

Legal effects and review of the Regulation 1107/2006
(disabled persons and persons with reduced mobility when travelling by air)

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Abstract

The purpose of the study is to present content, effects and shortcomings of the Regulation 1107/2006 (“the Regulation”) concerning the rights of disabled persons and persons with reduced mobility when travelling by air. Indeterminacy of the term ‘PRM’ and inadequate information to carriers and airport operators about the need for assistance to PRMs hinders the adequate implementation of the Regulation. *Sui generis principle of solidarity implies that a charge for assistance to PRMs is levied on each carrier using an airport, proportionate to the number of passengers it carries to or from the airport, and this enables a high level of protection of PRMs.* As a counter-balance to the principle of solidarity, a principle of cost efficiency has been incorporated which puts an airport operator or the airport operator's subcontractor under the obligation to keep PRM charges commensurate to PRM ground handling charges. In addition to implementation of the solidarity principle, the high level of protection of PRMs is also ensured by the obligation to adopt quality standards for ground handling of PRMs at all airports servicing more than 150,000 passengers, as well as both airport operators and carriers being obliged to train their staff how to provide the appropriate assistance.

The absence of clarity on the obligations of airport operators and carriers has resulted in inconsistency in the regime of responsibility for damage to wheelchairs or mobility equipment and other assistive devices.

1. Introduction

Regulation 1107/2006 on rights of disabled persons and persons with reduced mobility in air transport (“the Regulation”) and Regulation EU 261/2004 on establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights, are the regulations by which passengers' rights have been protected at an EU level.

In EU, the Regulation establishes a unique legal frame for protection of the rights of disabled persons and persons with reduced mobility (“PRM passengers”) in air transport.

Before the Regulation came into force, assistance to PRM passengers was provided by carriers or ground service providers.

Since 26.07.2008 and upon full implementation of the Regulation,² providing assistance to PRM passengers has been distinct between airport operators and carriers.

This study is going to analyse almost all requirements of the Regulation, referring especially to the area of its implementation, defining the designated points of departure and arrival, the transmission of information, establishing the ground handling quality standards, PRM charges, appeal procedure, areas of responsibility including responsibility of airport operators

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² Article 18 of the Regulation 1107/2006

and carriers for the damage to wheelchairs and other mobility equipment or assistive devices.

2. The notion of PRM passenger

A PRM passenger means any person whose mobility when using transport is reduced due to any physical disability (sensory or locomotive, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or age, and whose situation needs appropriate attention and adaptation to his or her particular needs of the service made available to all passengers.³

It is implicit from the very name of the Regulation that the notion of PRM passenger refers exclusively to disabled persons and persons with reduced mobility. However, the definition of 'PRM passenger' is too vague and leaves space for different interpretations and uneven implementation of the Regulation.

The scope of assistance and extension of the definition of a PRM passenger to other categories of passengers have resulted in recitals that are recommendations in a legal sense, and offer protection of the same rights as all other citizens by the prohibition of discrimination on the grounds of disability or lack of mobility.⁴ In my opinion the definition of a PRM passenger is too extensive and it should refer only to disabled persons and persons with reduced mobility. It is necessary to define other categories of the passengers who need assistance in similar way, because the definition of a PRM passenger should not include persons whose condition requires appropriate attention and adjustment to their needs for special services, e.g. mothers/fathers with children whom need assistance.

A new definition of a PRM passenger will require a change of other documents containing a definition of PRM passenger.⁵

The ratio of my explanation relies on the fact that the passengers who need appropriate assistance cannot be classified, in language terms, either as disabled persons or persons with reduced mobility, and separating the provisions concerning the persons whose condition requires appropriate assistance will not eliminate implementation of the Regulation for these passenger categories.

Implementation of the Regulation on disabled persons is incontestable. In practical implementation of the Regulation in Greece, United Kingdom of Great Britain, Sweden, an obese passenger has not been treated as a PRM passenger.⁶ It is obvious that an explicit exclusion of overweight passengers from the definition of a PRM passenger is wrong. For such passengers to fall within the scope of a 'PRM passenger' will depend on whether they are indeed a passenger with reduced mobility. This must be assessed on a case-by-case basis. In any event, an airport operator is obliged to assist a prospective mother who asks for assistance, for example. Whether a pregnant woman is a PRM passenger is to be evaluated case by case. However, a heavily pregnant woman's obligation to obtain a medical certificate as a precondition to fly is a clear indicator that she may be a PRM passenger.⁷

The Regulation 965/2012 on defining technical requirements and administrative procedures concerning air traffic operations makes a distinction between PRM passengers and unaccompanied children as special categories of passengers, and implicitly defines that the unaccompanied children cannot be categorised under the notion of a PRM passenger. On the other hand, by adopting the Interpretation Guidebook on implementation of the

³ Article 2 item a) Regulation 1107/2006

⁴ Recital 1) Regulation 1107/2006

⁵ ICAO Doc 9984 Manual on Access to Air Transport by Persons with Disabilities, First Edition, 2013, p. XIII., ICAO Annex 9 – Facilitation, IATA Resolution 700

⁶ Final Report, Application of the Regulation by the Member States, Phillipe & Partners, p 22.

⁷ Interpretative Guidelines on the Application of Regulation (EC) no 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air, Brussels, p.2

Regulation, the EU explicitly recommends not to apply provisions of the Regulation⁸ to unaccompanied children.

According to IATA Recommendation from Resolution 700 and Recommendation 1700, the notion of a PRM passenger includes the following categories of PRM passengers: MEDA, STCR, WCHC, WCHS, WCHR, DEAF, DEAF/BLND, DPNA and MAAS PRM passengers.⁹

However, ECAC Doc 30, Part I with its latest modifications made in December 2015, recommends an assumption of the following categories under the notion of a PRM passenger: WCHC, WCHS, WCHR, BLND, DEAF/BLND and DPNA PRM passengers.¹⁰ Recommendation of ECAC Doc 30 does not include MEDA, STCR and MAAS categories of a PRM passenger.

The Recommendation from ECAC Doc 30, Part I is imprecise since the Regulation includes the categories of passengers who require appropriate attention and adaptation of services to meet their particular needs. These are pregnant women, obese passengers, fathers and mothers of minors - for whom carriers avoid using IATA code MAAS (all other passengers that need assistance), but use WCHR code instead. Given the fact that MAAS code is not in use any more, some airport operators refuse to provide assistance to a PRM transfer passenger with MAAS or even WCHR code if an aircraft is on the open position.¹¹

According to IATA Resolution 700, passenger on stretcher (STCR) is considered to be a PRM passenger. However, provisions of the Regulation 1107/2006 should not apply to such a passenger because an airport operator does not provide assistance to the PRM passenger but he is transported in an ambulance directly to the plane and goes on board assisted by medical staff, including a doctor who escorts a STCR passenger.

3. Scope of implementation of the Regulation 1107/2006

Provisions of the Regulation apply to disabled persons or persons with reduced mobility who intend to use the services of commercial air transport at departure from an airport, transit through an airport or at arrival to an airport, when the airport is situated in the territory of a Member State to which the Agreement applies.¹²

Systemic interpretation indicates that provisions of the Regulation also apply to disabled passengers and passengers with reduced mobility not using commercial air transport. In other words, provisions of the Regulation 1 apply to disabled passengers or passengers with reduced mobility on general aviation flights too (i.e. private aircraft, etc.).¹³

I believe it would be more precise if the Regulation contained the wording "disabled passengers" or "passengers with reduced mobility".

⁸ Commission Staff Working Document Interpretative Guidelines on the Application of Regulation EC No 1107/2006 of the European Parliament and of the Council of 5 July 2006 Concerning the Rights of Disabled Persons and persons with Reduced Mobility when Traveling by Air, p.3

⁹ MEDA – Passenger whose mobility is reduced due to medical reasons, with medical pathology in progress, having a medical certificate that he or she can fly, issued by a doctor. STCR – passenger on stretcher, WCHC – bed-ridden passenger who needs a wheelchair from/to entrance to the plane, up the stairs to his seat on board aircraft. WCHC category includes bed-ridden passengers, passengers that can move only by means of a wheelchair or other mobility equipment. This category also includes persons with paralyzed legs who need assistance during during embarkation/disembarkation to/from aircraft, but who can move in their own wheelchair, WCHS – passengers who can move by themselves in aircraft cabin but not upstairs/downstairs, and they need assistance for movement in Terminal building, from the Terminal to aircraft and vice versa, and from Terminal bldg to a transportation spot on the land (public) side of the airport, WCHR – passengers who can walk up and down stairs and move about in an aircraft cabin, but who requires a wheelchair or other means for movements between the aircraft and the terminal, in the terminal and between arrival and departure points on the city side of the terminal. BLND – weak-sighted and blind persons, DEAF – half-deaf and deaf persons, DEAF/BLND – blind and deaf persons who can move only if escorted, DPNA – persons with intellectual disability or impairment, MAAS (all other passengers that need assistance).

