

CHALLENGES OF EUROPEANISATION REGARDING THE PROTECTION OF PASSENGERS' RIGHTS IN THE EVENT OF A TRAIN DELAY IN THE REPUBLIC OF CROATIA

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ABSTRACT

*The author analyses the provisions of the European *acquis communautaire* on the liability of a railway undertaking for damages caused to passengers in the event of a train delay under Regulation (EC) No 1371/2007 on rail passengers' rights and obligations. In particular, reference is made to the recent judgment of the Court of Justice of the European Union (CJEU) in Case C- 509/11 regarding the impossibility of exempting railway undertakings from paying compensation to passengers in the event of a delay caused by force majeure. This paper explores the latest European Commission Proposal of September 2017 for a recast of Regulation (EC) No 1371/2007 and the justification for the introduction of the force majeure clause in Art. 17 of Regulation (EC) No 1371/2007. The newly proposed provision would allow the railway undertaking to be exempt from the liability to pay compensation for a delay if it manages to prove that the delay was caused by severe weather conditions or major natural disasters that jeopardise the safe provision of service and which could not have been foreseen or prevented even by taking all reasonable measures. The paper analyses the provisions of the applicable national legislation, indicating the beginning of a full implementation of Regulation (EC) No 1371/2007 in the Republic of Croatia.*

Keywords: protection of passengers' rights, liability for delays, Regulation (EC) No 1371/2007, Republic of Croatia

1. INTRODUCTION

Railways are an important part of the EU transport network which, as the foundation of every country's economy, have a significant role in passenger transport. In EU Member States 20% of passengers use rail transport¹ while in 2010 only 7% of inland passenger mobility in EU was related to rail transport.² Over the ten years to 2013, and as reported to Eurostat, passenger rail demand in the European Union increased by 61.8 billion passenger-kilometres to 424 billion passenger-kilometres.³ In 2016, European railways transported 9 billion passengers.⁴ In 2018, rail passengers transport in the EU was estimated at 472 billion passenger-kilometres, up 1.5 % from the previous year.⁵ Due to the pronounced nature of cross-border rail transport at EU level and the negative consequences of applying different legal provisions on rail passengers' rights and obligations within numerous national legal systems of EU Member States, both on international and national journeys within the EU, this non-unified approach to issues on the protection of passengers' rights in rail transport at European level has contributed to legal uncertainty and has resulted in unequal rights for train passengers travelling in the EU. The exercise of the established passenger rights in rail transport, as well as the constant strengthening of those rights, inevitably represents an additional financial obligation for those carriers that do not fulfil the obligations arising from the concluded transport contract. This paper analyses the provisions on railway undertaking's liability for damages to passengers in case of a train delay, since this represents a failure by the railway undertaking to perform contractual obligations, specifically pointing to its civil and misdemeanour liability in accordance with national and European legal provisions.

¹ See Barbone, L. *et al.*, *VAT-induced distortions in the passenger transport system in the European Union: assessment and option for reform*, Transportation Research Procedia, vol. 14, 2016, p. 336

² See more European Commission, *White Paper: Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system*, 2011, [<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0144:FIN:en:PDF>], accessed 04. February 2020

³ European Commission, *Study on the prices and quality of rail passenger services*, 2016, p. 4, [<https://ec.europa.eu/transport/sites/transport/files/modes/rail/studies/doc/2016-04-price-quality-rail-pax-services-final-report.pdf>], accessed 23. May 2020

⁴ European Commission, *Report from the Commission to the European Parliament and the Council on monitoring development of the rail market – Sixth report on monitoring development of the rail market*, 2019, p. 39, [https://ec.europa.eu/transport/sites/transport/files/6th_rmms_report.pdf], accessed 23. May 2020

⁵ Eurostat, *Railway passenger transport statistics - quarterly and annual data*, 2019, [https://ec.europa.eu/eurostat/statistics-explained/index.php/Railway_passenger_transport_statistics_-_quarterly_and_annual_data#Number_of_passengers_transportated_by_rail_increased_in_2018], accessed 23. May 2020. More on the development of railway passenger transport in EU see Stoilova, S., *Study of Railway Passenger Transport in the European Union*, Tehnički vjesnik, vol. 25, no. 2, 2018, pp. 587 – 594

