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Ring-fencing EU Passenger Rights in the UK - impact of a hard Brexit

Policy Paper



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EU Passenger and Travel Rights have become an important part of consumer protection and non-discrimination law. Their availability was an achievement of EU transport policy and EU legislation, which has been implemented, bit by bit, in the laws of the Member States including the UK.

However, with a hard BREXIT, part of these laws and protections are in the process of being dismantled or, at least, their effects seriously reduced. The outward looking approach and availability of rights for domestic and EU travel with broader impact on international travel by EU carriers is to be reduced to availability merely in the UK or to services by UK carriers. Enforcement of rights will be limited to those available by UK law and other EU rights will remain only available if enforced in any of the EU Member States.

Of major potential impact for citizens driving in the EU will be the loss of the protection offered by the Motor Insurance Bureau. This means that persons injured in accidents abroad can no longer avail themselves of the support of the Motor Insurance Bureau in claiming in the UK, but will have to investigate details of the defender abroad and sue and enforce their rights abroad, in a foreign language and often based on a different, possibly lower standard of living. This means that even where the victim is successful in claiming abroad, the victim suffering damages may not be fully compensated to the standard at the place where the damages are felt.

The impact is likely to be felt more significantly at the lower income end of citizens and the elderly who are less able to obtain detailed advice and have fewer means and/or energy to pursue their rights in litigation abroad with all the hurdles a dis-unified Europe will entail. This policy brief starts by setting out the current legal framework before sketching the impact of a hard Brexit in this area.

Policy Recommendations

- Avoiding a hard Brexit, in order to avoid the serious undermining of passenger and travel rights that will otherwise ensue.
- Any negotiated solution should include the continuing availability of passenger and travel rights, including insolvency protection and insurance provisions and support services (such as compensation bodies as in the UK motor insurance bureau).
- In case of a hard Brexit or otherwise in case of a disconnect from these EU rules, provisions should be kept in place to mirror as much as possible available EU protections. EU developments in favour of consumer protection should be tracked and implemented in the UK to similar standards.
- Facilities should be provided and resourced to provide drivers and passengers involved in accidents abroad with fall-back assistance and compensation in case of an accident caused by an uninsured or untraced driver.

The Current Legal Framework

Transport Policy and Passenger Rights

EU Policy has created the following ten principles on the path towards EU Passenger Rights:¹

1. Non-discrimination
2. Access and assistance for disabled passengers and persons with reduced mobility
3. Information
4. Choice to cancel trips due to disruption
5. Rerouting or rebooking
6. Assistance in event of long delay
7. Compensation
8. Carrier Liability
9. Easy complaint handling
10. Effective enforcement of rights



Implementation in the EU and the UK and EU Member State

This system is implemented via international conventions and EU Law in two tiers.

I. International convention systems

provide a mandatory and exclusive international liability regime enshrining the liability of the carrier for the passengers and their luggage and in case of delay. These conventions were implemented by Member States and have, where possible, also been acceded by the EU. These include conventions for carriage by

- Air: Warsaw and Montreal Conventions
- Sea: Athens Convention
- Rail: COTIF Convention with Appendix A enshrining the CIV Uniform Rules
- Road: CVR Convention.²

II. In addition, European Instruments

exist to supplement these international rules and to embed them into the wider EU consumer framework. Others provide provision where no international rules exist, such as in bus travel or where they are not widely ratified, such as in road passenger travel. This EU framework exists of:

- *EU Implementation of updates to International Instruments* in case or air and sea passenger carriage via European Regulations to push for quick entry into force of international instruments.³
- *EU Passenger Rights Regulations*⁴ were developed for all modes of transport and made specific provision for non-discrimination and right to care for disabled passengers and persons with reduced mobility. In particular, these Regulations impose mandatory rules relating to non-discrimination between

passengers with regard to transport conditions offered by carriers, to non-discrimination and assistance for disabled persons and persons with reduced mobility, on rights of passengers in cases of cancellation or delay, on minimum information to be provided to passengers and on handling complaints and general rules of enforcement.