¹⁰ ECAC Doc 30, Part I, Amendment 5, December 2013, p.5-2, 5-3

¹¹ Example of such airports: Zagreb and Munich

¹² Article 1 paragraph 2 Regulation 1107/2006

¹³ More information available: Maria Jose Viegas, Passengers with Reduced Mobility in the European Union: Legal Issues Regulation (EC) No 1107/2005 of 5 July 2006, Volume 38, Issue 1, February 2013, p.55-56

It is inarguable that provisions of the Regulation are applicable at all airport in EU and by all EU carriers.¹⁴

Provisions of the Regulation are implemented from the door sill of aircraft of an EU carrier operating from airports in third countries to an airport in EU.¹⁵

Provisions of the Regulation do not apply to:

- 1) Airports in third countries; and
- 2) Non-EU carriers that operate from an airport of a third country.

Due to establishing of the European Common Aviation Area (ECAA), EU extended implementation of the Regulation to Ireland, Norway and countries of South-East Europe: the Republic of Albania, Bosnia and Herzegovina,¹⁶ The Republic of Bulgaria, the Republic of Croatia, Former Yugoslav Republic of Macedonia, the Republic of Island, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and interim missions of the United Nations at Kosovo, are under obligation to implement ECAC Doc 30 containing provisions on Ground Handling of PRM passengers.¹⁷ A result of the establishment of the European Common Aviation Area is the extension of implementation of the Regulation to airports and carriers of Member States to which the ECAA Agreement applies.

In respect of third countries airports, provisions of the Regulation apply to EU carriers from the door sill of their aircraft, except in the event that air transport is performed from the airport in a Member State to which the ECAA Agreement applies.

4. Prevention of denied carriage

Prevention of denied air carriage and prohibition of discrimination of PRM passengers is a reason (*causa*) for adopting the Regulation.

Air carriage may be denied:

- If a passenger does not have a valid ticket or reservation,¹⁸
- In case of meeting relevant safety requirements,¹⁹
- If the size of aircraft or its door physically prohibits embarking or air transport of a PRM passenger.²⁰

The Community law is poor in respect of mandatory provisions related to safety conditions in carriage of PRM passengers by air. The Regulation 965/2012 on defining technical requirements and administrative procedures of air traffic operations stipulates that special categories of passengers, including PRM, are to be seated in a way not to obstruct emergency exits. Otherwise they could:

- Impede crew members in their duties;
- Obstruct access to emergency equipment,
- Impede the emergency evacuation of the aircraft.²¹

¹⁴ Nationality of aircraft derives from Chicago Convention from 1944 and represents a basis for exchange of air freedoms through conclusion of bilateral agreements on air freedoms for the period between 1944 - 1998 and a ruling of European court of justice in the case involving EU and the Federal Republic of Germany – C. 467/98 (Open Sky ruling); after that EU got a mandate to negotiate and conclude Open Sky agreements with third countries. For that reason and in order to make common market and prevent discrimination, the concept of EU carrier became incorporated in Open Sky agreements.

¹⁵ Maria Jose Viegas, Passengers with Reduced Mobility in the European Union: Legal Issues Regulation (EC) No 1107/2006 of 5 July 2006, Volume 38, Issue 1, February 2013, p.56.

¹⁶ Bosnia and Herzegovina incorporated provisions of the Regulation 1107/2006 into its legislation by adopting the Law on obligations in civil air traffic of Bosnia and Herzegovina („Official Gazette BiH, No: 51/15).

¹⁷ Croatia, Bulgaria and Romania are signatories to ECAA Treaty and after becoming EU Member States, they had to adopt EU legislation, including the Regulation 1107/2006. Consequently, provisions of ECAA Treaty do not apply to these countries.

¹⁸ Article 3 item b) Regulation 1107/2006

¹⁹ Article 4 paragraph 1 item a) Regulation 1107/2006

²⁰ Article 4 paragraph 1 item a) and b) Regulation 1107/2006

²¹ CAT.OP.MPA.155 Carriage of special categories of passengers (SCPs). Similar provision was in the Regulation EU 859/2008 on establishing technical requirements and administrative procedures being implemented in commercial air traffic, i.e. OPS. 1.260, which said: Operator shall establish procedures for air

Excluding the explicit ban on allocation of PRM passengers to the seats that hamper access to aircraft exits, it is obvious that carriers are entitled to decide on the seat allocation. Depending on a type of aircraft they allocate PRM passengers to seats by the windows, in the middle of the row or by the aisle, and in cooperation with airport operators and providers of Ground Handling services, decide how to safely embark and disembark PRM passengers. As a rule, the international air transport of PRM passengers must not be conditioned by having a medical certificate. Neither carrier nor airport operator is authorised to require a PRM passenger to have a medical certificate. However, for safety reasons the carrier is authorised to ask a PRM passenger to present a medical certificate for a heavily pregnant woman, passengers using oxygen, and those suffering from infectious diseases, etc.²²

A carrier, his agent or a tour operator, exclusively for safety reasons, may require a PRM passenger to be escorted but is obliged to explain such a demand in detail. The explanation on necessity to have a person accompanying a PRM passenger may be communicated to a PRM passenger verbally, but on his request, the carrier, his agent or a tour operator are obliged to send him a written explanation within five (5) working days of receipt of the request.²³ As a rule, carriers require a PRM passenger to have a person accompanying him/her, according to General conditions of carriage and/or Passenger Handling Manual, if the PRM passenger is not able to take care of himself/herself, i.e. not able to breathe or eat on his/her own, to get up, communicate, use medical aids or use the aircraft toilet without assistance.

Criteria for the provision according to which a PRM passenger must have a person accompanying him, is that such a person provide him assistance only on board the plane and not at the airport. *The carrier, tour operator and airport operator are not authorized to ask the person accompanying a PRM passenger to assist him at the airport.*

4. Notification of carriers and airport operators and transmission of information

PRM passengers are entitled to require assistance from carriers, their agents or tour operators. The Regulation stipulates that carriers, their agents or tour operators would take all necessary measures at their point of sale in the territory of the State to which the Treaty applies, including sales by phone or Internet, in order to be able to receive PRM passengers' requests for assistance²⁴. Timeliness and quality of the service provided to a PRM passenger depend upon carrier's notification about a PRM's request and transmission of the information to airport operator. The biggest problem concerning the Regulation is PRM passengers' ignorance of their rights. *In cause-and-effect, a sore point of the Regulation is informing carriers about assistance required to be provided to PRM passenger, as well as communication of information by the carrier to airport operator.*

Ways of informing the PRM passengers about their rights include web pages of carriers, airport operators and managing bodies in charge of implementation of the Regulation.

In addition, EU recommends informing the PRM passengers about their rights by means of notices on air tickets, bills, etc.²⁵

However, PRM passengers often do not understand abbreviations on airlines' web pages, and thus cannot determine the type of assistance the carrier is obliged to provide.

transport of persons with reduced mobility (PRM). (b) Operator must guarantee that PRM passengers will not have seats that could: (1) disturb the crew; (2) hamper access to emergency equipment; (3) disturb evacuation of a plane in case of emergency (c); the captain must be informed on transport of a PRM passenger.

²² Evaluation of Regulation 1107/2006, Final Report and Appendices A-B, Appendix A, June 2010,

²³ Article 4 paragraph 4 Regulation 1107/2006

²⁴ Article 6 paragraph 1 Regulation 1107/2006

²⁵ Report from the Commission to the Council to the European Parliament and the Council on the functioning and effects of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the Right of Disabled Persons and Persons with Reduced Mobility when Traveling by Air, p9.

Consequently, it disables adequate preparation of the airport operator and carrier for the provision of such assistance.

The Regulation stipulates that the carrier, his agent or tour operator who have received a request for assistance at least 48 hours before scheduled time of departure has to forward the information at least 36 hours before announced time of departure to the airport operator or the operating carrier responsible for transporting the passenger.²⁶

The reason (*causa*) for this provision is to enable carrier and airport operator to prepare for ground handling of a PRM passenger.

The carrier is informed about a PRM passenger's requests via e-mail, phone or the application on its web page.²⁷

Carriers notify airport operators not later than 36 hours before a take-off by messages via the Societe Internationale de Telecommunications Aeronautiques (hereinafter referred to as: SITA messages). SITA messages forwarded by carriers are Passenger Assistance List (hereinafter referred to as: PAL message) and Change Assistance List (CAL message).²⁸

However, PAL and CAL messages are not present so much in practice. As a rule, carriers notify airport operators using Passenger Name List (PNL) messages containing a list of all passengers, including a system list of PRM passengers that has to be delivered to the airport operator not later than 24 before the flight, and not infrequently, 10 – 24 hours before departure. Usually, a number of PRM passengers on the PNL list do not correspond to the number of passengers who required assistance. For that reason PNL messages are not a reliable indicator of the number of PRM passengers that will need assistance at the airport.

The mentioned messages are sent for departing PRM passengers only. Apart from SITA messages, carriers may inform airport operator on necessity to provide assistance using e-mail. This is mostly done by tour operators because they do not have access to SITA messages.²⁹

For arriving PRM passengers, the airport operator is informed about the necessity to provide assistance via SITA Passenger Service Message (hereinafter referred to as: PSM message) or via SITA Passenger Transfer Message (hereinafter referred to as: PTM message).

It is obvious that airport operators are being notified in an untimely manner about the necessity for the provision of assistance, and they are mostly informed via SITA messages. For departing passengers the airport operators are informed 10 – 24 hours before the flight via PNL messages, while for arriving passengers via PSM or PTM messages, between 1 and 12 hours before landing of the aircraft to the point of destination.³⁰

A flaws of PNL messages system is also that they include only IATA code for PRM passengers, but not a particular type of assistance a PRM passenger needs, for example a description of medical equipment, wheelchair size, registered trained dog, etc.