2. PROTECTION OF PASSENGERS' RIGHTS IN THE EVENT OF A DELAY UNDER REGULATION (EC) NO 1371/2007

In order to provide better protection of passengers' rights in rail transport, within the context of the common transport policy, on 23 October 2007 the EU adopted Regulation (EC) No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations⁶ which entered into force on 3 December 2009. Regulation (EC) No 1371/2007 applies in international and national⁷ rail transport in the EU to all rail journeys and services throughout the Community⁸ provided by one or more licensed carriers⁹ in railway transport, e.g. licensed railway undertakings¹⁰ in accordance with Council Directive 95/18/EC.¹¹

⁶ Regulation (EC) No 1371/2007 on rail passengers' rights and obligations [2007] OJ L 315/14 – 41 (Regulation (EC) No 1371/2007), entered into force on 3 December 2009

⁷ National transport within the EU is any transport, whether it is transport within one EU Member State or transport between two or more Member States

⁸ See more Činčurak Erceg, B.; Vasilj, A., *Current affairs in passengers rights protection in the European Union*, in: Dujčić, D.; Petrašević, T. (eds.), *EU and Comparative Law Issues and Challenges Series (ECLIC 2)*, 2018, pp. 221 – 222

⁹ Carrier means the contractual railway undertaking with whom the passenger has concluded the transport contract or a series of successive railway undertakings which are liable on the basis of this contract (Regulation (EC) No 1371/2007, Art. 3(1), point (2))

¹⁰ Railway undertaking means a railway undertaking as defined in Art. 2 of Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification [2001] OJ L 75/29-46 (Directive 2001/14/EC) and any other public or private undertaking the activity of which is to provide transport of goods and/or passengers by rail on the basis that the undertaking must ensure traction; this also includes undertakings which provide traction only (Regulation (EC) No 1371/2007, Art. 3(1), point (1)). It is important to note that the Directive 2001/14/EC has not been in force since 16 May 2015 and has been amended by Directive 2012/34/EU on establishing a single European railway area [2012] OJ L 343/32 - 77 (Directive 2012/34/EU) according to which railway undertaking means any public or private undertaking licensed according to this Directive, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only (Directive 2012/34/EU, Art. 3(1), point (1))

¹¹ Regulation (EU) No 1371/2007, Art. 2(1) of Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings [1995] OJ L 143/70 – 74 (Council Directive 95/18/EC), not in force since 16 May 2015 when Directive 2012/34/EU entered into force. The aim of Council Directive 95/18/EC was to break the heterogeneity of national decisions on the licensing and to ensure uniform conditions for market access in the whole EU (Vasilj, A., *Implementation of the railway system of the Republic of Croatia in the EU railway system*, in: Primorac, Ž.; Bussoli, C.; Recker, N. (eds.), *Book of Proceedings "16th International Scientific Conference on Economic and Social Development – The Legal Challenges of Modern World"*, Split, 2016, p. 358), see more Radionov, N., *Hrvatsko željezničko pravo i mjere prilagodbe pravu Europske Unije prema planu provedbe Sporazuma o stabilizaciji i pridruživanju*, *Zbornik Pravnog fakulteta u Rijeci*, no. 2, 2002, pp. 315 - 316. More on licensing of railway undertakings see Directive 2012/34/EU, Arts. 16 - 25

Regulation (EU) No 1371/2007 sets standards on liability of railway undertaking due to breach of contractual obligation from the concluded transport contract.¹² Based on the transport contract, the railway undertaking is obliged to transport the passenger to a particular station by the type of train and in the class as agreed, according to a pre-announced timetable, respecting the conditions of comfort and hygiene which are considered necessary given the type of train and the length of the journey.¹³ The railway undertaking is liable to passengers for damages arising from improper performance of the carriage, including its liability for damages to passengers in the event of a train delay. According to Art. 3(1), point (12) of Regulation (EC) No 1371/2007, delay means the time difference between the time the passenger was scheduled to arrive in accordance with the published timetable and the time of his or her actual or expected arrival. Delays always refer to the delay of the passenger's journey and not to the delay of the train, but in practice, the time of arrival of the train at the final destination (stated on the ticket) will be used to calculate the length of the delay.¹⁴

Train delays represent the largest number of cases of breach of a contractual obligation by a railway undertaking. The liability of the railway undertaking in respect of a delay, missed connection¹⁵ and cancellation¹⁶ has been regulated in Annex I "Extract from Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV)"¹⁷ of Regulation (EC) No 1371/2007

