Initial appraisal of a European Commission Impact Assessment

European Commission proposal on air passenger rights (revision)


• Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission’s Impact Assessment (IA) accompanying the above-mentioned proposal, submitted on 13 March 2013.

In order to limit any potential negative impact from the liberalisation of the European air transport market on service quality, accompanying measures have been taken at EU level to protect air passengers. Regulation 261/2004 (‘the Regulation’) introduced new rules on compensation and assistance in the event of denied boarding, short-notice cancellation, long delay and involuntary downgrading. Depending on the circumstances of travel disruption, the Regulation requires air carriers to provide passengers with assistance (meals, refreshments, telephone calls and hotel accommodation), offer re-routing and refunds, pay flat-rate compensation, and pro-actively inform passengers about their rights. The air carrier is not obliged to pay financial compensation if it can prove that the cancellation or delay was caused by ‘extraordinary circumstances’, although obligations of care and assistance are still upheld in these circumstances.

Regulation 2027/97, which translates the Montreal Convention into EU law, contains provisions with regard to compensation of individual damage where baggage has been mishandled.

A Commission Communication of 11 April 20111 reported on the difficulties that passenger still encounter in seeking to enforce their rights on the basis of the Regulation and on varying interpretation of its provisions, due to grey areas and gaps in the current text, and non-uniform enforcement across Member States.

The Regulation has also been interpreted in case law of the European Court of Justice. The Commission explicitly refers to the Sturgeon case2 in the IA on the current proposal, not in the

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2 Joined cases C-402/07 and C-432/07. The Court held that a long delay of at least three hours at arrival entitles passengers to the same compensation as in the case of a flight cancellation.
least because of the European Parliament’s request that the effects of this judgment be examined in the context of a revision of the Regulation³.

• Problem definition

The IA identifies the main problem requiring EU intervention as the fact that ‘very often air passengers do not enjoy the rights to which they are entitled in case their travel plans are disrupted, i.e. in instances of denied boarding, long delays, cancellations or mishandled baggage’. (IA, p. 12).

The underlying causes for the observed lack of compliance with the legislation in force relate firstly to insufficient effective and uniform enforcement across Europe. The legislation has grey areas and key aspects of the Regulation (for example, the notion of ‘extraordinary circumstances’, leading to exemption of payment of compensation) are difficult to interpret. Moreover, the enforcement policy varies in terms of effectiveness across Member States and no formal coordination procedure exists between national enforcement bodies. Individual means of redress for passengers are limited and the complaint-handling process can be complex. All these difficulties result in a low ‘claim rate’. Airlines indicate that only between 5 and 10 per cent of passengers entitles to compensation do actually claim it (IA, p. 16). The complexity of the legislation is further illustrated by the very high number of passenger enquiries received by the Commission’s Europe Direct Contact Centre.

The second underlying cause for the poor compliance with the Regulation lies, according to the Commission, in a strongly disincentivising effect of certain costs following from the obligations imposed by the Regulation. Airlines would not be able to bear the price in costs and risks of assistance/care and compensation in case of extraordinary events of long duration, which are beyond the airlines’ control, and for certain small-scale operations. Airlines are also liable for care and compensation where disruptions are due to third parties, but the latter do not enjoy economic incentives to take measures to reduce the frequency and/or the severity of such disruptions.

The IA also addresses the question of how the problem would evolve if no action at EU level was taken. Overall, it is not expected that, over time, airlines will receive greater incentives to comply with the air passenger rights regulation. Only for out-of-court means for individual redress are some improvements expected from the implementation of Directive 2013/11/EU on consumer alternative dispute resolution (ADR) and of Regulation (EU) No 524/2013 on consumer online dispute resolution (ODR), both adopted on 13 June 2013.

• Objectives of the legislative proposal

The general objective of the proposal is ‘to promote the interest of air passengers by ensuring that air carriers comply with a high level of air passenger protection during travel disruptions, while ensuring that air carriers operate under harmonised conditions in a liberalised market.’

