



3.4.2023

NOTICE TO MEMBERS

Subject: Petition No 0165/2018 by Mario Berger (German) on passengers being excluded from return flights if they have not taken the outbound flight

1. Summary of petition

The petitioner considers this a violation of his consumer rights, as not taking the outbound flight had the immediate consequence of exclusion from the return flight. He explains that for a business trip from Copenhagen to Munich he had to make a new booking for an earlier outbound flight. This, he feels, is not a legitimate reason to be refused permission to board the already booked return flight, however. The petitioner believes he has the right to use the return flight he already paid for and that the action of the airline constitutes both unlawful expropriation and breach of contract.

2. Admissibility

Declared admissible on 12 June 2018. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 21 September 2018

Current provisions in place safeguarding the air passengers rights, enshrined in the Regulation (EC) No 261/2004¹ do not prohibit the so-called 'no-show' practice. Moreover, as stated in the Interpretative Guidelines² 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 ('no-show'), this does not constitute denied boarding within the meaning of Article 2(j) of the Regulation (EC) No 261/2004. It is however important that the consumer is clearly informed of the airline's Conditions of Carriage for the type of ticket he/she has purchased and informed of the consequences of a 'no show'.

¹ 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 (OJ L 46, 17/2/2004, p.1).

² Point 3.1.1. of Interpretative Guidelines on Regulation (EC) No 261/2004 (2016/C 214/04).

Indeed, the Commission is aware of the consumers' concerns that certain air carriers might vaguely specify in their standard Conditions of Carriage that, if a passenger does not take a particular flight, return or onward reservations may be cancelled. Furthermore, a growing number of carriers are now de-bundling their air tickets segments (especially in low costs airlines) and the no-show practice is not as commonly used as in the past.

The Commission has already sought to address the issue in its proposal for amending Regulation (EC) No 261/2004¹. The proposal confirms that passengers may not be denied boarding on a return journey of the same ticket on the grounds that they did not take the outward journey. However, this would not affect the right of airlines to impose particular rules with regards to the sequential use of flights within a same journey².

The Commission proposal did not recommend a full ban of the 'no-show' policies as this could lead to a reduction of competition on certain routes, especially those involving segments outside of the EU. In addition, such a ban may reduce the interest for carriers to offer cheaper prices on certain routes and thus would be to the detriment of consumers, especially for the less time-sensitive travellers that would have opted for a longer-but-less-expensive indirect flight³.

Certain national consumer associations and/or consumer protection authorities consider that 'no-show' clauses should be regarded as unfair under Council Directive 93/13/EEC⁴ on unfair terms in consumer contracts⁵. Directive 93/13/EEC requires Member States to ensure that their national authorities or courts can assess whether a specific standard term in consumer contracts is unfair, having regard to all relevant circumstances of the case at stake. Moreover, the Directive allows Member States to set more stringent consumer protection levels in their national laws. Spanish, German and Austrian courts⁶ as well as the Italian Competition and Market Authority⁷ already decided that "no show" clauses used in the standard terms and conditions of various airlines (British Airlines, Lufthansa, Iberia, Alitalia) were contrary to national legislation. The Belgian *Test Achats* consumer association has filed a court case in July 2018 requesting Air France-KLM group's 'no show' clause to be declared invalid and that passengers should be compensated for damages resulting from the application of such a clause, on the basis that the clause creates a significant imbalance between the aviation

¹ 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 flights 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).

² Article 1(3(b)) of the proposal - Article 4(4) of the amended Regulation (EC) No 261/2004).

³ Impact Assessment, SWD(2013)62 final of 13 March 2013, p.133.

⁴ Council Directive 93/13/EEC on unfair terms in consumer contracts, (OJ L 95, 21/4/1993, p. 29–34)

⁵ See e.g. judgment of the German Supreme Court (Bundesgerichtshof) of 29.4.2010, Xa ZR 101/09.

⁶ OCU v Spanair 31 July 2012 (Juzgado Mercantil n. 1 Barcelona); OCU v Iberia 11 September 2012 (Juzgado Mercantil n. 12, Madrid); AG of Köln (Germany), 05/01/2005; AG of Frankfurt (Germany), 21/02/2006; Landgericht Frankfurt am Main (Germany), 14/12/2007; Commercial Court n. 2 Barcelona (Spain), 22 March 2010; Audiencia Provincial (Court of appeal) of Madrid (Spain) 27/11/2009; Commercial court of Bilbao (Spain), 7 July 2008; Commercial court of Bilbao (Spain), 25 July 2008; Commercial court of Bilbao (Spain), 3 July 2009; Oberlandesgericht (Higher Regional Court) of Frankfurt (Germany), 18 December 2008; BGH (Federal Court of Justice, Germany), 29 April 2010; Handelsgericht of Vienna (Austria), March 2010; VKI v Lufthansa, Oberster Gerichtshof (Austria), 24 January 2013.

⁷ Consiglio di Stato Sezione VI Sentenza 30 settembre 2016, n. 4048; <http://www.neldiritto.it/appgiurisprudenza.asp?id=13369#.W4Aqu9FIISK> [accessed on 24 August 2018].

company and the passenger¹. They consider that the loss of the total ticket, when one leg has not been used, is disproportionate and unjustified. The outcome of the Belgian court case is pending.

Conclusion

The Commission is aware of the practice of "no show" of airlines and the issues which passengers face in this regard. This 'no-show' practice was addressed in the proposal for a revision of Regulation (EC) No 261/2004.

The proposal has not yet been adopted by the co-legislators. Therefore, the proposed rules concerning the "no-show" policy are not yet in force throughout the EU.

Under certain circumstances, 'no-show' clauses may be considered unfair and thus non-binding by the relevant courts or authorities of the Member States. Certain airlines are therefore allowing consumers to use the remaining part of their tickets, when appropriate notice of the 'no show' is performed by the consumer.

4. Commission reply (REV), received on 03 April 2023

Following its meeting on 5 September 2019, the PETI Committee had asked the Commission an additional communication with regard to the legislative developments.

Additional Communication from the Commission

The Commission stated in its previous observations that it was aware of the practice of "no show" of airlines and the issues which passengers face in this regard. This 'no-show' practice was addressed in the proposal for a revision of Regulation (EC) No 261/2004.

To date the proposal² is still being discussed by the co-legislators. In Council, the Aviation working party dealt with the proposal the last time in the meeting of 26 January 2023. No date for a next meeting has been set.

Therefore, the situation remains unchanged that the proposed rules concerning the "no-show" policy are not yet in force throughout the EU.

Currently a case raising similar questions is pending before the European Court of Justice, case C-238/22 *FW v/ LATAM Airlines*. The Commission has presented its observations in this case end of July 2022, a date for a hearing or a judgment has not yet been fixed (02 March 2023).

¹ <https://www.test-achats.be/action/espace-presse/communiqués-de-presse/2018/no-show-clausule-2018>

² 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 flights 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).