5. Designation of points of arrival and departure

In cooperation with the Airport Users Committee or relevant organisations representing disabled persons and persons with reduced mobility, the airport operator shall designate points of arrival and departure within the airport boundary or at a point under the direct control of the managing body, both inside and outside buildings.³¹

²⁶ Article 6 paragraph 2 Regulation 1107/2006

²⁷ Evaluation of Regulation 1107/2006, Final Report, Steer Davied Gleave, June 2010, p.76

²⁸ At Sarajevo International Airport air carriers do not inform the airport operator via SITA PAL and CAL messages.

²⁹ For easier preparation of flights, tour operators send the information in SITA form, i.e. text in Word, which airport staff log into SITA application.

³⁰ Disadvantage of PSM messages is in the fact they are issued upon closing the flight by the airport of departure or transfer, and the airport of arrival has time to prepare Ground Handling depending on the flight duration, which may be 1 hour to 10 - 12 on overseas operations

³¹ Article 5 paragraph 1 Regulation 1107/2006

The airport operator is entitled to designate points of arrival and departure on his own in case there is no the Airport Users Committee at the airport or if there are no organisations representing disabled persons and persons with reduced mobility in the local community.

Linguistic interpretation of the provision indicates that the airport operator is obliged to designate at least two points of departure and arrival at the airport, out of which one has to be in terminal building. Causa of the provision is to facilitate announcement to passengers and enable the airport operators to provide assistance to PRM passengers.

According to Regulation, points of departure and arrival have to be clearly sign posted and passengers must be able to receive basic information about the airport in accessible formats.³² Accessible format of the information means that each category of PRM passengers must be able to access basic information about the airport and the type of assistance that the airport operator is obliged to provide to/from points of departure and arrival at the airport.

Points of departure and arrival are usually marked with a wheelchair sign, placed at strategic places like parking areas, taxi stands, bus stops and subway stops for departing and arriving passengers, under condition they are placed within the airport boundary.³³ The airport boundary is the space within the protective perimeter fence being “under a direct control of the airport operator”, but can also mean the space out of the protective fence of the airport. *It is obvious from the above mentioned that the European Parliament and the Council the European Union, in Article 5 of the Regulation decided upon a technical definition of the airport, what means that the points of departure and arrival may be placed out of the perimeter fence of the airport.*³⁴

Since the airport operator is obliged to set quality standards at the airport receiving over 150,000 passengers a year, a question arises whether the obligation of setting the points of departure and arrival is applicable only to EU airports with annual traffic of over 150,000 passengers or to all EU airports. The systemic interpretation indicates that setting the points of departure and arrival is an obligation of all EU airports, no matter how many passengers they have, while, on the other hand, the points of departure and arrival are a constituent part of the quality standard for the Ground Handling of PRM passengers, according to which the airport operator is obliged to establish quality standards and resources for realization of the obligations from Appendix I of the Regulation. This includes the signing of the points of departure and arrival.

6. Quality standards for assistance to PRM passengers

Airport operators with annual traffic over 150,000 passengers shall set quality standards for assistance in Ground Handling for PRM passengers in cooperation with the Airport Users Committee and organisations representing disabled persons and persons with reduced mobility. Flaws in the provision related to the setting of quality standards depending on a number of passengers arise where annual traffic fluctuates - something typical for smaller airports. Such an airport may have air traffic of over 150,000 passengers in one year, and the next year less than 150,000 passengers. This small imprecision does not diminish

³² Article 5 paragraph 2 Regulation 1107/2006

³³ ECAC Policy Statement in the Field of Civil Aviation Facilitation, Doc 30 Part I, Eleventh Edition, 2009 p. 5-4 , Recital 5 Regulative 1107/2006

³⁴ Article 2 item f) Regulation: „Airport” means any area of land specially adapted for the landing, taking-off and manoeuvres of aircraft, including ancillary installations which these operations may involve for the requirements of aircraft traffic and services including installations needed to assist commercial air services. Accordingly, airport means also the land out of the airport protective boundaries. Also, definition of airport car park from Article 2 item k) Regulation 1107/2006 means a technical definition of an airport, and that is a car park, within the airport boundaries or under the direct control of the managing body of an airport, which directly serves the passengers using that airport.

highly set EU standards. The request from Article 9 paragraph 3 of the Regulation is generally realised by publishing the quality standards on a web page of an airport operator.³⁵ Regulation stipulates the airport operator's obligation, while setting the quality standards, to fully take into account internationally recognised policies and codes of conduct concerning facilitation of the transport of disabled persons and persons with reduced mobility, notably the ECAC Code of Good Conduct in Ground Handling for Persons with Reduced Mobility.³⁶ The internationally recognized policies and Codes of conduct concerning GH of PRM passengers are as follows:

- Annex 9 - Facilitation,
- ICAO Doc 9984 Manual on access to air transport of disabled persons and persons with reduced mobility,
- ECAC Doc 30, Part I, Chapter 5 and
- IATA Resolution 700.

Quality standards for Ground Handling of PRM passengers must contain the obligations established in ECAC Code of Good Conduct in Ground Handling for Persons with Reduced Mobility³⁷. *Systemic interpretation indicates that quality standards must include the following - description of services, measures and resources the airport operator is going to use in order to meet the demands from the Annex of the Regulation, as well a level of service the airport operator is obliged to provide.* Obligations from Annex I of the Regulation are legally binding and the airport operator cannot decide unilaterally or by agreement not to provide assistance set in Annex I of the Regulation. A carrier and airport operator may reach an agreement that the airport operator will provide additional services, apart from those from Annex I of the Regulation, or to render the services of better quality than set in the quality standards. According to linguistic interpretation it would be impossible that a carrier and airport operator could conclude an agreement and set, cumulatively, the additional services and of a higher standard than set in quality standards. However, purposive interpretation leads to the opposite conclusion since the reason (causa) for adopting the Regulation was to increase the level of protection of PRM passengers.

In case of provision of additional services and services of higher standard by the airport operator, this results in additional costs for Ground Handling of PRM passengers, and so the airport operator may levy an additional PRM, which shall be a transparent cost related to the service, at a rate established after consultation.³⁸ The provision of additional PRM charge is of declarative character because the airport operator is exclusively obliged to meet costs for Ground Handling of PRM passengers.

The agreement on GH service level is a sui generis unilaterally binding Agreement according to which the airport is obliged to provide appropriate level of Ground Handling services to PRM passengers.

7. Right to assistance at airports

An Airport operator is exclusively obliged to provide assistance to PRM passengers at departure, transfer and arrival, both at the airport and on board the aeroplane.³⁹

At departure, the airport operator shall provide assistance to a PRM passenger from the point of departure to the embarking, and on board the plane from the door of the plane to the PRM passenger's seat.

³⁵ Final Report, Assessment on rules on penalties applicable to regulation infringements 1107/2006, concerning the rights of disabled persons and persons with reduced mobility when travelling by the air, Phillipe & Partners, p 55

³⁶ Article 9 paragraph 2 Regulation 1107/2006

³⁷ ECAC Code of good conduct in provision of Ground Handling services to persons with reduced mobility is incorporated in Annex 5-C ECAC Doc 30

³⁸ Article 9 paragraph 5 Regulation 1107/2006

³⁹ Opposite to Maria Jose Viegas, Passengers with Reduced Mobiliti in the European Ubion; Legal Issues Regulation (EC) No 1107/2006, Air and Space Law, Number 1, February 2013, p.52.

On arrival, the assistance is provided from the PRM passenger's seat to the door of the plane, and at the airport, from the plane to the point of arrival.

The airport operator may provide assistance at the airport on his own or subcontract the provision of services.

Regulation sets obligations of the airport operator to provide assistance to a PRM passenger under the following conditions:

- Passenger holds a reservation and
- Carrier or his agent or the tour operator concerned have been notified about special needs of such a passenger at least 48 hours before the published time of departure of the flight.

This notification pertains to a return flight, too, if both flights were contracted with the same carrier.⁴⁰

The provision on the obligation to provide assistance is imprecise because it does not contain the obligation of the carrier to forward a notification of the required assistance to the airport operator at least 36 hours before the flight. Also, an obvious flaw of the provision for return flights is that notification of the airport operator depends on the fact that both flights are performed by the same carrier, which is unnecessary since the obligation to provide assistance exists regardless of the carrier with which a passenger concludes a transportation agreement. For flights, as already said, airport operators are as a rule notified by SITA messages forwarded from the airport of departure during take-off, which makes the carrier's obligation to forward the notification largely irrelevant (Article 6 paragraph 3) Regulation 1107/2006.

On the other hand, this provision is of declarative quality since the airport operator has to provide assistance even if not being informed about it, according to Article 7 paragraph 3 of the Regulation which says that an airport operator *is obliged* to make all reasonable efforts to provide assistance.

In case of subcontracting of the provision of assistance to PRM passengers, Ground Handling of PRM passengers is performed by:

- Airport operator's affiliated company,
- Third provider of Ground Handling services,
- Legal entities specialized for GH of PRM passengers.⁴¹

The airport operator decides on subcontracting of services if not being a provider of Ground Handling at the airport.