- *The EU Package Travel and Linked Travel Arrangements Directive*⁵ is concerned with yet another arena in which travel services are provided in conjunction with other services of the hospitality or travel industry and insures that travel customers do not lose out due to the patchwork of providers and arrangements for the various different services on offer. In particular, the Package Travel Directive provides mandatory rules on information obligations and on the content of the package travel contracts; rules on changes to the package contract; on performance duties and consequences of lack of conformity in the performance of the contract.

In particular, the organiser is made liable for the performance of the travel services included in the package travel contract, irrespective of whether he or others provide the services. This brings important safeguards for the consumer. The Directive also deals with the interaction between retailer and organiser with the traveller and ensures that the traveller is not disadvantaged in the enforcement of his rights by interacting with and booking through a retailer. Furthermore, and very importantly so, it provides for insolvency protection for packages and linked travel arrangements and relevant obligations of the organiser.

The Directive also regulates the interaction of its provisions with international conventions and the EU Passenger Rights Regulations for carriage by sea and inland waterways, road, rail, bus and coach. The Directive is implemented in the UK by the Package Travel and Linked Travel Arrangements Regulations 2018 (SI 2018/634).

• *EU Consumer Law*

In addition to general principles of contract and tort law, EU Consumer Protection, as regulated by Member States taking into account relevant EU Directives such as the Directive 93/13/EEC of the Council on Unfair Terms in Consumer Contracts, must be taken into account for any issues not covered by the specialised instruments as discussed above.

Resulting Rights and their Enforcement

The rights as indicated are enforceable by the passenger in the following manner:

- Carrier Liability is available for claims for personal injury, death, delay or loss or damage to luggage and enforced by direct claims against carrier.
- General Passenger Rights are available in parallel to carrier liability claims and encompass rights to care and compensation for cancellation, denied boarding and long delay. They can be made directly against the carrier for compensation and do not hinder making claims according to consumer protection laws in parallel. However, there will be limits on the overall compensation in accordance with the specialised instruments.
- Disabled persons and persons with reduced mobility have rights to information, assistance and non-discrimination. However, there are no direct claims for damages in case of breach but instead national enforcement bodies have a duty to control appropriate performance of carriers and can issue fines.
- Consumer claims and enforcement of rights are furthermore supported by industry alternative dispute resolution procedures.

Are the EU Rights Special?

Yes, there are no comparative rules for example in Singapore or Australia, despite the common law heritage of these countries. While some consumer rights and non-discrimination laws are available,⁶ in the case of Singapore their

scope is not fulfilled for passengers and the case of Australia they are not very effective at protecting the passenger in his/her travel rights and enforcement of such rights. For example, there are no explicit rights for care, cancellation and delay and no specific enumerated obligations on carriers not to discriminate against disabled persons or person with reduced mobility. Claims are thus only available under general law, where the breach of duty is much more difficult to define and thus any "right" more difficult to enforce. It is argued that this state of play can very easily result in a reduced level of attention to ensuring the same standards, as there are no direct momentary consequences attached for a carrier.⁷

Brexit and its Impact?

How will this Landscape change with the UK's Exit from the EU?

Even if there is no Withdrawal Agreement, International conventions on carrier liability will remain, however there will be impact on any other EU Passenger Rights in the sense that application of the Passenger Rights and Package Travel Regulations and other Consumer Rights will be limited in scope and reach, both as applied in the UK, as envisaged by current UK (EU Exit) Regulations, and in the post-Brexit EU Member States.

While in principle the rights will remain available to claimants, these will then only be available as a matter of UK law and limited to the UK. The European Union Withdrawal Act 2018 provides for EU legislation and EU-derived domestic legislation to remain in force insofar as it was operative immediately before exit day.⁸ However Government Ministers have been provided with the powers to make amendments by regulation in order to deal with deficiencies in retained EU law arising from the withdrawal of the UK. This concerns in particular

where an application would go beyond what had practical application in relation to the UK or was otherwise redundant.⁹ As such retained, as per Government advice, will be the rights and obligations under the EU Passenger Rights Regulations as embedded in the UK.¹¹

But what are the Consequences of Limiting the Application of EU Rules as UK Retained Legislation?

