'Long delay' at arrival*

The Court has ruled that a delay at arrival of at least three hours gives the same rights in terms of compensation as a cancellation ([30]) (for more details see Section 4.4.5 on compensation).

3.3.3. *Measuring the delay at arrival and concept of time of arrival*

The Court has concluded that the concept of 'time of arrival', which is used to determine the length of the delay to which passengers on a flight have been subject if arrival is delayed, corresponds to the time at which at least one of the doors of the aircraft is opened, the assumption being that, at that moment, the passengers are permitted to leave the aircraft ([31]).The Commission considers that the operating air carrier should register the time of arrival on the basis of, for instance, a signed declaration by the flight crew or handling agent. The time of arrival should be provided free of charge upon request to the national enforcement body and the passengers where the operating air carrier seeks to rely on the arrival time as evidence of compliance with the Regulation.

3.4. **Upgrading and downgrading**

3.4.1. *Definition of upgrading and downgrading*

Upgrading and downgrading are respectively defined in Article 10(1) and (2) of the Regulation.

3.4.2. *Rights associated with upgrading and downgrading*

In the case of upgrading, an air carrier cannot request any supplementary payment. In the case of downgrading, compensation in the form of reimbursement of a percentage of the price of the ticket is provided for under Article 10(2)(a) to (c) of the Regulation.

The definition of downgrading (or upgrading) applies to the class of carriage for which the ticket was purchased and not to any advantages offered through a frequent flyer programme or other commercial programme provided by an air carrier or tour operator.

([29]) As regards extraordinary circumstances, see Section 5.

([30]) Joined cases C-402/07 and C-432/07, Sturgeon e.a. ECLI:EU:C:2009:716, paragraph 69. See also joined Cases C-581/10 and C-629/10, Nelson e.a. ECLI:EU:C:2012:657, paragraph 40, and Case C-413/11, Germanwings, ECLI:EU:C:2013:246, paragraph 19.

([31]) Case C-452/13, Germanwings, ECLI:EU:C:2014:2141, paragraph 27.

4. PASSENGERS' RIGHTS

4.1. Right to information

4.1.1. *General right to information*

Article 14(1) of the Regulation specifies the text of a notice which must be displayed at check-in in a manner clearly visible to passengers. This notice should be displayed physically or electronically in as many relevant languages as possible. This has to be done not only for check-in at the airport desk, but also on kiosks at the airport and on-line.

In addition, whenever an air carrier gives partial, misleading or wrong information to passengers on their rights, either individually or on a general basis through media advertisements or publications on its website, this should be considered as an infringement of the Regulation in accordance with Article 15(2) read in conjunction with recital 20 and may also constitute an unfair or misleading commercial business-to-consumer practice under Directive 2005/29/EC of the European Parliament and of the Council ([32]).

4.1.2. *Information to be provided in case of delay*

Article 14(2) of the Regulation provides that an operating air carrier denying boarding or cancelling a flight must provide each passenger affected with a written notice setting out the rules for compensation and assistance. It further states that the carrier 'shall also provide each passenger affected by a delay of at least two hours with an equivalent notice'. The requirement to provide affected passengers with a detailed written explanation of their rights thus applies explicitly to cases of denied boarding, cancellation and delay. However, considering that a delay can be suffered at departure but can also materialise at the final destination, the operating carriers should also seek to inform passengers affected by a delay of at least three hours at their final destination. Only in this way can each passenger be properly informed in accordance with the express requirements of Article 14(2) ([33]). Such an approach is fully compliant with the Court ruling in the *Sturgeon* case ([34]), which established that passengers who suffer a delay of at least three hours must be treated in the same way as passengers whose flights are cancelled, for the purpose of the right to compensation under Article 7 of the Regulation.

This is without prejudice to information requirements established by other provisions of Union law, in particular Article 8(2) of Directive 2011/83/EU of the European Parliament and of the Council ([35]) and Article 7(4) of Directive 2005/29/EC on unfair commercial practices. The omission of material information and the provision of misleading information on the rights of passengers may also constitute an unfair or misleading commercial business-to-consumer practice under Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

4.2. Right to reimbursement, re-routing or rebooking in the event of denied boarding or cancellation

Article 8(1) of the Regulation imposes on air carriers the obligation to offer passengers a triple choice, between (i) reimbursement of the ticket price ([36]) and, in the case of connections, a return flight to the airport of departure at the earliest opportunity, (ii) re-routing to their final destination either at the earliest opportunity or, (iii) re-routing at a later date at the passenger's convenience under comparable transport conditions, subject to availability of seats. As a general principle, when the passenger is informed about the cancellation of the flight and is correctly informed on the available choices, the choice offered to passengers under Article 8(1) is to be made once. In such cases, as soon as the passenger has chosen one of the three options under Article 8(1)(a), (b) or (c), the air carrier no longer has any obligation linked to the other two options. Nonetheless, the obligation to compensation may still apply according to Article 5(1)(c) in connection with Article 7.

([32]) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22).

([33]) Information provided to passengers with regard to the list of national enforcement bodies in the EU can refer to the Commission's website, which contains all contact details of the National Enforcement Bodies.