Regulation is contrary to Directive 96/67 which says that handling of passengers includes all kinds of assistance related to arrival, departure, transfer and transit of passengers.⁴² In case of a discrepancy between provisions of the Regulation and Directive 96/67, the provisions of the Regulation shall prevail. Thus the assistance to PRM passengers is primarily rendered by the airport operator while access is subcontracted to third party providers of Ground Handling services and their independent performance of GH services to PRM passengers.⁴³ *In other words, provision of assistance to PRM passengers is an exemption from the rule that Ground Handling of PRM passengers may be rendered by carriers or third party providers.* Autonomous provision of assistance to PRM passengers by carriers is impossible because the very notion of subcontracting is contrary to the autonomous provision of Ground Handling services. Namely, subcontracting means a transfer of rights and obligations to a third legal entity.

Furthermore, the Regulation does not stipulate the procedure for selection of subcontractors, nor the access to the infrastructure of the airport operator. The question arises whether a subcontractor must be a third party provider of Ground Handling services or it may be another third party legal entity. In the opinion of Marie Jose Viegas, a subcontractor should be a third party provider of Ground Handling services, i.e. a legal entity specialised for

⁴⁰ Article 7 paragraph 1 Regulation 1107/2006

⁴¹ Evaluation of Regulation 1107/2006, Final Report, Steer Davies Gleave, June 2010, p. 32

⁴² Appendix 1 Directive 96/67 on provision of Ground Handling services at EU airports

⁴³ Article 1 paragraph 5 Regulation 1107/2006

provision of Ground Handling services, and that the subcontractor, according to provisions of the Directive 96/67, should obtain an approval from a relevant Directorate of civil aviation.⁴⁴

In cooperation with carriers, through the Airport Users Committee, the airport operator may subcontract on his own initiative or on the carriers' request. This means that for subcontracting of Ground Handling of PRM passengers it is not necessary to obtain the carrier's approval. Consequently, it excludes implementation of 3.1 of the Main Agreement from 2013/2008/2004 of the Agreement on Ground Handling of aircraft, passengers, cargo, goods and mail, according to which it is necessary to obtain a carrier's approval for subcontracting of services.⁴⁵

To assure quality of service, the Regulation, as a condition for subcontracting, sets a cumulative liability of airport operators for providing assistance at the airport as if the airport operator had rendered the service, as well adoption of the quality standards for Ground Handling of PRM passengers.

The systemic interpretation indicates that it is necessary for an airport operator to have an annual traffic over 150,000 passengers in order to subcontract the Ground Handling of PRM passengers.

8. Assistance by carriers

The level of the service an carrier is obliged to provide to a PRM passenger has been set out in Annex II of the Regulation and includes the following: transport of not more than two pieces of mobility equipment, including the electric wheelchair, offering important flight information in accessible formats, transport of registered dogs in a cabin, allocation of a seat satisfying the needs of a PRM passenger, allocation of a seat to the person accompanying the PRM passenger, next to the PRM passenger.

Unlike airport operators, the concept of reasonable efforts does not apply to carriers. The concept of reasonable efforts is applied only for allocation of the seat that meets the needs of a PRM passenger, bearing in mind that the seat should not hamper access to the door in the case of emergency.. Also, the carrier shall make all reasonable efforts to allocate the person accompanying the PRM passenger the seat next to the PRM passenger. This obligation of making all reasonable efforts is not absolute, but applicable only in the case where a PRM passenger requested assistance from the carrier as follows:

- a) at least 48 hours before the flight, and
- b) checked-in at least 1 hour before published time of departure or the time defined in advance by the carrier or his agent or a tour operator in a written form (including e-mail); or PRM passenger comes to the point of departure within the airport boundary or at the time defined in advance by the carrier or his agent or a tour operator in a written form (including e-mail); or, if the time was not fixed, at least two hours before published time of departure.⁴⁶

In case the above mentioned conditions have not been fulfilled, the carrier is not obliged to apply the concept of reasonable efforts in allocation of a seat that meets needs of a PRM passenger or a person accompanying the PRM passenger next to his seat, or to provide assistance from Annex II of the Regulation.

⁴⁴ Maria Jose Viegas, Passengers with Reduced Mobiliti in the European Ubion; Legal Issues Regulation (EC) No 1107/2006, Air and Space Law, Number 1, February 2013, p.54. Consequently, Marie Jose Viegas holds that sub-contracting of handling service to PRM passengers may be done if the airport operator has an annual volume of over two million passengers or 50.000 tons of cargo, according to provisions of Directive 96/67. Namely, approval for third providers of GH services at the market of Ground Handling services is to be obtained under the condition that the airport operator has 2 million passengers a year or 50.000 tons of cargo. According to extensive interpretation, acceptable attitude is that GH service to PRM may be provided by specialized legal entities whose business is the provision of GH services.

⁴⁵ Article 3.1 of Main Agreement SGHA 2013/2008/2004

⁴⁶ Article 10 Regulation 1107/2006

9. Charges for PRM passengers

Charges for PRM passengers are proportional to costs and should not exceed the costs of Ground Handling of PRM passengers. In case the PRM charge exceeds the GH cost, it would be contrary to Article 8 paragraph 1) of the Regulation which stipulates that assistance to PRM passengers is provided free of additional charges.

The opposite situation is possible, i.e. that charges for PRM passengers are less than GH costs.

The Regulation says that an airport operator may, on a non-discriminatory basis, introduce a special charge for provision of assistance to PRM passengers, under the condition that the PRM charge is justified, proportional to costs, transparent and established in cooperation with the Airport Users Committee.⁴⁷

Since the charge for PRM passengers is not the airport charge, provisions of the Directive 2009/12 on airport charges do not apply to it. However, while establishing a PRM charge, the principle of cost efficiency, transparency, non-discrimination and consultation must be obeyed.

PRM charge is justified when the principle of cost efficiency has been met and non-justified if the revenues resulting from PRM charges exceed the costs of Ground Handling of PRM passengers.

A question arises whether a special PRM charge could be introduced where the PRM does not notify of the need to be provided with assistance in a timely manner, i.e. if the airport operator is authorised to define a higher special PRM charge in case he was not notified by the carrier on provision of assistance to PRM passenger within the deadlines defined by the Regulation.

Differentiation of a special PRM charge and setting out a special PRM charge higher than the basic one by the airport operator is possible only in order to provide a better quality GH service to PRM passengers. That invites additional costs for PRM passenger Ground Handling by applying the principle of transparency, non-discrimination, cost efficiency and consultations.

Sui generis solution would be to divide a PRM charge among carriers in proportion with a total number of all the passengers they have transported to/from an airport. *In other words, the basis for the PRM charge is not defined by the number of individually transported PRM passengers but a number of all the passengers transported to or from the airport concerned.* In opposite case, i.e. if the PRM charge was proportional to the number of transported PRM passengers, the costs of Ground Handling of PRM passengers could never be covered. To meet the cost efficiency principle, a principle of solidarity is being introduced to the detriment of non-discrimination principle, in a way that the carrier who transported the biggest number of passengers pays a PRM charge in spite of the possibility that there may be no PRM passengers on board, i.e. it is possible that a carrier finances PRM passengers' transport by the other carriers which have had less passengers but more PRM passengers. The principle of solidarity is explicitly integrated in recitals of the Regulation in a way that provision of assistance should be financed so that all the passengers using the airport share the burden equitably and to avoid disincentives for transport of disabled passengers and persons with reduced mobility. The most efficient way of funding is to charge all carriers using the airport, proportionally to the total number of passengers transported to or from the airport concerned.⁴⁸

The principle of consultation is of a formal character because the airport operator is authorised to set up a PRM charge on his own if the Airport Users Committee's disagreement with the amount of the PRM charge.

The language interpretation indicates that the airport operator is not obliged to set up a special PRM charge or the charge integrated into a passenger charge. The PRM charge is

⁴⁷ Article 8 paragraph 2 and 3 Regulation 1107/2006

⁴⁸ Recital 8 Regulative 1107/2006

established by setting the direct cost of Ground Handling service to PRM passengers (depreciation costs for the infrastructure and equipment, cost for employees' salaries), indirect costs (maintenance cost for airport infrastructure), capital spending for acquisition of new equipment⁴⁹ and administrative costs (cost for employees participating in purchase/acquisition of the new equipment, cost of training the staff for Ground Handling of PRM passengers, project leading cost, etc.).

In case the airport infrastructure is used by various categories of passengers, including PRM passengers, a PRM charge is established proportionally to the use of the airport by the PRM passengers.⁵⁰ This model can be used when a PRM charge is a constituent part of a passenger charge.

Other way of establishing a PRM charge is to calculate the costs of using the airport infrastructure and other costs (training and salaries of the staff who provide assistance to PRM passengers) resulting exclusively from Ground Handling of PRM passengers, and which are not integrated in a passenger charge. In other words, costs for use of infrastructure used by all the passengers, including PRM ones, are integrated into a passenger charge, and what is charged is only the costs resulting from use of airport infrastructure and human resources intended for Ground Handling of PRM passengers (ambulift, wheelchair, staff costs).