One key feature and change is that after Brexit the UK will then no longer count as an EU Member State. Therefore, from the point of view of the remaining EU Member States and their courts, journeys to and from the UK will no longer trigger the application of the EU Regulations or impact on their reach. Furthermore, the UK application of the EU Regulations as a matter of UK law will be limited to the UK and services where the place, airport or port of embarkation is situated in the UK or the place of disembarkation from the transport vehicle is in the UK and carriage undertaken by a UK carrier.¹² Cruise passengers will only be protected by UK law where embarkation is from a UK port.¹³

Thus, limitations of application and reach of the instruments and thus passengers' rights will emerge, compared to the status before the UK's exit.

The result is thus a UK-centric application of the former EU legislation and thus a narrowing of the market available to UK consumers and UK traders, which is likely to have some impact on the provision of services, offers and prices available to UK customers. The reach of passengers' rights will no longer be as extensive and non-UK organisers will have further regulatory hurdles to overcome and costs to bear.¹⁴

Furthermore, enforcement of rights will depend on whether it is against a

UK carrier under the UK regulations. If the carrier has its place of business outside the UK, additional hurdles will be those of founding jurisdiction and enforcing a judgment in another country, because EU rules on jurisdiction, recognition and enforcement of judgments will no longer apply to the UK.¹⁵ It will remain to be seen how well alternative dispute resolution can assist, yet, for example, the EU Online Dispute Resolution platform will no longer be available to UK consumers or UK traders.¹⁶ This is likely to create further barriers for consumers in making a claim and enforcing their rights.

Significant Detriment for UK Travellers as Motor Drivers and Passengers

Related to EU passenger rights and travel rights are rules for UK drivers abroad, their insurance provisions and ability to claim damages for the person abroad who had caused the accident. The Motor Vehicles (Compulsory Insurance) (Amendment etc.) (EU Exit) Regulations 2019/551 imposes crucial changes on the availability of recourse to insurance representation and leads to the abolition of the UK compensation body.¹⁷

The consequences are succinctly summarised in the UK Government Brexit Guidance for Motorists:

"If you are involved in a road traffic accident in an EU or EEA country you should not expect to be able to make a claim via a UK-based claims representative or the UK Motor Insurers' Bureau (MIB).

Instead, you may need to bring a claim against either the driver or the insurer of the vehicle in the EU or EEA country where the accident happened. This may involve bringing the claim in the local language.

In the event of an accident in an EU or EEA country caused by an uninsured or an untraced driver, you may not receive compensation if there is no Brexit deal. This will vary from country to country.

If involved in a road traffic accident in an EU or EEA country before the UK leaves the EU, you may need to bring legal proceedings in the UK against either the insurer or the MIB. After the UK leaves the EU, you may need to bring legal proceedings against either the responsible driver or the insurer of the vehicle in the EU or EEA instead. If you need more information about this, you should seek legal advice."¹⁸

The above shows another significant backwards step in consumer protection in the UK compared to what was available in the UK as an EU Member State.



Enforcement of rights after a hard Brexit can become a mounting problem. Even more so, in case of severe accidents involving motor drivers and their passengers abroad resulting in significant damages, for example due to disability of the victims of the accident or due to death of the victim being the provider for dependants, difficulties in enforcement can lead to serious loss.

Disadvantages to UK Consumers due to Disconnect from EU Developments

UK consumers will most likely not be benefitting from future developments of the Passenger Rights system as envisaged by the EU. Developments at EU level are envisaged in air passenger

law cumulating eventually in a reform of the EU Passenger Rights Regulation. Furthermore, rail passenger rights, while in good shape in the UK, will not have been fully aligned by the time Brexit is likely to occur and appropriate impetus for UK reform may thus be lost.¹⁹ EU envisaged reforms for multimodal transport, integrated ticketing, payment and information system, and also for rail through ticketing, will be lost to UK law unless the UK legislator takes EU reforms as basis for a reform within the UK.²⁰

Conclusion

Brexit without a deal will bring with it a

significant shrinking of the market and a diminishing of consumer and traveller protection. The enforcement of rights in cross border cases will become increasingly more difficult as the former alignment of rules and measures no longer applies.