([34]) Joined cases C-402/07 and C-432/07, Sturgeon e.a., ECLI:EU:C:2009:716, paragraph 69.

([35]) 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 (OJ L 304, 22.11.2011, p. 64).

([36]) The ticket price is reimbursed for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan. In principle, if the passenger chooses to return to his/her airport of departure, the part or parts of the journey already made no longer serves any purpose in relation to the original travel plan.

The air carrier should simultaneously offer the choice between reimbursement and re-routing. In the case of connecting flights, the air carrier should simultaneously offer the choice between reimbursement and a return flight to the airport of departure and re-routing. The air carrier has to bear the costs for re-routing or a return flight, and must reimburse the costs for the flight borne by the passenger where the air carrier does not comply with its obligation to offer re-routing or return under comparable transport conditions at the earliest opportunity. Where the air carrier does not offer the choice between reimbursement and re-routing and, in the case of connecting flights, reimbursement and a return flight to the airport of departure and re-routing, but decides unilaterally to reimburse the passenger, he or she is entitled to a further reimbursement of the price difference with the new ticket under comparable transport conditions.

However, where an air carrier can demonstrate that when the passenger has accepted to give his or her personal contact details, it has contacted a passenger and sought to provide the assistance required by Article 8, but the passenger has nonetheless made his or her own assistance or re-routing arrangements, then the air carrier may conclude that it is not responsible for any additional costs the passenger has incurred and may decide not to reimburse them.

When passengers are offered the option of continuation or re-routing of a journey, this must be 'under comparable transport conditions'. Whether transport conditions are comparable can depend on a number of factors and must be decided on a case-by-case basis. Depending on the circumstances, the following good practices are recommended:

— if possible, passengers should not be downgraded to transport facilities of a lower class compared with the one on the reservation (in the event of downgrading, the compensation provided for in Article 10 applies),

— re-routing should be offered at no additional cost to the passenger, even where passengers are re-routed with another air carrier or on a different transport mode or in a higher class or at a higher fare than the one paid for the original service,

— reasonable efforts are to be made to avoid additional connections,

— when using another air carrier or an alternative mode of transport for the part of the journey not completed as planned, the total travel time should, if possible, be as reasonably close as possible to the scheduled travel time of the original journey in the same or higher class of carriage if necessary,

— if several flights are available with comparable timings, passengers having the right to re-routing should accept the offer of re-routing made by the carrier, including on those air carriers cooperating with the operating carrier,

— if assistance for people with disabilities or reduced mobility was booked for the original journey, such assistance should equally be available on the alternative route.

Any new right to compensation according to Article 7 will apply to the re-routed flight accepted under Article 8(1)(b) or (c) if it is also cancelled or delayed at arrival (see Section 4.4.11). The Commission recommends that options are clearly spelled out to passengers when assistance is to be provided.

If a passenger has booked an outbound flight and a return flight separately with different air carriers and the outbound flight is cancelled, reimbursement is due for this flight only. However, in the case of two flights which are part of the same contract but still operated by different air carriers, in addition to their right to compensation from the operating air carrier, passengers should be offered two options in the event of cancellation of the outbound flight: i) to be reimbursed for the whole ticket (i.e. both flights) or ii) to be re-routed on another flight for the outbound flight.

4.3. **Right to care in the event of denied boarding, cancellation or delay at departure**

4.3.1. *Concept of right to care*

When the passenger, following an incident of denied boarding, cancellation or delay at departure agrees with the air carrier to re-routing at a later date at his or her own convenience (Article 8(1)(c)), the right to care ends. In fact, the right to care subsists only as long as passengers have to wait for re-routing, under comparable transport conditions, to their final destination at the earliest opportunity (Article 8(1)(b)) or a return flight (Article 8(1)(a) second indent).

4.3.2. *Provision of meals, refreshments and accommodation*

The intention of the Regulation is that the needs of passengers waiting for their return flight or re-routing are to be adequately taken care of. The extent of adequate care will have to be assessed on a case-by-case basis, having due regard to the needs of passengers in the relevant circumstances and the principle of proportionality (i.e.: according to the waiting time). The price paid for the ticket or temporality of the inconvenience suffered should not interfere with the right of care.

With regard to Article 9(1)(a) (meals and refreshments), the Commission considers the expression 'in reasonable relation to the waiting time' to mean that operating air carriers should provide passengers with appropriate care corresponding to the expected length of the delay and the time of day (or night) at which it occurs, including at the transfer airport in the case of connecting flights, in order to reduce the inconvenience suffered by the passengers as much as possible, while bearing in mind the principle of proportionality. Particular attention has to be given to the needs of people with disabilities or reduced mobility and unaccompanied children.

Furthermore, passengers should be offered care free of charge in a clear and accessible way, including via electronic means of communication when passengers have accepted to give their personal data. Otherwise, passengers should make themselves known to the operating air carrier in the event of travel disruption. This means that passengers should not be left to make arrangements themselves, e.g. finding and paying for accommodation or food. Instead, operating air carriers are obliged to actively offer care. Operating air carriers should also ensure, where available, that accommodation is accessible for people with disabilities and their service dogs.