¹² Transport contract means a contract of carriage (for reward or free of charge) between a railway undertaking or a ticket vendor (any retailer of rail transport services concluding transport contracts and selling tickets on behalf of a railway undertaking or for its own account – Regulation (EU) No 1371/2007, Art. 3(1), point (7) and the passenger for the provision of one or more transport services (Regulation (EC) No 1371/2007, Art. 3(1), point (8))

¹³ Vasilj, A.; Činčurak Erceg, B., *Prometno pravo i osiguranje*, Pravni fakultet Osijek, 2016, p. 140

¹⁴ Communication from the Commission, *Interpretative Guidelines on Regulation (EC) No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations*, 2015, p. 3, [[https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:52015XC0704\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:52015XC0704(01)&from=EN)], accessed 01. February 2020 (Guidelines 2015)

¹⁵ The term "missed connection" is not defined by the European legislature, but in European Commission Report to the European Parliament and the Council, *Report on the Application of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on Rail Passengers' Rights and Obligations*, 2013, [<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013DC0587&from=HR>], accessed 11. December 2019 (Report from 2013), it is clearly indicated (see paragraph 3) that the term in question should be defined in Regulation (EC) No 1371/2007 in order to contribute to further improvement of its application

¹⁶ The term "train cancellation" is not defined but we can apply the definition of a train cancellation according to Jakaša which includes the failure to set the composition according to the timetable so that the train in question does not depart at all or interrupt the journey at an earlier station (Jakaša, B., *Kopneno i zračno saobraćajno pravo*, Informator, Zagreb, 1969, p. 501)

¹⁷ Appendix A to the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention Concerning International Carriage

(Title IV “Liability of the Carrier”, Chapter II “Liability in case of cancellation, late running of trains or missed connections”).¹⁸ The provisions of Art. 32(1) of Annex I to Regulation (EC) No 1371/2007 regulate the liability of a carrier in the event of cancellation, late running of trains (delay) or missed connections, and the aforementioned provisions prescribe the liability of the carrier for loss or damage caused to the passenger¹⁹ resulting from the fact that, by reason of cancellation, the late running of a train or a missed connection, his journey cannot be continued the same day, or that a continuation of the journey the same day could not reasonably be required because of given circumstances. The carrier shall be relieved of this liability, when the cancellation, late running or missed connection is attributable to one of the following causes: a) circumstances not connected with the operation of the railway which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent; b) fault on the part of the passenger; or c) the behaviour of a third party²⁰ which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent.²¹ This is a *vis majeure* clause, i.e. a complex legal-technical concept consisting of several elements, all of which are cumulatively necessary in this particular case in order to be characterised as such.²²

Within the provisions of Arts. 15 - 18, Chapter IV “Delays, missed connections and cancellations” of Regulation (EC) No 1371/2007, minimum passenger rights in case of delays, missed connections and cancellations are legally regulated. Where it is reasonably to be expected that the *delay* in the arrival at the final destination

by Rail of 3 June 1999, Official Gazette, International Agreements, No. 12/2000. On 23 February 2013, the EU accessed to the COTIF. See more Radionov Radenković, N., *Restrukturiranje tržišta željezničkih usluga u Europskoj Uniji i nova Konvencija o željezničkom prijevozu (COTIF 1999)*, Zbornik Pravnog fakulteta u Zagrebu, vol. 53, no. 3 - 4, 2003, pp. 851 - 855; Mudrić, M., *Treći željeznički paket: otvaranje tržišta međunarodnog prijevoza putnika te prava i obveze putnika u međunarodnom prijevozu*, in: Sever, D.; Mlinarić, T. J. (eds.), Zbornik referatov 3. Mednarodnega znanstvenega in strokovnega kongresa upravljalcev železniške infrastrukture RIMC, Univerzitetna knjižnica Maribor, 2007, p. 5; Tomić Dalić, V., *Uloga osiguranja u zaštiti prava putnika u željezničkom prijevozu u slučaju oštećenja zdravlja, ozljede ili smrti putnika*, Osiguranje, no. 6, 2015, pp. 48 - 49

¹⁸ Regulation (EC) No 1371/2007, Art. 15

¹⁹ The damages shall comprise the reasonable costs of accommodation as well as the reasonable costs occasioned by having to notify persons expecting the passenger (Annex I to Regulation (EC) No 1371/2007, Art. 32(1))