Most concerning is however that UK consumers will become vulnerable to newly created gaps in protection. Victims of traffic accidents may be left unprotected and unsupported in the future as the services of the UK-based claims representative and the UK Motor Insurers' Bureau are no longer available.

References

¹ See <https://ec.europa.eu/transport/facts-fundings/infographics/zero-to-ten_en> towards the end, at tab: "10 passenger rights however you travel", and see also <https://ec.europa.eu/transport/themes/passengers_en> [last accessed 23.07.2019].

² See the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 1999) and the earlier Warsaw Convention, the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 1929) and its various protocols; the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, and the 1974 Convention as amended by the Protocol of 2002 (hereafter Athens 2002); the Uniform Rules Concerning the Contract for International Carriage of Passengers by Rail (CIV), Appendix A of the Convention Concerning International Carriage by Rail, May 9, 1980, amended by Protocol of 3 June 1999 (COTIF); and the Convention on the contract for the international carriage of passengers and luggage by road (CVR) Geneva, 1973. The latter, while in force, has only 9 state parties (Bosnia and Herzegovina, Croatia, Czech Republic, Latvia, Montenegro, Republic of Moldova, Serbia, Slovakia, Ukraine) and the Convention on the contract for the international carriage of passengers and luggage by inland waterway (CVN) Geneva, 1976, is not in force.

³ 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 repealing Regulation (EEC) No 295/91 (OJ No L 46, 17.2.2004, p. 1); and Regulation EC/392/2009 of the European Parliament and of the Council of April 23, 2009 on the liability of carriers of passengers by sea in the event of accidents (OJ L131, 28.5.2009, p.24).

⁴ 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 repealing Regulation (EEC) No 295/91 (OJ No L 46, 17.2.2004, p. 1); Regulation (EU) 1177/2010 of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ L334, 17.12.2010, p.1) as amended; Regulation (EC) No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations (OJ No L 315, 3.12.2007, p. 14); and Regulation (EU) No 181/2011 of the European Parliament and of the Council concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ No L 55, 28.2.2011, p. 1).

⁵ 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 (hereafter EU Package Travel Directive).

⁶ In Australia there is the Commonwealth Australian Consumer Law (ACL) set out in Sched 2 of the Australian Competition and Consumer Act 2010 which stipulates consumer guarantees for services, that is services must be provided with due care and skill within reasonable time and must be fit for the particular purpose. However, remedies under this Act clash in part with the state based Civil Liability Acts and thus reduce effectiveness of the Consumer Guarantees. (See e.g. K. Lewins, "Cruise ship passengers under Australian law" (2018) 32 A&NZ Mar LJ). In Singapore there is only the Consumer Protection (Fair Trading) Act 2003 as amended, which is does not provide any consumer/passengers rights. Instead, the emphasis in Singapore is on consumer education in knowing what to expect when contracting with different providers (see paper by Singapore at the Worldwide Air Transport Conference (ATCONF) 6th Meeting, Montréal, 18 to 22 March 2013, on "Consumer Protection in Air Transport – Singapore's Experience" ATCONF/6-WP/79 6/3/13, available at https://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATCONF-wp79_en.pdf [last accessed 30.07.19]).

⁷ See for example that there may be a correlation between the decrease in frequency of delays and cancellations in the US at a time when regulations covering such events came into effect (see paper by the Secretariat of the Worldwide Air Transport Conference (ATCONF) 6th Meeting, Montréal, 18 to 22 March 2013, on "Effectiveness of Consumer Protection Regulations" (ATCONF/6-IP/1, 27/2/13), para 8.1 a), available https://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATCONF-ip0001_en.pdf [last accessed 30.07.19]).