If care is nevertheless not offered even though it should have been, passengers who have had to pay for meals and refreshments, hotel accommodation, transport between the airport and place of accommodation and/or telecommunication services can obtain reimbursement of the expenses incurred from the air carrier, provided they were necessary, reasonable and appropriate ([37]).

If a passenger reject the air carrier's reasonable care which has to be offeredunder Article 9 and makes his or her own arrangements, the air carrier is not obliged to reimburse the expenses incurred by the passenger, unless otherwise established under national law or agreed beforehand by the air carrier and in any case, up to the amount corresponding to the aforementioned air carrier's 'reasonable offer' in order to provide equal treatment between passengers. Passengers should also retain all receipts for the expenses incurred. However, passengers do not have the right to be compensated for damage suffered because of a lack of care if they have not incurred expenses.

In any event, passengers who feel that they are entitled to have more of their expenses reimbursed or to obtain compensation for damage suffered as a result of a delay, including expenses, retain the right to base their claims on the provisions of the Montreal Convention, as well as Article 3 of Regulation (EC) No 2027/97 and to pursue the air carrier through a national court procedure or address themselves to the competent national enforcement body. In some Member States passengers may have to address themselves to alternative dispute resolution for consumer disputes entities (see paragraph 7.3 below).

It should be borne in mind that according to recital 18 of the Regulation, care may be limited or declined if its provision would itself cause further delay to passengers awaiting an alternative or a delayed flight. In case a flight is delayed late in the evening but can be expected to depart within a few hours and for which the delay could be much longer if passengers had to be dispatched to hotels and brought back to the airport in the middle of the nightthis carrier should be allowed to decline to provide this care. Similarly, if a carrier is about to give vouchers for food and drinks but is informed that the flight is ready for boarding, it should be allowed to decline providing care. Apart from these cases, the Commission is of the opinion that this limitation is to be applied only in very exceptional cases, as every effort should be made to reduce the inconvenience suffered by passengers.

The right of care under the Regulation is without prejudice to the obligations of organisers of packages under package travel rules.

4.3.3. *Care in extraordinary circumstances or exceptional events*

According to the Regulation, the air carrier is obliged to fulfil the obligation of care even when the cancellation of a flight is caused by extraordinary circumstances, that is to say circumstances which could not have been avoided even if all reasonable measures had been taken. The Regulation contains nothing that would allow the conclusion to be drawn that it recognises a separate category of 'particularly extraordinary' events, beyond the 'extraordinary circumstances' referred to in Article 5(3) of the Regulation, which would lead to the air carrier being exempted from all its obligations, including those under Article 9 of the Regulation, even during a long period, particularly since passengers are especially vulnerable in such circumstances and events ([38]).

In exceptional events, the intention of the Regulation is to ensure that adequate care is provided in particular to passengers waiting for re-routing under Article 8(1)(b). However sanctions should not be imposed on airlines where they can prove that they have undertaken their best endeavours to comply with their obligations under the Regulation

([37]) Case C-12/11, McDonagh, ECLI:EU:C:2013:43, paragraph 66.
([38]) Case C-12/11, McDonagh, ECLI:EU:C:2013:43, paragraphs 30.

taking into consideration the particular circumstances linked to the events and the principle of proportionality. However, NEBs should apply sanctions if they consider that an air carrier has taken advantage of such events to evade its obligations under the Regulation.

4.4. **Right to compensation in the event of denied boarding, cancellation, delay at arrival, re-routing and reimbursement for downgrading**

A. ***Compensation in the event of denied boarding***

4.4.1. *Compensation, denied boarding and exceptional circumstances*

Articles 2(j) and 4(3) of the Regulation must be interpreted as meaning that compensation is always due in the event of denied boarding and air carriers cannot validly justify an instance of denied boarding and be exempted from paying compensation to passengers by invoking extraordinary circumstances ([39]).

4.4.2. *Compensation, denied boarding and connecting flights*

Passengers on connected flights must be compensated where, in the context of a single contract of carriage with an itinerary involving directly connecting flights and a single check-in, an air carrier denies boarding to some passengers on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight ([40]). In contrast, if passengers have two separate tickets for two consecutive flights and delay of the first flight means that they are unable to check in on time for the following flight, in this case air carriers are not obliged to pay compensation. However, if the delay of the first flight is over three hours, the passenger can be entitled for compensation from the carrier operating this first flight.

4.4.3. *Amount of compensation*

The compensation is calculated in accordance with Article 7(1) of the Regulation. It can be reduced by 50 % if the conditions of Article 7(2) are fulfilled.

B. ***Compensation in the event of cancellation***

4.4.4. *General case*

Compensation is due in the event of cancellation, under the conditions set out in Article 5(1)(c) of the Regulation and unless the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, in accordance with Article 5(3) (as regards extraordinary circumstances, see section 5).