²⁰ Another undertaking using the same railway infrastructure shall not be considered as a third party (Annex I to Regulation (EC) No 1371/2007, Art. 32(2), point (c))

²¹ Annex I to Regulation (EC) No 1371/2007, Art. 32(2)

²² Radionov, N., *Komparativni prikaz odgovornosti prijevoznika za prijevoz stvari cestom i željeznicom – Novo hrvatsko transportno pravo u svjetlu međunarodnih transportnih propisa*, Vladavina prava, vol. 4, no. 1, 2000, p. 137

under the transport contract will be more than 60 minutes, the passenger shall immediately have the choice between: a) reimbursement of the full cost of the ticket,²³ under the conditions by which it was paid, for the part or parts of his or her journey not made and for the part or parts already made if the journey is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant, a return service to the first point of departure at the earliest opportunity; or b) continuation or re-routing, under comparable transport conditions,²⁴ to the final destination at the earliest opportunity or at a later date at the passenger's convenience²⁵ – Regulation (EC) No 1371/2007, Art. 16.

If the passenger, in case of delay, has not received reimbursement of the full cost of the ticket according to Art. 16 of Regulation (EC) No 1371/2007 and continued the journey despite the delay, the passenger has the right to claim compensation for the delay from the railway undertaking, e.g. compensation of the ticket price (as a type of fixed and standardised financial compensation, the price paid by way of consideration for transport services which were not supplied in accordance with the transport contract)²⁶ if he or she is facing a delay between the places of departure and destination stated on the ticket (Regulation (EC) No 1371/2007, Art. 17). The minimum compensations for delays²⁷ are: a) 25 % of the ticket price for a

²³ The payment of the reimbursement shall be made under the same conditions as the payment for compensation referred to in Art. 17 of Regulation (EC) No 1371/2007. See more Marin, J., *Protection of Passengers' Rights in the European Union*, in: Zanne, M.; Bajec, P. (eds.), *Zbornik referatov Pomorstvo, promet in logistika ICTS 2011*, Fakultet za pomorstvo in promet Portorož, 2011, pp. 7 - 8

²⁴ Whether transport conditions are comparable can depend on a number of factors and must be decided on a case-by-case basis. Depending on the circumstances, the following good practices are recommended: a) if possible, passengers are not downgraded to transport facilities of a lower class (where this occurs, passengers such as first class ticket holders should receive reimbursement of the difference of the ticket price); b) where passengers can only be re-routed on another rail carrier or on a transport mode of a higher class or with a higher fare than paid for the original service, re-routing shall be offered without additional costs for the passenger; c) reasonable efforts are made to avoid additional connections; d) when using another rail carrier or an alternative mode of transport for the part of the journey not completed as planned, the total travel time should be as close as possible to the scheduled travel time of the original journey; e) if assistance for disabled persons or persons with reduced mobility was booked for the original journey, assistance should equally be available on the alternative route; f) where available, re-routing accessible to persons with disabilities or reduced mobility should be offered (Guidelines 2015, *op. cit.*, note 14, point 4.2.3.)

²⁵ See more Petiti Lavall; M. V.; Puetz, A., *Rail Passengers' Rights Under Regulation (EC) No. 1371/2007 and Their Implementation in Spain: Does the Spanish Rail Sector Regulation Comply with the Acquis Communautaire?*, *Zbornik Pravnog fakulteta u Zagrebu*, vol. 66, no. 2 - 3, 2016, pp. 368 - 369

²⁶ See Case C-509/11 *ÖBB Personenverkehr AG/SchienenControl Kommission, Bundesministerin für Verkehr, Innovation und Technologie* [2013] OJ C 2013:613, par. 38, 45

²⁷ Compensation for delay shall be calculated in relation to the price which the passenger actually paid for the delayed service (Regulation (EC) No 1371/2007, Art. 17(1)), e.g. it is a minimum compensation that is calculated considering the ticket price

delay of 60 to 119 minutes; b) 50 % of the ticket price for a delay of 120 minutes or more. The compensation of the ticket price shall be paid within one month after the submission of the request for compensation and may be paid in vouchers and/or other services (if the terms are flexible) or in money (at the request of the passenger).²⁸ Railway undertakings may introduce a minimum threshold under which payments for compensation will not be paid and this threshold shall not exceed EUR 4 (Regulation (EC) No 1371/2007, Art. 17(3)). It is an amount that is a kind of franchise that reduces operating costs and rejects insignificant claims.²⁹ The passenger shall not have any right to compensation if he is informed of a delay before he buys a ticket, or if a delay (due to continuation on a different service or re-routing) remains below 60 minutes.³⁰