According to the current commercial practice, the airport operator is obliged to separate the accounts related to the assistance provided to disabled persons and persons with reduced mobility from the accounts of its other activities.⁵¹ This begs the question whether the airport operator is obliged to separate the accounts, i.e. to keep separately incomes and expenditures resulting from Ground Handling of PRM passengers even in case the airport operator has not defined a specific PRM charge. The point of reference for obligation to have the accounts separated even in the case of not establishing a specific PRM charge, in terms of linguistic interpretation, is contained in the binding formulation "shall separate the account-keeping charges". However, I believe the systemic interpretation leads to a different conclusion, and that would be that according to the Regulation, in that, the airport operator is not obliged to separate accounts if the PRM charge is a constituent part of the passenger charge. Article 8 of the Regulation pertains to the "specific charge", while a situation of forming a PRM charge within a passenger charge has not been stipulated explicitly. If the airport operator decided to include a PRM charge into a passenger charge, they will not be applying provisions of the Regulation, but Article 4 of the Directive 96/67 on access to the market of Ground Handling services at EU airports.⁵²

The reason for setting the accounts apart is meeting the principle of cost efficiency and transparent presentation of incomes and expenditures resulting from Ground Handling of PRM passengers. In case of forming a specific PRM charge, the airport operator is obliged to submit an annual overview to the Airport Users Committee where one exists or any other appropriate entity⁵³, as well as to the enforcement body or bodies,⁵⁴ of charges received and expenses made in respect of the assistance provided to disabled persons and persons with reduced mobility⁵⁵.

The obligation of submitting the annual overview to the Airport Users Committee is conditional and will not exist if at the airport concerned there is no the Airport Users Committee or a relevant Association of disabled persons. Significance and role of the Airport

⁴⁹ Cost of new equipment are defined in a way to define annual depreciation of purchased equipment for handling of PRM passengers.

⁵⁰ Commission Staff Working Document Interpretative Guidelines on the Application of Regulation EC No 1107/2006 of the European Parliament and of the Council of 5 July 2006 Concerning the Rights of Disabled Persons and persons with Reduced Mobility when Traveling by Air, p.15

⁵¹ Article 8 paragraph 5 Regulation 1107/2006

⁵² According to Article 1 paragraph 5 Regulation 1107/2006, provisions of Directive 96/67 are implemented if not contrary to provisions of Regulation 1107/2006

⁵³ Other relevant bodies mean organizations of disabled persons.

⁵⁴ Executive body means, as a rule, the competent Directorate of civil aviation.

⁵⁵ Article 8 paragraph 6 Regulation 1107/2006

Users Committee and relevant organizations of disabled persons has been made irrelevant by their being involved only for advisory purposes and legally non-binding opinions.

The obligation of submitting the annual review to the relevant Directorate for Civil Aviation is unconditional if a PRM specific charge has been set up.

Further, in case the airport operator has not established a specific PRM charge or it is not contained in the passenger charge, the question arises whether the airport operator is obliged to submit the annual review to the Airport Users Committee of the relevant organisation of disabled persons where they exist, and the relevant Directorate for civil aviation. In spite of the language interpretation which indicates that the airport operator is obliged to submit the annual overview, I hold that the systemic interpretation indicates to quite the opposite conclusion, i.e. that the airport operators is not obliged to submit the annual overview to the Airport Users Committee or a relevant organization of disabled persons due to the fact that a free of charge assistance provided to PRM passengers makes irrelevant the implementation of the principle of transparency, consultation, non-discrimination and cost efficiency. In case a PRM charge is a constituent part of a passenger charge, the implementation of Article 1 paragraph 5 of the Regulation means the implementation of provisions of the Directive 96/67, and not provisions of the Regulation, which do not stipulate the airport operator's obligation to submit the annual overview to the Airport Users Committee or a relevant organisation of disabled persons and the Directorate for civil aviation.

10. Training

Training of the staff providing assistance to PRM passengers has three aims in order to:

- 1) Ensure that all the personnel, including those employed by any sub-contractor, providing direct assistance to disabled persons and persons with reduced mobility have knowledge of how to meet the needs of persons having various disabilities or mobility impairments;
- 2) Provide disability-equality and disability-awareness training to all their personnel working at the airport who deal directly with the travelling public,
- 3) Ensure that, upon recruitment, all new employees attend disability related training and that personnel receive refresher training courses when appropriate⁵⁶.

It is obvious that focus is on training of the personnel who provide direct assistance to PRM passengers.

Contrary to the provision on setting the quality standard implementing the obligations of ECAC Doc 30, Recital 10 of the Regulation 1107/2006 recommends implementation of the ECAC Doc 30, Part 1, chapter 5 and associated appendices, and especially the Code of Good Conduct in provision of Ground Handling services to persons with reduced mobility. This recommendation refers to implementation of the Code on good conduct, and it can be concluded that the focus has been placed on the training of the personnel who will provide assistance to PRM passengers.

The recommendation, and not an obligation, of performing the training in accordance with the ECAC Doc 30, Part I, is justified for the following reasons.

The immediate assistance to PRM passengers should be provided by employees from a department or service of the airport operator being specialised for Ground Handling of PRM passengers.⁵⁷ However, for cost-related reasons it is often impossible to set specialised services for Ground Handling of PRM passengers. Instead, the airport operator's employees and those of any sub-contractor who provide assistance to PRM passengers also perform other duties related to passenger Ground Handling. In a situation where there is no specialised department/service for Ground Handling of PRM passengers, the personnel to be trained for providing the assistance will be recruited among:

⁵⁶ Article 11 Regulation 1107/2006

⁵⁷ ECAC Doc 30, Part 1, Annex G, Training, 5G-4,11 th Edition 2009

- Passenger check-in staff,
- Announcers – information readers,
- Lost & Found staff,
- Baggage Ground Handling staff, etc.

Disability-equality and disability awareness training, apart from the airport operator's employees, is also attended by a significant number of legal entities working at the airport, including the following: Customs, Border Police, security agencies, ticketing staff, parking collectors, catering staff at the airport (catering, restaurants, snack bars), special sales facilities (Duty Free shop, etc.).⁵⁸

In case the airport operator does not have a specific department/service for Ground Handling of PRM passengers, a large number of employees will be obliged to be trained in the provision of direct assistance to PRM passengers.

It is not clear if the airport operator's sub-contractors who have direct contacts with disabled passengers are obliged to attend the disability-equality and disability awareness training. According to the linguistic interpretation they are not obliged. This would practically mean that those airport operator's staff having direct contact with such passengers must be trained while the airport operator's sub-contractors who provide assistance to PRM passengers are not, which is opposite to the legislator's intention.

Carrier's cabin crew staff members are obliged to attend training on an immediate provision of attendance to PRM passengers, while the ticketing staff and carrier's representatives at the airport must be trained for disability-equality and disability awareness.

The provision according to which all new employees of both the airport operator and carrier have to attend disability related training is unfounded and challenged for valid reasons⁵⁹. It is quite legitimate to train new employees who will directly be involved in Ground Handling or have direct contacts with PRM passengers, but the *causa* of the provision is a training of new employees, even if they do not have immediate contact with PRM passengers i.e. for example, those that perform administrative duties (commercial, legal, financial).

The Regulation does not stipulate duration of the training of the airport operator's and carrier's employees. This is contrary to unification since it allows the Member States to define duration of the training on their own which can result in an uneven level of protection of PRM passengers.

11. Compensation for lost and damaged wheelchairs, other mobility equipment and assistive devices

When wheelchairs or other mobility equipment and assistive devices are lost or damaged, it is essential to establish the applicable statutory instrument, i.e. applicable substantive law. According to the Regulation, the damage is compensated in accordance with rules of international, Community and national law.⁶⁰ In the international air traffic, liability of an carrier or carrier's agent for lost, destroyed or damage hold and cabin baggage has been defined by provisions of the Warsaw system⁶¹ and the Convention for the Unification of Certain Rules for International. Carriage by Air (hereinafter referred to as: Montreal Convention).

⁵⁸ Security agencies, complementary parking services, catering services, ticketing may be a constituent part of the airport operator's organization

⁵⁹ Evaluation of Regulation 1107/2006, Final Report, Steer Davied Gleave, June 2010, p.134

⁶⁰ Article 12 Regulation 1107/2006 has stipulated: Where wheelchairs or other mobility equipment or assistive devices are lost or damaged whilst being handled at the airport or transported on board aircraft. The passenger to whom the equipment belongs shall be compensated, in accordance with rules of international, Community and national law.

⁶¹ Warsaw Convention, Hague Protocol, Guadalajara Convention, Guatemala Protocol and Montreal Protocols 1, 2, 3 and 4 make the Warsaw system in a wider sense. Since the Guatemala Protocol and Montreal Protocol 3 have not come into force, the current Warsaw system is made of the Warsaw Convention, Hague Protocol, Guadalajara Convention and Montreal Protocols 1, 2 and 4.

For the reason of unification of liability for damage in the international transport of passengers and baggage by EU carriers, by the Regulation 889/2002, which had amended the Regulation 2027/97 **on carrier liability in the event of accidents**, the Montreal Convention was adopted, except for carrier's liability for the damage caused on cargo. Taking into account that wheelchairs, mobility equipment and assistive devices are legally treated as baggage, in the EU it is incontestable that in case of the damage that was caused on board, the applicable instrument is Montreal Convention, adopted by the Regulation 889/2002, which had amended the Regulation 2027/97 on liability of carrier in case of an accident. By the recital 18 of the Regulation, which is not binding, it is recommended that the penalties, including orders to pay compensation for damage to the passenger concerned, should be efficient, comparative and discouraging.

Wheelchairs, mobility equipment and assistive devices may be both hold and cabin baggage.