4.4.5. *Amount of compensation*

The compensation is calculated in accordance with Article 7(1) of the Regulation. It can be reduced by 50 % if the conditions of Article 7(2) are fulfilled.

C. ***Compensation in the event of delay***

4.4.6. *'Long delays' at arrival*

As regards 'long delays', the Court has ruled that passengers, including delayed passengers, may suffer from a similar inconvenience as passengers whose flight is cancelled, consisting in a certain loss of time ([41]). Based on the principle of equal treatment, passengers reaching their final destination with a delay of three hours or more are entitled to the same compensation (Article 7) as passengers whose flight is cancelled. The Court predominantly based its ruling on Article 5(1)(c)(iii) of the Regulation, in which the EU legislator draws legal consequences, including the right to compensation, for passengers whose flight is cancelled and who are not 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. The Court deduced from this that the right to compensation laid down in Article 7 of the Regulation aims at repairing a loss of time of at least three hours. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken ([42]) (as regards extraordinary circumstances, see Section 5).

([39]) Case C-22/11, Finnair, ECLI:EU:C:2012:604, paragraph 40.
([40]) Case C-321/11, Rodríguez Cachafeiro and Martínez-Reboredo Varela Villamor, ECLI:EU:C:2012:609, paragraph 36.
([41]) Joined Cases C-402/07 and C-432/07, Sturgeon e.a., ECLI:EU:C:2009:716, paragraph 54.
([42]) Joined Cases C-402/07 and C-432/07, Sturgeon e.a., ECLI:EU:C:2009:716, paragraph 69.

4.4.7. *Compensation for late arrival in the case of connecting flights*

The Court ([43]) takes the view that a delay must be assessed for the purposes of the compensation provided for in Article 7 of the Regulation, in relation to the scheduled time of arrival at the passenger's final destination as defined in Article 2(h) of the Regulation, which in the case of directly connecting flights must be understood as the destination of the last flight taken by the passenger.

In accordance with Article 3(1)(a), passengers who missed a connection within the EU, or outside the EU with a flight coming from an airport situated in the territory of a Member State, should be entitled to compensation, if they arrived at final destination with a delay of more than three hours. Whether the carrier operating the connecting flights is an EU carrier or a non-EU carrier is not relevant.

In the case of passengers departing from an airport in an non-EU country to an airport situated in the territory of a Member State as their final destination in accordance with Article 3(1)(b), with directly connecting flights operated successively by non-EU and EU carriers or by EU carriers only, the right to compensation in case of a long delay on arrival at the final destination should be assessed only in relation to the flights operated by EU carriers.

Missed connecting flights due to significant delays at security checks or passengers failing to respect the boarding time of their flight at their airport of transfer do not give entitlement to compensation.

4.4.8. *Compensation for late arrival when a passenger accepts a flight to an airport alternative to that for which the booking was made*

Compensation is due in such a case. The time of arrival to be used for calculating the delay is the actual time of arrival at the airport for which the booking was originally made or another close-by destination agreed with the passenger in accordance with Article 8(3) of the Regulation. Costs incurred for the transport between the alternative airport and the airport for which the booking was originally made or another close-by destination agreed with the passenger should be borne by the operating air carrier.

4.4.9. *Amount of compensation*

When the delay at arrival is less than four hours for a journey of more than 3 500 km involving an airport located outside the EU, the compensation can be reduced by 50 % and therefore amounts to EUR 300 ([44]) in application of Article 7(2) of the Regulation.

4.4.10. *Calculation of the distance on the basis of the 'journey' to determine the compensation in the event of long delay at final destination.*

The *Folkerts* case ([45]) explicitly referred to the concept of a 'journey' composed of several connecting flights. The 'final destination' being defined in Article 2(h) of the Regulation as the destination on the ticket used for the check-in or, in the case of directly connecting flights, the destination of the last flight. According to Article 7(4) of the Regulation the distance which determines the compensation to be paid in case of long delay at the final destination should be based on the 'great circle' distance between the place of departure and the final destination i.e. the 'journey' and not by adding the 'great circle' distances between the different relevant connecting flights composing the 'journey'.

D. ***Reimbursement in the event of downgrading***

4.4.11. *Calculation of the amount*

In accordance with Article 10 of the Regulation, reimbursement is payable only for the flight on which the passenger has been downgraded and not for the whole journey included in a single ticket, which may include two or more connecting flights. The aforementioned reimbursement should be paid within 7 days.

5. EXTRAORDINARY CIRCUMSTANCES

5.1. Principle

In accordance with Article 5(3) of the Regulation, an air carrier is exempted from paying compensation in the event of cancellation or delay at arrival if it can prove that the cancellation or delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

([43]) Case C-11/11, Folkerts, ECLI:EU:C:2013:106, paragraph 47.
([44]) Joined cases C-402/07 and C-437/07, Sturgeon e.a., ECLI:EU:C:2009:716, paragraph 63.
([45]) Case C-11/11, Folkerts, ECLI:EU:C:2013:106, paragraph 18.

In order to be exempted from the payment of compensation the carrier must therefore simultaneously prove:

— the existence and the link between the extraordinary circumstances and the delay or the cancellation, and

— the fact that this delay or cancellation could not have been avoided although it took all reasonable measures.