⁸ See European Union Withdrawal Act 2018 (hereafter EUWA 2018) ss 3(1) and 2(1).

⁹ EUWA 2018 s 8(1)(b), (2)(a).

¹⁰ See EUWA 2018 ss 3(1) and 2(1). And see UK guidance to passengers at <https://www.gov.uk/guidance/passenger-travel-to-the-eu-by-air-rail-or-sea-after-brexite> [last accessed 30.07.2019].

Extracts:
"What may change for UK citizens travelling as passengers to the EU after the UK leaves the EU UK citizens planning a trip to the EU and EEA before the UK leaves the EU do not need to take action. If the UK leaves the EU without a deal on 31 October 2019, some things may change for passengers travelling to and within the EU and EEA."
...

"Air passenger rights
For air passengers on a flight departing the UK, the same passenger rights as apply today will continue to apply after the UK leaves the EU. For EU registered airlines, EU law will continue to apply in respect of flights to and from the EU." ...
See <https://www.gov.uk/guidance/passenger-travel-to-the-eu-by-air-rail-or-sea-after-brexite> [last accessed 30.07.2019].

¹¹ By the Merchant Shipping (Passengers' Rights) Regulations 2013 (SI 2013/425).

¹² See the relevant Passenger Rights Regulations (n 4 above) as amended by the Merchant Shipping (Passengers' Rights) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/649), the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019 (SI

2019/278), the Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018 (SI 2018/1367), and also the Rail Passenger Rights and Obligations (Amendment) (EU Exit) Regulations 2018 (SI 2018/1165) and the Rights of Passengers in Bus and Coach Transport (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/141). References to EU legislation are substituted with relevant UK legislation and references to the European Union and EU Member States deleted with the consequences that the rules and the market freedoms are limited to the UK. According to the Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018 regs 19, 26(4) and 27, for example, providers from other Member States are no longer exempt from providing insolvency security in the UK and UK retailers are liable for the performance of the package and insolvency protection unless the retailer proves that the organiser complies with the provisions of the Regulation.

¹³ See EU Regulation 1177/2010 art 2(1)(c) as retained UK law.

¹⁴ For example, under regulations 19, 26(4) and 27 of the Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018, providers from other Member States are no longer exempt from providing insolvency security in the UK and UK retailers are liable for the performance of the package and insolvency protection unless the retailer proves that the organiser complies with the provisions of the Regulation.

¹⁵ For an overview from the EU viewpoint see the European Commission's Notice to Stakeholders of 27 February 2018 "Withdrawal of the United Kingdom and EU Rules on Consumer Protection and Passenger Rights", available at <https://ec.europa.eu/transport/sites/transport/files/legislation/brexit-notice-to-stakeholders-consumer-protection-passenger-rights.pdf> [last accessed 30.07.2019].

¹⁶ See Regulation (EU) No 524/2013 of The European Parliament and of The Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), Art. 2.

¹⁷ See See Motor Vehicles (Compulsory Insurance) (Amendment etc.) (EU Exit) Regulations 2019/551

¹⁸ "Road traffic accidents in the EU if the UK leaves the EU without a deal on 31 October 2019", available at <https://www.gov.uk/guidance/prepare-to-drive-in-the-eu-after-brexite> [last accessed 31.07.19].

¹⁹ See House of Commons Briefing Paper, "Rail passenger rights, compensation and complaints", Number CBP 8572, 20 May 2019 and contrast Regulation (EC) No 1371/2007 on rail passengers' rights and obligations (n. 4 above) in particular art 17.2 and the right to cash refunds if so required rather than solely by a voucher system as had been possible until recently in the UK. See also Department of Transport Guidance Note of November 2011 on Regulation No. 1371/2007, Parts II and III.

²⁰ See EU commission on Logistics and Multimodal Transport, "Delivering EU-wide multimodal travel information, planning and ticketing services – dream or reality?" of 19.11.2018 at https://ec.europa.eu/transport/themes/logistics/events/2018-year-multimodality-travel-information-planning-and-ticketing_en [last accessed 31.07.2019].



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