Interestingly, the passenger is entitled to a fixed compensation even if the delay is caused by force majeure.³¹ Indeed, the European legislature does not envisage the force majeure³² as a possible reason for the restriction of railway undertakings liability for payment of compensation in case of delay according to Art. 17 of Regulation (EC) No 1371/2007. The reason for this provision is found in the fact that Regulation (EC) No 1371/2007 was adopted as one of the proposed measures of the “Third Railway Package” from 2004 which, in order to establish rights and obligations for international rail passenger and to improve the effectiveness and attractiveness of international rail passenger transport,³³ likewise intended to improve passengers’ rights. This is evident from the Proposal of the European Parliament and of the Council on International Rail Passengers’ Rights and Obligation from 2004 which provides for European legislature’s effort to oblige railway

²⁸ Regulation (EC) No 1371/2007, Art. 17(2)

²⁹ Radionov, N., *Željeznički promet*, in: Radionov, N.; Marin, J. (eds.), *Europsko prometno pravo*, Pravni fakultet u Zagrebu, 2011, p. 114

³⁰ Regulation (EC) No 1371/2007, Art. 17(4)

³¹ Marin, J., *Osiguranje u funkciji zaštite prava putnika i poslovanja putničkih prijevoznika*, in: Ćorić, S. et al. (eds.), *Zbornik radova s međunarodne znanstveno-stručne konferencije Dani hrvatskog osiguranja 2014*, p. 50

³² Force majeure can be defined as an event that caused the damage, and originates from some cause that is beyond that realm and whose action could not be predicted, avoided or eliminated (Romštajn, I.; Vasilj, A., *Hrvatsko prometno pravo i osiguranje*, Pravni fakultet Osijek, 2006, p. 37) or as abnormal and unforeseeable circumstances beyond the control of the trader concerned, whose consequences could not have been avoided despite the exercise of all due care, so that conduct of the public authorities may, according to the circumstances, constitute a case of force majeure (Opinion of Advocate General Nil Jääskinen, *Opinion in Case C- 509/11*, 2013, ECLI:EU:C:2013:167, par. 31 [<http://curia.europa.eu/juris/document/document.jsf?text=&docid=135004&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4414733>], accessed 15. December 2019)

³³ European Parliament and the Council, Proposal for a Regulation on International Rail Passengers’ Rights and Obligations, 2004, [<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52004PC0143>], accessed 25. May 2020

undertakings to pay compensation to passengers in case of train delays caused by vis majeure for which, according to CIV Rules, railway undertakings are exempted from liability. On the basis of these provisions, Regulation (EC) No 1371/2007 was adopted, which, in relation to damages resulting from delays, prescribes greater liability of railway undertakings (impossibility of exemption from liability in case of vis majeure) and greater passenger rights.

The concept of force majeure, codified under COTIF-CIV system,³⁴ can be seen as an unpredictable and unavoidable circumstance beyond the control of the railway undertakings. It is a matter of inadmissibility of railway undertakings to, according to the model of other transport modes and COTIF solutions, include in their general conditions of carriage a provision exempting payment of compensation for delay in cases where the delay in question is caused by force majeure, and as a consequence of this decision passengers have the right for compensation for delay of railway undertakings also in case of a force majeure. Although it is a legal institute which, as a general principle of contract law, provides for the exemption of carriers from liability for damages caused by passenger delays in all transport modes (except rail transport), provision of Art. 17 of Regulation (EC) No 1371/2007 has contributed to different interpretations and the creation of legal uncertainty. In fact, according to Art. 15 of Regulation (EC) No 1371/2007, the liability of railway undertakings in respect of delays, missed connections and cancellations shall be governed by Chapter II, Title IV, Annex I of Regulation (EC) No 1371/2007. The relevant provisions fall within the ambit of Art. 32(2) of the CIV rules which, as part of international law, allows for the exemption of the carrier from liability if the damage resulting from the delay is caused by vis majeure, e.g. circumstances not connected with the operation of the railway which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent. In relation to the relevant provisions of Regulation (EC) No 1371/2007 which increase passenger rights and the fact that the relevant provisions of the CIV Rules (referred to in Regulation (EC) No 1371/2007) prescribe significantly diminished passenger rights, it is important to point out to the fact that the provisions of COTIF-CIV 1999 have been ratified by all EU Member States³⁵ so the mutual relationship of the COTIF-CIV provisions and provisions of Regulation (EC) No 1371/2007 is resolved in such a way that the COTIF-CIV provisions on a particular issue are primarily applied, while Regulation (EC) No 1371/2007 indepen-