A given extraordinary circumstance can produce more than one cancellation or delay at final destination, such as in the case of an Air Traffic Management decision as referred to in recital 15 of the Regulation.

As derogation from the normal rule, i.e.: the payment of compensation, which reflects the objective of consumer protection, it must be interpreted strictly ([46]). Therefore all the extraordinary circumstances which surround an event such as those listed in recital 14 are not necessarily grounds for an exemption from the obligation to pay compensation, but require a case-by-case assessment ([47]). Finally, in case of technical problems extraordinary circumstances must relate to an event which meets two cumulative conditions: first, it is not inherent in the normal exercise of the activity of the air carrier concerned; second, it is beyond the actual control of that carrier on account of its nature or origin ([48]).

The carriers may provide as proof extracts from log books or incident reports and/or external documents and statements. In cases where reference is made to such proof in the reply to the passenger and/or to the national enforcement body, they should also be transmitted. Where the air carrier seeks to rely on the defence of extraordinary circumstances, such proof should be provided free of charge by the air carrier to the national enforcement body and the passengers in line with national provisions regarding access to documents.

5.2. **Technical defects**

The Court ([49]) has clarified further that a technical problem which comes to light during aircraft maintenance or is caused by failure to maintain an aircraft cannot be regarded as 'extraordinary circumstances'. The Court takes the view that even where a technical problem which has occurred unexpectedly is not attributable to poor maintenance and is not detected during routine maintenance checks, such technical problem does not fall within the definition of 'extraordinary circumstances' when it is inherent in the normal exercise of the activity of the air carrier. For instance, a breakdown, such as that at issue which was caused by the premature malfunction of certain components of an aircraft may constitute an unexpected event. Nevertheless, such a breakdown remains intrinsically linked to the very complex operating system of the aircraft, which is operated by the air carrier in conditions, particularly meteorological conditions, which are often difficult or even extreme, it being understood moreover that no component of an aircraft lasts forever. Therefore, it must be held that unexpected event is inherent in the normal exercise of the air carrier's activity ([50]). However, a hidden manufacturing defect revealed by the manufacturer of the aircraft or by a competent authority, or damage to the aircraft caused by acts of sabotage or terrorism would qualify as extraordinary circumstances.

5.3. **Collision of mobile boarding stairs with an aircraft**

The Court ([51]) has clarified that the collision of mobile boarding stairs with an aircraft cannot be considered as 'extraordinary circumstances' exempting the air carrier from payment of compensation under Article 5(3) of the Regulation. Mobile stairs or gangways can be regarded as indispensable to air passenger transport, and therefore air carriers are regularly faced with situations arising from the use of such equipment. A collision between an aircraft and a set of mobile boarding stairs is, hence, an event inherent in the normal exercise of the activity of the air carrier. Extraordinary circumstances would apply, for example, when damage to the aircraft is due to an act external to the airport's normal services, such as an act of terrorism or sabotage.

5.4. **Airport congestion due to bad weather conditions**

In accordance with recital 14 of the Regulation, the case of an operating air carrier being obliged to delay or cancel a flight at a congested airport, due to bad weather conditions, including if these conditions result in capacity shortages, would stem from extraordinary circumstances.

5.5. **Reasonable measures an air carrier can be expected to take in extraordinary circumstances**

Whenever extraordinary circumstances arise an air carrier must, in order to be released from the obligation to pay compensation, show that it could not avoid them even if it had taken all reasonable measures to this effect.

([46]) Case C-549/07, Wallentin-Hermann, ECLI:EU:C:2008:771, paragraph 17 and the case-law cited.
([47]) Case C-549/07, Wallentin-Hermann, ECLI:EU:C:2008:771, paragraph 22.
([48]) Case C-549/07, Wallentin-Hermann, ECLI:EU:C:2008:771, paragraph 23.
([49]) Case C-549/07, Wallentin-Hermann, ECLI:EU:C:2008:771, paragraph 25.
([50]) Case C-257/14, van der Lans, ECLI:EU:C:2015:618, paragraph 40-42.
([51]) Case C-394/14, Siewert, ECLI:EU:C:2014:2377, paragraphs 19-20.

Furthermore, the Court ([52]) has found that under Article 5(3) of the Regulation, an air carrier can be required to organise its resources in good time so that it is possible to operate a programmed flight once the extraordinary circumstances have ceased, that is to say, during a certain period following the scheduled departure time. In particular, the air carrier should provide for a certain reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end. Such reserve time is assessed on a case-by-case basis. However, Article 5(3) cannot be interpreted as requiring, as a 'reasonable measure', provision to be made, generally and without distinction, for a minimum reserve time applicable in the same way to all air carriers in all situations when extraordinary circumstances arise. In this regard available resources will generally be higher at the home base compared to outbound destinations thereby giving more possibilities to limit the impact of extraordinary circumstances. The assessment of the air carrier's ability to operate the programmed flight in its entirety in the new conditions resulting from the occurrence of those circumstances must be carried out in such a way as to ensure that the length of the required reserve time does not result in the air carrier being led to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time.