Specific objectives are:
- to ensure effective and consistent enforcement of passenger rights across the EU by (1) clarifying definitions and key principles underlying passenger rights and simplifying the rights,
by (2) ensuring an effective and consistent sanctioning policy, and by (3) ensuring effective complaint-handling processes and means of redress for passengers;
- to reduce the disincentivising effects on airlines of certain costs of the Regulation by (1) ensuring that airlines obligations with regard to passenger rights cover risks that are limited in time and/or in size, by (2) ensuring that financial compensation in certain situations does not translate into decisive disincentives for compliance, and by (3) ensuring that third parties are incentivised to address the causes of the travel disruptions for which they are responsible.

These specific objectives are to be achieved through a number of operational objectives.

The IA contains a table, illustrating clearly the correspondence between the policy objectives and the described problems (p. 25).

**Range of options considered**

The Commission provides a long list of possible policy measures (with a detailed description in Annex 10 at p. 106), selected after ‘initial screening’. It packages the measures into four policy options – apart from the ‘no policy change’ option, discussed in the chapter on the definition of the problem.

*Option 1* – Moderate change of enforcement, with a focus on economic incentives. Under this option, enforcement would be better coordinated, mainly through a better stream of information between the national enforcement bodies (NEBs) and the Commission. Some of the obligations with regard to care (refreshments, meals, accommodation) would be replaced by an obligation on airlines to propose optional insurance for passengers at the moment of booking. Rerouting obligations and compensation are left to airlines.

*Option 2* – Balancing a stronger enforcement policy with economic incentives. This would entail a stronger coordination of NEBs with a central and formal coordinating role for the Commission. Care and assistance obligations would be reinforced, while the global amount of financial compensation to be paid would be limited in order to compensate airlines for the higher ‘care’ costs. The Commission has proposed two variants for this limitation of the compensation. Under Variant 2.a., the time threshold after which the passenger has the right to compensation in case of delays is increased from three hours to at least five. Further sub-variants are possible, for example taking a different delay threshold depending on the flight distance. Under Variant 2.b, the scope of the exemption for ‘extraordinary circumstances’ is extended to include most technical faults. **Sub-option (Variant) 2a is the Commission’s preferred policy option.**

*Option 3* – Focus on a stronger enforcement policy⁴. The focus of this option is entirely on stronger enforcement and on clarification of existing passenger rights. Air carriers would have to designate a responsible person for each airport who would have the power to take decisions with regard to care and compensation. An industry fund would be introduced to ensure continued care is case of mass disruptions.

*Option 4* – Centralised enforcement. This option would entail a powerful and centralised enforcement policy, led by a central EU enforcement body, combined with an obligation of rerouting in case of long delays. Like under option 3, an industry fund would be set up for cases of mass disruption.

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⁴ This policy option is stated to include some elements of the EP Resolution of 29 March 2012.
The Commission indicates that it has discarded three other possible options: (1) a repeal of the Regulation; (2) the introduction of an industry fund that would take charge of all expenses linked to care and compensation; and (3) a stricter implementation of the existing, unchanged Regulation coupled with guidance material and voluntary commitments from industry and enforcement bodies.

- **Scope of the Impact Assessment**

The Commission states that the core impacts of the initiative are economic and social impacts, and that environmental impacts are indirect and almost negligible.

Economic impacts are defined in this case as impacts on the following: enforcement, compliance costs, the functioning of the internal market and competition, competitiveness of EU airlines, administrative costs and burdens and cost for public authorities. The impact on the competitiveness of EU airlines is dealt with separately in Annex 6 to the IA, relating to both competition of air transport with other modes and competition with non-EU airlines. The conclusion is that, for both aspects, the impact of the proposed option would be very low.

Social impacts are first the impact on passengers / consumers. All options would provide for better enforcement of passenger rights, and for a clarification and strengthening of rights in many instances. The IA discusses in detail the advantages and disadvantages of each policy option for passengers. Effects on employment would be limited, although there could be an indirect effect, via the impact that changing costs can have on airfares and hence on demand for air services.