³⁴ An integral part of the COTIF and CIV which prescribes the right of railway undertaking to be relieved of liability in case of force majeure - Grabovac, I.; Kaštela, S., *Međunarodni i nacionalni izvori hrvatskoga prometnog prava*, HAZU-Knjževni krug, Zagreb-Split, 2013, p. 264

³⁵ Marin, *op. cit.*, note 31, p. 49

dently regulates the responsibility for additional rights that are not regulated in COTIF-CIV.³⁶ Given that the provisions of Regulation (EC) No 1371/2007 are in force in the EU, a different regulation of the issue of passenger rights covered in Regulation (EC) No 1371/2007 from the one covered in COTIF-CIV, would lead to a conflict between EU secondary legislation and international treaty.³⁷ As it is often the rule in international legal instruments that, despite the prescribed standards, domestic law is applied if it better protects certain rights (in this case the rights of passengers),³⁸ in accordance with such an opinion, the provisions of Regulation (EC) No 1371/2007 would take precedence.³⁹

The relationship between European legal provisions and CIV Rules, regarding the application of the institute vis majeure in passenger rail transport, was shown in the last European case law. In fact, according to the judgement of the Court of Justice of the European Union (CJEU) in Case C-509/11 railway undertakings are not exempt from the obligation to pay compensation in the event of a delay where the delay is attributable to force majeure. It is the position of CJEU that Regulation (EC) No 1371/2007 does not mention vis majeure at all (nor any other circumstance that could be equated with that institute),⁴⁰ on the basis of which the railway undertaking would have the right to be exempt from the refund obligation (price of the paid train ticket) in case of delay. On the contrary, the Court's view is that the European legislature intended to provide protection to passengers by extending the railway undertaking's liability for damages which, according to the CIV Rules, would not be covered in the case of vis majeure. Given the fact that the rights of passengers in rail transport should be protected, as a weaker party to the contract, the CJEU is of the opinion that any other interpretation of Art. 17 of Regulation No 1371/2007 would have the effect of calling into question the essential purpose of protecting the rights of railway passengers.⁴¹ Furthermore, the compensation system provided for by the EU legislature in Art. 17 of Regulation No 1371/2007 cannot be treated in the same way as the railway carrier's liability system under Article 32(1) of the CIV Uniform Rules⁴² (while CIV Rules apply to the passenger's right to claim compensation in case of delay, not to the right to claim a lump-sum compensation, e.g. the price of the railway ticket paid by the

³⁶ Grabovac; Kaštela, *op. cit.*, note 34, p. 264

³⁷ Radionov, *op. cit.*, note 29, p. 111

³⁸ This provision corresponds to the provisions of Art. 5 of CIV Rules governing the right of the carrier to assume greater responsibilities and obligations than those provided for in these rules

³⁹ Mudrić, *op. cit.*, note 17, p. 11

⁴⁰ Par. 50, Case C-509/11

⁴¹ Par. 51, Case C-509/11

⁴² Par. 39, Case C-509/11

passenger, and in respect of which, according to the provisions of Regulation (EC) No 1371/2007, he is entitled to receive a refund), therefore the carrier's grounds of exemption from liability provided for in Article 32(2) of the CIV Uniform Rules cannot be considered applicable in the context of Article 17 of Regulation No 1371/2007.⁴³ The author agrees with the reasoning of CJEU in Case C-509/11 despite the fact that, in case of *vis majeure*, rail passengers have the right to claim compensation from the carrier in case of a delay, and the right in question is not exercised by passengers in other transport modes.