As regards technical defects, the fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken all reasonable measures to relieve that carrier of its obligation to pay compensation ([53]).

6. COMPENSATION, REIMBURSEMENT, RE-ROUTING AND CARE IN THE CASE OF MULTIMODAL JOURNEYS

Multimodal journeys involving more than one mode of transport under a single transport contract (e.g. a journey by rail and air sold as a single journey) are not covered as such under the Regulation, nor are they covered by any Union legislation on passenger rights in other modes of transport. If a passenger misses a flight because of a delayed train, he or she would only benefit from the rights to compensation and assistance granted by Regulation (EC) No 1371/2007 of the European Parliament and of the Council ([54]) in relation to the rail journey, and then only if the passenger was delayed by more than 60 minutes at the destination ([55]). By the same token, other provisions would apply in the case of a flight missed following a delayed ship or coach journey in the context of a single contract of carriage ([56]). However, organisers of packages may be liable under Directive 90/314/EEC or Directive (EU) 2015/2302 also for the missed flights and the impact on the package as a whole if the multimodal journey forms part of a combination with other travel services, e.g. accommodation.

7. COMPLAINTS TO NATIONAL ENFORCEMENT BODIES, ADR ENTITIES ([57]) AND CONSUMER PROTECTION UNDER THE CPC REGULATION ([58])

7.1. Complaints to National Enforcement Bodies

In order to ensure that complaint procedures are dealt with efficiently and to provide a secure legal environment for air carriers and other businesses potentially involved, the Commission recommends that passengers be advised to make complaints to the national enforcement body of the country where the incident took place, within a reasonable time frame, when they consider that an air carrier has infringed their rights. Passengers' complaints to a national enforcement body should be made only when they have first complained to the air carrier and disagree with the air carrier's answer or in the absence of any satisfactory reply from the air carrier. The Commission recommends that the air carrier should reply within 2 months and that no restrictions are imposed regarding the use of one of the EU official languages. However, the Court ([59]) considered that under the Regulation, national enforcement bodies are not required to act

([52]) Case C-294/10, Eglītis et Ratnieks, ECLI:EU:C:2011:303, paragraph 37.
([53]) Case C-549/07, Wallentin-Hermann, ECLI:EU:C:2008:771, paragraph 43.
([54]) Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ L 315, 3.12.2007, p. 14).
([55]) Articles 17 and 18 of Regulation (EC) No 1371/2007.
([56]) See in this respect Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ L 334, 17.12.2010, p. 1); Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ L 55, 28.2.2011, p. 1).
([57]) Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on on Alternative Dispute Resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ((Directive on consumer 'ADR') (OJ L 165, 18.6.2013, p. 63).
([58]) Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) (OJ L 364, 9.12.2004, p. 1).
([59]) Joined cases C-145/15 and C-146/15, Ruijssenaars e.a., ECLI:EU:C:2016:187, paragraphs 32, 36 and 38.

on such complains in order to guarantee in each cases, individual passengers' rights. Hence, a national enforcement body is not required to take enforcement action against air carriers with a view to compelling them to pay the compensation provided for in the Regulation in individual cases, its sanctioning role as referred to in Article 16(3) of the Regulation consisting of measures to be adopted in response to the infringements which the body identifies in the course of its general monitoring activities provided for in Article 16(1). However, according to the Court, the Regulation does not prevent Member States from adopting legislation which obliges the national enforcement body to adopt measures in response to individual complaints in the absence of alternative dispute resolution entities or reply from such ADR entity where it exists. Finally, this ruling is without prejudice to the obligation of national enforcement bodies to provide complainants, in compliance with principles of good administration and where no such entities exist, with an informed answer following their complaints. The Commission considers that good practice would also require that passengers be informed about appeal possibilities or other action they can take if they do not agree with the assessment of their case. A passenger should have the right to decide whether he/she wants to be represented by another person or entity.

7.2. **ADR Entities**

In addition to complaints under the Regulation, provided that the air carrier is established in the EU and participates in the ADR scheme, passengers resident in the EU can, also submit their contractual disputes with air carriers established in the EU to alternative dispute resolution (ADR) entities established under the ADR Directive. If they have bougth their ticket online, they can also submit such disputes to the Online Dispute Resolution (ODR) platform established under the ODR Regulation that can be accessed via the following link: http://ec.europa.eu/odr.

Where air carriers are not obliged under national law to participate in procedures before ADR entities, it is desirable that they voluntarily commit to participate in relevant procedures and inform their customers thereof.

7.3. **Further means to assist stakeholders to apply the Regulation**

There are a number of ways to assist stakeholders to apply the Regulation. The first one concerns Regulation (EC) No 2006/2004 of the European Parliament and of the Council ([60]) on consumer protection cooperation (the CPC Regulation) which lays down the general conditions and a framework for cooperation between national enforcement authorities. Cooperation between these authorities is essential to ensure that consumer rights legislation is equally applied across the internal market and to create a level playing field for businesses. It covers situations when the collective interests of consumers are at stake andconfers additional investigation and enforcement powers to national authorities to stop breaches of consumer rules when the trader and the consumer are established in different countries. Regulation (EC) No 261/2004 on air passenger rights is part of the CPC Regulation Annex. Therefore, the national authorities responsible for the enforcement of Regulation (EC) No 261/2004 have to fulfil their obligations under the CPC Regulation where the collective interests of consumers are at stake in a cross-border context.