The IA also examines briefly the impact of the preferred option on fundamental rights, in particular Articles 38 (consumer protection) and 26 (integration of persons with disabilities) of the Charter on Fundamental Rights.

The Commission emphasises that the proposed Regulation needs to be coherent with other EU legislation, such as the Package Travel Directive 90/314 (currently under revision as well), the Unfair Contract Terms Directive 93/13/EEC, and the new legislation on ADR (Directive 2013/11/EU) and ODR (Regulation (EU) No 524/2013), but it does not go into detail on this point.

- **Quality of data, research and analysis**

The IA relies heavily on an evaluation of the existing Regulation by the external consultant Steer Davies Gleave, and on a 2012 study by the same consultant, analysing the current market situation and problems and assessing quantitatively the impacts of the policy measures.

The assumptions underlying the baseline scenario and costs calculations, as well as the model used are explained in Annexes 8a and 8b to the IA. Sensitivity tests are undertaken where necessary, notably to take account of different claim rates (see Annex 9, p. 101 and Annex 14).

Administrative burdens are calculated using the Standard Cost Model (Annex 12, p. 138).

In general, the methodology for this IA is clearly and transparently explained and seems correct.
• **Subsidiarity**

The proposal is based on Article 100(2) TFEU, giving the EU the power to lay down appropriate provisions for air transport. The Commission states that no Member State alone can efficiently act to protect consumers in this area, and that the EU level seems to be the appropriate level to address the identified problems.

No national parliament of a Member State has issued a reasoned opinion raising problems in respect of subsidiarity.

• **Budgetary or public finance implications**

The Regulation requires Member States to establish national enforcement bodies (NEB) to ensure the correct application of the Regulation. A number of policy measures (contained in all options) entail new administrative costs for NEBs, such as annual reporting to the Commission checking airlines’ policies with regard to baggage and procedures and contingency plans, in total for a Net Present Value (NPV) of about 2 million euro over the period 2015-2025.

The Commission indicates that there could be compensating factors that may reduce costs for NEBs, such as a reduction in the number of complaints, but that these reductions cannot be calculated.

• **Stakeholder consultation**

With regard to a possible revision of Regulation 261/2004, a public consultation was carried out between 19 December 2011 and 11 March 2012. For more detailed information on the outcome of this consultation, the Commission refers to its website\(^5\).

Following a recommendation of the Commission’s IA Board, the point of view of different stakeholders (airlines, NEBs, consumer organisations, …) are reflected throughout the IA.

• **Monitoring and evaluation**

The IA lists a number of parameters on which the national enforcement bodies must provide information, with a view to monitoring the level of compliance with the revised Regulation and the consistency of national enforcement policies.

• **Commission Impact Assessment Board**

The Commission’s IA Board (IAB) issued its opinion on an earlier draft IA on 21 September 2012. In response to the IAB’s recommendations, DG MOVE seems to have better explained the baseline scenario and better reported the stakeholder opinions throughout the text of the IA. It also added clarification on the calculation of the expected costs and benefits of the proposal.

• **Coherence between the Commission’s legislative proposal and IA**

The legislative proposal seems to be coherent with the IA.

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\(^5\) [http://ec.europa.eu/transport/passengers/consultations/2012-03-11-apr_en.htm](http://ec.europa.eu/transport/passengers/consultations/2012-03-11-apr_en.htm)
Author: Elke Ballon

Ex-Ante Impact Assessment Unit
Directorate G for Impact Assessment and European Added Value
Directorate General for Internal Policies of the Union (DG IPOL)
European Parliament.

This note, prepared by the Ex-Ante Impact Assessment Unit for the Committee on Transport and Tourism (TRAN), analyses whether the principal criteria laid down in the Commission’s own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

This document is also available on the internet at:

To contact the Ex-Ante Impact Assessment Unit, please e-mail:
impa-secretariat@ep.europa.eu

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