The wheelchairs, mobility equipment and assistive devices are treated as hold baggage if given to a check-in staff member during registration for flight of PRM passengers. The wheelchairs, mobility equipment and assistive devices are treated as cabin baggage if delivered to the airport operator's staff or the staff of the Ground Handling provider or the staff of carrier in front of the aircraft when they are marked with a DAA bag tag - Delivery at Aircraft.⁶² Low-cost carriers generally do not allow that wheelchairs, mobility equipment and assistive devices are marked with DAA tags. Certain carriers allow marking of wheelchairs, mobility equipment and assistive devices with DAA tags DAA, but they also must be registered by an automatic bag tag.⁶³

Legal consequences and carrier's responsibility for damage are different where caused in the hold and the damage caused in the cabin. Namely, the Montreal Convention defines carrier's objective liability for damage on hold baggage. The carrier's liability for damage to cabin baggage is subjective since the carrier is responsible for the damage to cabin baggage made by him or at the fault of his employees or his agents.

By stipulating explicitly the subjective liability of the carrier, his employees or his agents for the cabin baggage damage, it can be concluded that authors of the Montreal Convention established objective liability of the carrier, his employee and agents for damage on hold baggage, since there is no legal basis for exemption from liability if the carrier proves he was not guilty for the damage on hold baggage - but only if he proves instead that the damage occurred due to an imminent defect, bad quality or imperfection of the baggage⁶⁴. In other words, the carrier cannot be exempted from liability if he acted in compliance with all aviation standards, i.e. if he took all available measures to prevent the damage, but only if the damage was caused by a defect on the wheelchair, mobility equipment and assistive devices.

It is beyond dispute that in case of the damage on wheelchair, mobility equipment and other assistive devices that was caused on board aircraft, the applicable instrument is Montreal Convention. However, generally the wheelchairs, mobility equipment and other assistive devices are not taken into the cabin due to its size.

⁶² DAA is a category of cabin baggage that cannot be taken in the cabin due to its size, weights, or lack of space in storages in smaller aircraft, but sometimes in bigger ones, so that a PRM passenger could use wheelchair, mobility equipment or assistive device at a transfer airport and final destination upon landing and parking of aircraft, if the aircraft is parked on an open position, or in front of air bridge if the aircraft is parked next to it.

⁶³ Austrian Airlines allows marking of wheelchairs, mobility equipment and assistive device with DAA tags, but at the same time they must be registered as hold baggage. Such a solution enable air carrier, depending on commitments, whether to deliver the wheelchair or not to a PRM passenger at a transfer airport. Air carriers introduced double registration of wheelchairs, mobility equipment and assistive devices because of high costs in case of their loss or non-arrival at a final destination. When they are marked with DAA bag tags, a baggage check-in clerk first fill in the next transfer landing and a flight number. If wheelchairs, mobility equipment and assistive devices have not been delivered to a PRM passenger at transfer airport, then the airport operators or their sub-contractors do not know which is the final destination of the wheelchair, mobility equipment and assistive devices.

⁶⁴ Article 17 Montreal convention

Carriers' liability for hold baggage has been defined by provisions of the Montreal Convention and it starts from the moment a PRM passenger registers his wheelchair, mobility equipment and other assistive devices to a clerk at the check-in counter. In case the PRM passenger required assistance at the airport's point of departure, possible damage on a wheelchair, mobility equipment and other assistive devices that was made on the way from the point of departure towards the check-in counter, shall be determined in compliance with provisions of the national law to which point the conflicted legal norms of the international competent court.

When a PRM passenger takes over his wheelchair, mobility equipment and other assistive devices in the baggage claim area at contracted destination, there ends a liability of carrier for damaged wheelchair, mobility equipment and other assistive devices in international and national air transport.⁶⁵ In practical implementation of the Regulation, the question arise whether the airport operator is obliged to provide assistance to a PRM passenger with the transport of baggage from a conveyor belt to a point of arrival at the airport. The European Union, in its Interpretative guidebook on implementation of the Regulation, refers to Recital 5 of the Regulation and instructs that the airport operator is obliged to transport the baggage from the conveyor belt to the airport point of arrival.⁶⁶

The consequence of such interpretation is that the airport operator, or his sub-contractor, is liable for damage on a wheelchair, mobility equipment and other assistive devices from the baggage claim area to the airport arrival point, due to implementation of the national law to which point the conflicted norms of the international competent court. Provisions of the Montreal Convention cannot apply to the airport operator and/or carrier's sub-contractor since they cannot be treated as the carrier's agents.

The Montreal convention does not stipulate area of carrier's liability for cabin baggage in the international air transport, but in order to avoid any dilemma in implementation of Montreal Convention to cabin baggage, it stipulates that the baggage means both hold baggage that has been registered and has a baggage tag, and the baggage that was not handed over and does not have a baggage tag.⁶⁷ It also stipulates that the carrier is liable for damage to cabin baggage, including passenger's personal belongings, if the damage resulted from fault of the carrier or his employees or agents.⁶⁸

The carrier's scope of liability for cabin baggage, i.e. wheelchairs, mobility equipment and other assistive devices that are handed over next to the aircraft and marked with a DAA baggage tag correlates to the carrier's liability for passengers, since the cabin baggage goes with the passenger. It means that in the international air transport the carrier's liability for the cabin baggage, according to provisions of Montreal Convention, starts at the moment of a PRM passenger's embarkation on board aircraft (forming of a queue of passengers to embark the plane) and ends at the moment when the process of disembarkation from aircraft is finished (arrival of passenger into terminal building).⁶⁹ In case of a transit landing, while passengers stay either in terminal building or on board a plane, the carrier remains liable for the cabin baggage, including wheelchairs, mobility equipment and other assistive devices that were handed over next to the aircraft and marked with DAA tag, and, also those which are not taken by PRM passengers during transit landings since the transit passengers are under control of the carrier in the international transport in terms of provisions of Montreal Convention. Carrier's liability for wheelchairs, mobility equipment and other assistive devices of transfer passengers, marked with DAA tags, which are taken to the aircraft if it is parked on air bridge or in front of the aircraft, i.e. whilst doors open in terms of international air

⁶⁵ Wheelchairs, mobility equipment and other assistive devices are not taken over from baggage conveyor belt in order to prevent possible damage

⁶⁶ Interpretative Guidelines on the Application of Regulation (EC) no 1107/2006 of the European Parliament and of the Council of 5 July 2006 Concerning the Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air, Brussels p.14

⁶⁷ Article 17 paragraph 4 Montreal Convention

⁶⁸ Article 17 paragraph 3 Montreal Convention

⁶⁹ Baker v. Landsdell Protective Agency – US District Court (SDNY) 18 Avi 18,497, Hexter v. Air France 1982 – US District Court S.D.N.Y., 563 F. Supp 932.

transport and provisions of Montreal Convention, exists from the moment a PRM passenger leaves the aircraft and comes to terminal building, or, either the passenger is transported from the aircraft to the terminal, or uses an air bridge, or the passenger walks from the plane to the terminal. It ends at the moment of the passenger arrives to the terminal, while the liability of the carrier concerned or other carriers starts from the moment of the forming a queue of passenger for embarking on board the aircraft.

If a PRM passenger does not enter the terminal building but goes by bus directly to the next aircraft, there is no splitting of legal systems, since the whole transfer is defined by provisions of the Montreal Convention, under the condition that the transfer is performed by the carrier's agent.

If a PRM passenger's wheelchair, mobility equipment and other assistive devices marked with a baggage DAA tag has been destroyed, damaged or lost after entering the terminal building before a queue is formed for embarking of a transfer passenger on board a plane, applicable law is the national law. Implementation is indicated by norm of collision of an international competent court, while a passively legitimate party is the airport operator that will be able to exclude its liability for the damage by proving that he is not guilty for the damage caused on a cabin baggage.

The Regulation stipulates loss and damage as two kinds of damage to wheelchairs, mobility equipment and other assistive devices.⁷⁰ The provision for liability for damage would be more precise if a the 'destruction' of the wheelchair, mobility and other assistive devices had been explicitly defined.⁷¹

The Montreal Convention uniquely, and regardless of the baggage weight, stipulates the liability of carrier for the damage on hold and cabin baggage which has been limited to the amount of 1.000 SDR per passenger, irrespective of whether the wheelchair, mobility equipment and other assistive devices were a hold or cabin baggage.⁷² Furthermore, the Montreal Convention missed a possibility of connecting a partial damage or loss of baggage which has impact on the total value of the baggage by calculating the amount of damage compensation depending on its total weight. According to the revision of the liability limit made by ICAO in 2009, carriers in international air traffic are liable for damage to hold and cabin baggage in the amount of 1.131 SDR per passenger, i.e. approximately 1.416,76 EUR. However, value of a PRM passenger's electric wheelchair may equal up to 20.000 EUR.⁷³ Proposal to change the Montreal Convention in terms of damage caused on a PRM passenger's assistive device seems to be unrealistic. A PRM passenger, in the event of a damaged device, may be compensated for the amount exceeding the mentioned amount of approximately 1.417 EUR in case:

- That he proves carrier's intention or gross negligence,
- The carrier renounces the implementation of limited liability in case of damaged baggage. Freedom of arranging the contracting relations is the basic principle of the law on obligations and is applied in the Montreal Convention, too.⁷⁴ Article 27 of the The Montreal Convention includes also a possibility of rejecting any kind of legal protection available according to the Montreal Convention, by what was done under the influence of the Japanese Initiative, IATA Inter-carrier Agreements of 1995 and 1996.
- That a PRM passenger, at the moment when registered baggage is delivered to the carrier, made a special declaration of interest in delivery at a destination and has paid a supplementary sum if the case so requires.