Furthermore, passengers who encountered problems in cross-border situations can turn to the European Consumer Centres network ([61]). The ECC-Net informs consumers of their rights under European and national consumer legislation, gives advice on possible ways of dealing with consumer complaints, provides direct assistance to resolve complaints in an amicable way with traders and redirect consumers to an appropriate body if the ECC-Net cannot help. Passengers can also revert to national consumer organisations for information and direct assistance under the Regulation.

8. **BRINGING ACTION UNDER THE REGULATION**

8.1. **Jurisdiction under which action can be brought under the Regulation**

For flights from one Member State to another Member State, carried out on the basis of a contract with a single air carrier which is the operating carrier, a claim for compensation under the Regulation can be brought, at the applicant's choice, to the national court which has jurisdiction over either the place of departure or the place of arrival, as stated in the contract of carriage ([62]), in application of Regulation (EC) No 1215/2012 of the European Parliament and of the Council ('Brussels I') ([63]). Under Article 4(1) of Brussels I passengers also retain the option of bringing the matter before the courts of the defendant's (air carrier's) domicile.

([60]) See footnote 58.
([61]) http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm
([62]) Case C-204/08, Rehder, ECLI:EU:C:2009:439, paragraph 47.
([63]) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

8.2. **Time limit for bringing action under the Regulation**

The Regulation does not establish time limits for bringing actions in the national courts. This issue is subject to the national legislation of each Member State on the limitation of actions. The 2-year limitation of action under the Montreal Convention is not relevant for claims brought under the Regulation and does not affect the national legislations of the Member States, because the compensation measures laid down by the Regulation fall outside the Convention's scope as they are aimed at addressing an inconvenience suffered by passengers, while remaining additional to the system for damages laid down by the Convention. Hence, the deadlines may differ between Member States ([64]).

9. **AIR CARRIER LIABILITY UNDER THE MONTREAL CONVENTION**

The Convention for the Unification of Certain Rules for International Carriage by Air, commonly known as the 'Montreal Convention', was agreed at Montreal on 28 May 1999. The European Union is a contracting Party to this Convention ([65]) and some of its provisions have been implemented in Union law by Regulation (EC) No 2027/97, as amended by Regulation (EC) No 889/2002. These rules are part of a set of measures aiming to protect air passengers' rights in the European Union along with Regulation (EC) No 261/2004.

— Compatibility of the Regulation with the Montreal Convention:

  — The Court ([66]) has confirmed that the requirements to provide compensation for delay at arrival and assistance in the event of delay at departure are compatible with the Montreal Convention. In that connection, the Court considers that the loss of time inherent in a flight delay constitutes an 'inconvenience' rather than 'damage' which the Montreal Convention aims at addressing. Such reasoning was based on the finding that excessive delay will first cause an inconvenience that is almost identical for every passenger and the Regulation provides for standardised and immediate compensation, whilst the Montreal Convention foresees redress which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis. Hence, the Regulation operates at an earlier stage than the Montreal Convention. The obligation to compensate passengers whose flights are delayed under the Regulation therefore falls outside the scope of that Convention, but remains additional to the system for damages laid down by it.

— Regulation (EC) No 2027/97 is only applicable to passengers flying with an 'air carrier', namely an air transport undertaking with valid operating licences ([67]) within the meaning of Article 2(1)(b) of this Regulation.

— Under Article 17 of the Montreal Convention, a passenger is a person who has been carried on the basis of a 'contract of carriage' within the meaning of Article 3 of that Convention even if an individual or collective document of carriage has not been issued ([68]).

— Article 22(2) of the Montreal Convention should be read in conjunction with Article 3(3) of that Convention and be interpreted as meaning that the right to compensation and the limits to a carrier's liability of 1 131 Special Drawing Rights (SDR) in the event of destruction, loss, damage or delay of baggage apply also to a passenger who claims that compensation by virtue of the loss, destruction, damage or delay of baggage checked in in another passenger's name, provided that the baggage did in fact contain the first passenger's own belongings. Therefore, each passenger affected by destruction, loss, damage or delay of baggage registered under somebody else's name shall be entitled to compensation within the limit of 1 131 SDR if he/she can prove that his/her belongings were in fact contained in the registered baggage. It is for each passenger concerned to prove this satisfactorily before a national judge, who can take into consideration the fact that the passengers are members of the same family, have bought their ticket jointly or have travelled together ([69]).

— Article 22(2) of the Montreal Convention, which sets the limit of an air carrier's liability for the damage resulting, inter alia, from the loss of baggage, includes both material and non-material damage ([70]). This Article also applies in case of destruction, loss, damage or delay in the carriage of checked wheelchairs or other mobility equipment

([64]) Case C-139/11, Cuadrench Moré, ECLI:EU:C:2012:741, paragraph 33.
([65]) Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) (OJ L 194, 18.7.2001, p. 39).
([66]) Case C-344/04, IATA and ELFAA, ECLI:EU:C:2006:10, paragraphs 43, 45, 46 and 47 and joined cases C-402/07 and C-432/07, Sturgeon e.a., ECLI:EU:C:2009:716, paragraph 51.
([67]) Case C-240/14 — Prüller-Frey, ECLI:EU:C:2015:567, paragraph 29.
([68]) Case C-6/14, Wucher Helicopter, ECLI:EU:C:2015:122, paragraph 36 to 38.
([69]) Case C-410/11, Espada Sanchez, ECLI:EU:C:2012:747, paragraph 35.
([70]) Case C-63/09, Axel Walz, ECLI:EU:C:2010:251, paragraph 39.

or assistive devices as defined in Article 2(a) of Regulation (EC) No 1107/2006. The liability of the carrier in this case is limited to the amount mentioned in the previous paragraph, unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires.

— On the interpretation of Articles 19, 22 and 29 of the Montreal Convention, the Court ([71]) considered that an air carrier may be liable under the Convention to an employer, in the event of damage occasioned by delay in flights on which its employees were passengers. The Convention should therefore be interpreted as applying not only to damage caused to passengers themselves, but also to damage suffered by an employer with whom a transaction for the international carriage of a passenger was entered into. In its ruling, the Court added that air carriers are however guaranteed that their liability may not be engaged for more than the limit applicable for each passenger as established by the Convention multiplied by the number of employees/passengers concerned.

— In case of a claim for compensation for damage falling under Article 19 of the Montreal Convention, the passenger has the choice between several courts determined by the Convention itself under its Article 33: the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination. In this case it does not matter if this place is located within the EU, since the jurisdiction is based on the Convention to which the EU is a Party.

([71]) Case C-429/14, Air Baltic Corporation AS, ECLI:EU:C:2016:88, paragraph 29 and 49.

ANNEX

EU NEB's competence in the context of long delay at arrival to final destination of directly connecting flights.

Legal context:

1. C-11/11, ECLI:EU:C:2013:106, 'Folkerts' ([1])

'33. Since that inconvenience materialises, with regard to delayed flights, on arrival at the **final destination**, the Court has held that a delay must be assessed, for the purposes of the compensation provided for in Article 7 of Regulation (EC) No 261/2004, in relation to the scheduled arrival time **at that destination** (see Sturgeon and Others, paragraph 61, and Nelson and Others, paragraph 40).

34. The concept of "final destination" is defined in Article 2(h) of Regulation (EC) No 261/2004 as being the **destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight**.

35. It follows that, in the case of directly connecting flights, **it is only the delay beyond the scheduled time of arrival at the final destination**, understood as the destination of the last flight taken by the passenger concerned, which is relevant for the purposes of the fixed compensation under Article 7 of Regulation (EC) No 261/2004.'

2. Regulation (EC) No 261/2004, Article 16 Infringements

'1. Each Member State shall designate a body responsible for the enforcement of this Regulation as regards **flights from airports situated on its territory and flights from a third country to such airports**. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected. The Member States shall inform the Commission of the body that has been designated in accordance with this paragraph.

2. Without prejudice to Article 12, each passenger may complaint to any body designated under paragraph 1, or to any other competent body designated by a Member State, about an alleged infringement of this Regulation at any airport situated on the territory of a Member State or concerning any flight from a third country to an airport situated on that territory. (.)'

Possible examples ([2]):

Disclaimers:

— This list of examples may not be complete and is predicated on the fact that such itineraries, involving one or more directly connecting flights which are part of a single contract of carriage are performed by the air carriers concerned in accordance with Article 3 of the Regulation and are allowed under existing Air Service Agreements concluded between EU Member States and/or the EU with third countries.

— These examples only consider situations 'in the case of directly connecting flights, (.) only the delay beyond the scheduled time of arrival at the final destination'.

— It is assumed that the long delay at final destination is only due to a missed connection, no other type of incidents is being considered and no extraordinary circumstances apply.

Journey 1: Departure from an EU MS A (Flight 1), transfer in an EU MS B to an EU final destination C (Flight 2).

According to Article 16(1), the competent NEB is the one of MS B. The amount of compensation is calculated on the basis of the whole journey.

Journey 2: Departure from an EU MS A (Flight 1), transfer in a third country airport to another third country final destination (Flight 2).

According to Article 16(1), the competent NEB is the one of MS A. The amount of compensation is calculated on the basis of the whole journey.

Journey 3: Departure from an non-EU MS (Flight 1 operated by an EU carrier), transfer in an EU MS A to a final destination in EU MS B (Flight 2).

According to Article 16(1), the competent NEB is the one of MS A. The amount of compensation is calculated on the basis of the whole journey.

([1]) Most relevant parts are highlighted in bold.
([2]) EU (European Union), MS (Member State), NEB (National Enforcement Body).