⁷⁰ Loss of baggage means the air carrier's loss of physical control over handed baggage and impossibility of its delivery to immediate possession of a passenger. Damage means decreased value of the baggage and disruption of its original appearance and content.

⁷¹ Destruction of baggage means destruction of its content and impossibility of further use. The baggage will be considered destroyed even if damage is of such character that repair costs would exceed the actual value of the baggage.

⁷² Article 22 paragraph 2 Montreal Convention

⁷³ Evaluation of Regulation 1107/2006, Final Report, Steer Davied Gleave, June 2010, p.72

⁷⁴ Article 27 Montreal Convention

If the carrier, caused by his negligence, damage to a wheelchair, mobility equipment and other assistive device, the burden to prove a higher degree of liability is upon a PRM passenger, i.e. the passenger is obliged to prove that the carrier caused the damage on the wheelchair, mobility equipment or other assistive devices intentionally or neglectfully.

11.1. Airport operator's liability for damage on wheelchair, mobility equipment and other assistive devices

A contract of air carriage is concluded between a carrier and a passenger, or between the carrier and party ordering the transport, according to which the carrier makes a commitment to carry the passenger and his baggage from the point of departure to the point of arrival, at the time according to a time table, i.e. at agreed time, and the passenger commits himself to pay appropriate charge. In order to fulfil the contract of carriage, airport operators and Ground Service providers perform certain activities i.e. marking of hold and/or cabin baggage with bag tags, transporting of registered baggage to a sorting area, handling the baggage in the sorting room, loading the baggage on board the aircraft and its unloading from the plane on arrival, handling the baggage in the sorting room and placing the baggage on a conveyor belt so that passengers can take the baggage from the belt after their disembarkation.

Carrier is liable for a wheelchair, mobility equipment and other assistive devices from the moment they have been handed over to a check-in clerk till they have been taken over from the baggage claim area,⁷⁵ whilst for the wheelchair, mobility equipment and other assistive devices marked with DAA tags and handed over by the aircraft, the carrier becomes liable from the moment of forming the queue for embarkation of passengers until the moment of entering the terminal building. It seems that liability scopes of the airport operator or Ground Handling provider and carrier overlap for the hold baggage from the moment of handing over the wheelchair, mobility equipment and other assistive device to a check-in clerk, and until the moment of loading them on board aircraft, and upon arrival from the moment of unloading the wheelchair, mobility equipment and other assistive devices from the plane until the moment of reclaim by the passengers. A question arises - who should be sued? Legally speaking, the most legitimate solution would be to sue the carrier due to the fact that, according to the contract of carriage, the carrier committed itself to transport a passenger and his baggage to agreed destination. Loss, destruction and damage of a wheelchair, mobility equipment and other assistive devices are a violation of the contractual obligation, i.e. failure to implement or defective implementation of contractual obligation. A carrier is liable for damage to the hold baggage by the principle of objective responsibility, and the passenger has to prove exclusively general conditions of liability for damage as follows: 1.) two different subjects of obligation (creditor– injured passenger, and debtor, carrier as a rule, 2.) damage must be caused by unlawful act of the debtor – carrier 3.) harmful act that caused the damage, 4) damage, and 5) cause-and-effect connection between the harmful act of debtor – carrier and the damage sustained by the injured party – PRM passenger. Practically, a PRM passenger can easily prove that he concluded a contract of carriage with carrier, and that failure to perform or defective performance of contractual obligations means a violation of the obligation/contract and as such is an unlawful act. That harmful act is the loss, destruction and damage of wheelchair, mobility equipment and assistive devices, and that the cause-and-effect connection is implicit in the violation of contractual obligation, which eventually caused the damage to the injured party, i.e. the PRM passenger.

For the damage on the wheelchair, mobility equipment and other assistive devices that were handed over as the hold baggage, a PRM passenger may file claim cumulatively against both the carrier and the airport operator.

⁷⁵ Wheelchair, mobility equipment and other assistive devices are not taken over from a conveyor belt because of a possibility to be damaged.

In case the claims are filed either cumulatively or alternatively against the airport operator⁷⁶, a passenger will be faced with a practical problem to prove that the airport operator is guilty for the damage. The question now arises about a legal relation between the passenger and the airport operator, i.e. if the airport operator is the carrier's agent in terms of Article 30 of Montreal Convention.⁷⁷ Unlike the passenger and airport operator that do not have a contractual relation, the Agreement on provision of Ground Handling services is concluded between the airport operator and the carrier, according to which carriers pay charges for use of the airport operators' services and infrastructure. Passenger also pays a charge, included in a ticket price, for rendered service (check-in, baggage loading, etc.) and use of airport infrastructure. The question now is whether the passenger and the airport operator concluded the contract since the passenger, at the moment of check-in, pays a passenger charge for use of airport infrastructure to the airport operator. *Taking into account that the passenger pays a passenger charge for use of airport infrastructure (check-in, baggage loading, etc.) for the purpose of realization of the contract of carriage and not for the purpose of concluding a separate contract with the airport operator, it may be concluded that the passenger and the airport operator are not in contractual relation.*

In other words, in case the airport operator is responsible for damage on a wheelchair, mobility equipment and other assistive devices, either being the hold or cabin baggage, *the airport operator shall have a non-contractual obligation to compensate the damaged baggage.* Practical problem related to argumentation of airport operator's liability for damage on the wheelchair, mobility equipment and other assistive devices is contained in proving of the general conditions of liability, as well as the fact that the airport operator is a passively legitimate party, i.e. in proving that the damage on the wheelchair, mobility equipment and other assistive devices happened while they were handled by the airport operator's employees and not while they were in a direct possession of the carrier. Proving the exclusive liability of the airport operator is possible only by bringing witnesses and by video recordings, requested through courts, of the incident that caused the damage.

In respect of a type of liability, it would not be fair that airport operators are liable for the damage on the wheelchair, mobility equipment and other assistive devices, either being the hold or cabin baggage, under more favourable conditions than carriers. In other words, both in national and international air transport, for the damage caused by lost, destroyed or damaged wheelchair, mobility equipment and other assistive devices registered as the hold baggage, there is an objective liability of airport operator, while for the damage on the wheelchair, mobility equipment and other assistive devices which are the cabin baggage, there is a subjective liability of airport operator. *Airport operator is liable for the damage on the wheelchair, mobility equipment and other assistive devices registered as the hold baggage of a PRM passenger only if after the check-in procedure, an employee of the airport operator caused the damage on the wheelchair, mobility equipment or other assistive devices, and the flight is cancelled or the passenger is denied boarding or he decided not to fly for certain reasons, or if the PRM passenger is called for safety reasons to remove the battery which is treated the dangerous goods from his wheelchair that was already registered and then he finds out it has been damaged.* According to provisions of Montreal Convention liability of an carrier for the damage exist if the damage happens during carriage, and in case

⁷⁶ If an airport operator sub-contracted a service, charges will be pressed, either cumulatively or alternatively, against the airport operator's sub-contractor. The sub-contractor's liability is the same as that of the airport operator for the damage on a wheelchair, mobility equipment and other assistive devices.

⁷⁷ Article 30 Montreal Convention stipulates: „1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention. 2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits. 3. Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

of cancelled flight, denied boarding to a PRM passenger or his decision not to fly the carriage is not realized, there will be the objective liability of the airport operator for the damage on wheelchair, mobility equipment and other assistive devices due to implementation of provisions of the national law to which collision norms of the internationally competent court indicate.

In case the loss, destruction and damage on the wheelchair, mobility equipment and other assistive devices occur on departure, within the airport before registration of the wheelchair, mobility equipment and other assistive devices at the passenger check-in counter, or on arrival, upon taking over the wheelchair, mobility equipment and other assistive devices from the baggage claim area in terminal building or elsewhere within the airport, it will be considered the subjective liability of the airport operator, since the passenger in a direct possession of either hold or cabin baggage, due to implementation of provisions of the national law to which indicate collision norms of the internationally competent court. The airport operator can exclude liability for the damage, either in a court proceedings or out of court procedure, if he manages to prove he was not guilty for the damage on the wheelchair, mobility equipment and other assistive devices, regardless of being the hold or cabin baggage.

The question is if the airport operator is an agent of the carrier in terms of provisions of the Montreal Convention. In Ronald Schmid's opinion, agency implies the following:

1. Performance of the obligations assigned by the carrier, i.e. the carrier's transfer of authorities to other legal entity,
2. Performance of these obligations must be for the purpose of realization of the contract on transportation,
3. Agent must not have a monopoly on the market.⁷⁸

Given the mentioned criteria, Ground service providers are the carrier's agents in terms of provisions of the Montreal Convention. The question now is whether the airport operator is the carrier's agent in the international cargo transport. Airport operator handles the baggage in order to realize the contract of carriage. However, agency means a transfer of carrier's authorities to airport operator. If the airport operator has a monopoly on the market, he cannot be considered the carrier's agent in terms of provisions of the Montreal Convention. The question is how to establish if the airport operator has a monopoly on the market. Ground Handling services to PRM passengers are primarily provided by airport operators, what is an exemption from the rule that ground service may be provided by carriers or third providers on their own.

In other words, airport operators have *sui generis* monopoly on the market in terms of provision of services to PRM passengers and thus, in case of destruction, damage or loss of wheelchairs, mobility equipment or other assistive devices, *cannot be considered the carrier's agents in the international air transport in terms of provisions of the Montreal Convention. Consequently, airport operators will not be able to use liability limits stipulated by provisions of the Montreal Convention.*

12. Enforcement body and its tasks

Each EU Member State shall designate a body or bodies responsible for enforcement of the Regulation. Generally speaking, a body responsible for enforcement of this Regulation is the Directorate for civil aviation of a Member State.⁷⁹ The Regulation does not set a requirement that regulatory body cannot be the same as a provider of assistance to PRM passengers. However, the enforcement body must be independent from the provider of assistance to

⁷⁸ Elmar Gjemulla, Ronald Schmid, Wolf Muller – Rostin, Regula Detling – Ott, Rod Margo, Montreal Convention, (2010), Kluwer Law International, p. 26-19, Article 19

⁷⁹ Final Report, Application of the Regulation by the Member States, Phillipe & Partners, p 56, Identical information can be found in Evaluation of Regulation 1107/2006, Final Report, Steer Davied Gleave, June 2010, p.88

PRM passengers. Legal *ratio* for establishment of an enforcement body is to ensure legal and functional independence of a supervisory body from airport operators and carriers.

The Regulation stipulated exclusive competence of the enforcement body for the following:

- Meeting the quality standards in Ground Handling of PRM passengers,
- Provision of assistance that airport operators are obliged for, including the obligations from the Annex, and
- Implementation of provisions on PRM charges,⁸⁰
- Taking measures concerning notification of PRM passengers on their rights from the Regulation and on possibility of raising an objection to the relevant body or bodies.⁸¹

In addition, the enforcement body is an appellative body in charge of deciding on objections of PRM passengers who are not satisfied with the way they were protected by the airport operator or carrier.⁸²

Recital 17 of the Regulation, which is not binding, recommends that complaints related to assistance provided at an airport should be addressed to a body or bodies of the Member State to which the airport belongs, while complaints concerning the assistance provided by carrier should be addressed to a body or bodies of the member State that issued a licence for the operations aimed for the purpose of implementation of this Regulation. On the other hand, the binding provision of the Regulation stipulates an explicit competence of the enforcement body for carriers in terms of the flights departing/arriving from/to the airport located at its national territory.

Member States are entitled to appoint a separate body being competent for providing the assistance at the airport and deciding on justifiability and legality of especially established PRM charge.

Stipulating the possibility of having a special body for control of provision of assistance at airport implicitly empowers the States to also establish a special body for control the assistance provide by carriers. In other words, the language interpretation indicates that the Member State may appoint two or more bodies responsible for enforcement of the Regulation.

13. Complaint procedure

The Regulation has stipulated a complaint procedure in two steps. A PRM passenger who considers that this Regulation has been infringed may bring the matter to the attention of either the airport operator or carrier, depending which of these two he thinks is responsible for infringement of his rights. A form of complaint has not been established by the Regulation, what means that a complaint may be lodged to the airport operator or carrier, both verbally and in a written form. The most frequent ways of lodging complaints to airport operator is by e-mail, handing them over at the information desk or boxes available in Terminal buildings.⁸³ Lately, web pages of airport operators also enable lodging of complaints.⁸⁴ Quality managers or heads of services or departments for Ground Handling of PRM passengers are responsible for establishing if the complaints have been justified. *Lack of provision on the procedure for lodging a complaint is a failure to define an subjective and objective deadline in which a PRM passenger may lodge a complaint concerning the Ground Handling, the deadline in which airport operator or carrier is obliged to decide if the complaint has been justified, the deadline in which the PRM passenger is obliged to raise an objection*

⁸⁰ Article 14 paragraph 1 and 2 Regulation 1107/2006

⁸¹ Article 15 paragraph 4 Regulation 1107/2006

⁸² Article 15 paragraph 2 Regulation 1107/2006

⁸³ Evaluation of Regulation 1107/2006, Final Report and Appendices A-B, June 2010, p.47

⁸⁴ <http://www.schiphol.nl/Travellers/AtSchiphol/InformationForPassengersWithReducedMobility/ComplaintsAndSuggestions.htm>, http://www.milanolate-airport.com/en/passenger-guide/passengers-with-reduced-mobility/prm-survey?code=PRM_SURVEY

against the decision of the airport operator or carrier, and, finally, the deadline in which the enforcement body has to make a decision about the PRM passenger's objection.

Solution from the Regulation is opposite to unification since it applies substantive law of the Member State which defines deadlines for initiation, decision making and raising the objection in administrative procedures.

As already mentioned, if a PRM passenger believes his rights have not been protected adequately, the objection is to be raised to a relevant Directorate for civil aviation or other body appointed by a Member State.

The provision according to which the State that has received the objection which comes within the competence of a relevant body of another Member State is obliged to forward the objection to that Member State was rather vague until adoption of the Interpretative Guidebook on implementation of the Regulation concerning the rights of disabled persons and persons with reduced mobility, due to which the European Union eliminated the vagueness about a body being competent to decide on objections.⁸⁵

Unlike the Regulation 216/2004 which includes an explicit obligation of carriers to inform passengers of their rights,⁸⁶ the Regulation does not include such an obligation, but Member States are responsible to take appropriate measures to keep the PRM passengers informed about their rights and the way of lodging a complaint to a specific body or bodies.⁸⁷ Better solution would be to have a provision according to which the airport operator and carrier are undoubtedly obliged to inform a PRM passenger about his rights. As a rule, Member States keep PRM passengers informed about their rights via web pages of the Directorate for civil aviation of a Member State and/or other relevant body for enforcement of the Regulation. Member States may in penalty clauses put the airport operators and carriers under an implicit obligation to inform PRM passengers about their rights by means of leaflets / web pages.

14. Conclusion

The Regulation stipulates PRM related obligations of carriers and airport operators. However, imprecision of the definition of a PRM passenger has caused to diversification of implementation of the Regulation.

Practical issues in implementation of the Regulation are related to notification of carriers and transmission of information to airport operators on necessity to provide assistance to PRM passengers. Failure to forward PAL/ CAL and PSM messages results in unpreparedness of airport operators for provision of assistance to a PRM passenger.

In order to cover the costs of Ground Handling and protection of rights of PRM passengers, the Regulation has incorporated the *sui generis* principle of solidarity.

Since the airport operators enjoy *sui generis* monopolistic position at the market in respect of Ground Handling of PRM passengers, in case of destroyed, damaged or lost wheelchairs, mobility equipment and other assistive devices in the international transport of baggage, they are liable for the damage limitlessly, through implementation of provisions the national law whose competence has been indicated by legal norms in case of conflict of law of the internationally competent court, and cannot be considered as an agent of carrier in respect of provisions of Montreal Convention. On the other hand, carriers are liable for the damage occurring during the international transport in a limited manner due to implementation of provisions of the Montreal Convention that was integrated into EU legislation in EU Regulation 2027/97 on liability of carrier in case of an accident (amended by the Regulation 889/2002).

⁸⁵ Commission Staff Working Document Interpretative Guidelines on the Application of Regulation EC No 1107/2006 of the European Parliament and of the Council of 5 July 2006 Concerning the Rights of Disabled Persons and persons with Reduced Mobility when Traveling by Air, p.17, 18

⁸⁶ Article 14 Regulation 261/2004

⁸⁷ Article 15 paragraph 4 Regulation 1107/2006

Airport operator is primarily authorized for provision of assistance to PRM passengers, what is an exemption from the rule established in the Directive 96/67. The airport operator will decide to subcontract in case of not being a provider of Ground Handling services at the airport.

Airport operators may, but not are obliged to set a PRM charge. If they set a PRM charge, they are authorized either to set a specific PRM charge or to include it into the passenger charge.

EU, by adopting the Interpretative guidebook, eliminated certain confusions in implementation of the Regulation, especially in the part pertaining to the competence of the executive body.

In spite of adoption of the Interpretative guidebook, some imperfections of the Regulation have still not been eliminated:

- Notion of a PRM passenger does not correspond to the name of the Regulation,
- Insufficient awareness of PRM passengers of their rights and insufficient awareness of tour operators of PRM passengers' rights and IATA codes for PRM passengers,
- Lack of defined deadline, both subjective and objective one, in which a PRM passenger may lodge a complaint concerning Ground Handling, the deadline in which an airport operator or carrier are obliged to make a decision whether a PRM complaint is justified, the deadline in which a PRM passenger may raise an objection against a decision of an airport operator or carrier, and the deadline in which an enforcement body is obliged to make a decision on a PRM passenger's objection.
- Setting up the obligation upon all new employees who are not in direct or indirect contact with PRM passengers to attend a training, and failure to define duration of the training of airport operator's and carrier's employees.

In spite of the mentioned imperfections, EU managed to provide for a high level of protection for PRM passengers by adopting the quality standards for Ground Handling of PRM passengers at airport with annual traffic exceeding 150.000 passengers and by stipulating the obligation of airport operator's and carrier's employees to attend training for GH of PRM passengers.