Based on the above, in order to establish a balance between strengthening rail passenger rights and reducing the burden on railway undertaking⁴⁴ and to make the situation of passengers and carriers uniform in all transport modes, a *vis majeure* clause is proposed to be implemented in Regulation (EC) No 1371/2007. In fact, ensuring legal clarity is also what is intended by the Proposal for a Regulation of the European Parliament and of the Council on rail passengers' rights and obligations from 2017 for a recast of Regulation (EC) No 1371/2007⁴⁵ in which the European Commission proposes the introduction of force majeure clause in Art. 17, which would strike a balance between strengthening rail passenger rights and reducing the burden on railway undertakings.⁴⁶ In practice, that should result in a reduction in the financial burden on railway undertakings, but also in the restriction of passengers' entitlement to compensation in case of delay. In the Proposal from 2017, the European Commission proposes the introduction of force majeure clause that applies only in very exceptional situations caused by severe extreme weather conditions or major natural disasters⁴⁷ by allowing the railway undertakings to be exempted from the payment of compensation to passengers in case of delay if the delay is due to force majeure, i.e. a case of delay which the railway undertakings did not cause and could not prevent. Although passengers (consumers) are against the introduction of the *vis majeure* clause,⁴⁸ the author supports the efforts of most railway undertakings and Member States, as well as those of

⁴³ Par. 42, Case C-509/11

⁴⁴ European Economic and Social Committee, *Opinion on the "Proposal for a regulation of the European Parliament and of the Council on rail passengers' rights and obligations (recast)"*, OJ C 197, 2018. p. 67 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2018.197.01.0066.01.ENG&toc=OJ%3AC%3A2018%3A197%3ATOC], accessed 25. May 2020, (Opinion from 2018)

⁴⁵ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on rail passengers' rights and obligations from 2017 on amendment of the Regulation (EC) No 1371/2007*, 2017, p. 5, [<https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:52017PC0548&from=EN>], accessed 13 December 2019 (Proposal from 2017)

⁴⁶ Opinion from 2018, *op. cit.*, note 44, par. 3.1

⁴⁷ Proposal from 2017, *op. cit.*, note 45, p. 2

⁴⁸ Introduction of a force majeure clause in Regulation (EC) No 1371/2007 will have the effect of reducing passengers' rights to compensation, but passengers will still be entitled to assistance and care

the European Commission which aims to ensure legal certainty and harmonised application of the vis majeure clause in all transport modes (maritime, air, rail)⁴⁹ because a force majeure clause will ensure legal fairness and proportionality.⁵⁰ In my estimation the proposed solution should be formulated in a clear and unambiguous way, because otherwise, the interpretation of the terms “severe extreme weather conditions or major natural disasters“, may cause different interpretations and contribute to legal uncertainty. In order to prevent this, in the Preamble of the Proposal from 2017 it is stated that the mentioned event should have the character of an exceptional natural catastrophe, as distinct from normal seasonal weather conditions, such as autumnal storms or regularly occurring urban flooding caused by tides or snowmelt.⁵¹ From this, it can be seen that the definition of these terms is not provided, but instead descriptive guidelines are given as to which cases the said terms may refer to in order to facilitate their application in practice. The decision to apply a narrow definition of vis majeure was made because it establishes a fair balance between the interests of passengers and the railway industry.⁵²

According to Art. 18(1) of Regulation (EC) No 1371/2007, in the case of a delay in arrival or departure, passengers shall be kept informed of the situation and of the estimated departure time and estimated arrival time by the railway undertaking or by the station manager as soon as such information is available. In the case of a delay in arrival or departure of more than 60 minutes, passengers shall also be offered free of charge: a) meals and refreshments in reasonable relation to the waiting time⁵³ (if they are available on the train or in the station, or can reasonably be supplied);⁵⁴ b) hotel or other accommodation, and transport between the railway station and place of accommodation, in cases where a stay of one or more nights becomes necessary or an additional stay becomes necessary, where and when phys-

⁴⁹ According to the Opinion from 2018, *op. cit.*, note 44, par. 4.1., the introduction of a force majeure clause as such is warranted, in order to align rail with the other modes of transport

⁵⁰ European Commission, *Commission Staff Working Document Executive Summary of the Impact Assessment - Proposal for a Regulation of the European Parliament and of the Council on rail passengers' rights and obligations*, 2017, p. 2, [<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2017:0317:FIN:EN:PDF>], accessed 24. May 2020

⁵¹ Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council on rail passengers' rights and obligations - Outcome of proceedings*, 2020, par. 21, [<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017PC0548&from=EN>], accessed 23. May 2020

⁵² Proposal from 2017, *op. cit.*, note 45, p. 6

⁵³ European Commission considers “in reasonable relation to the waiting time” to mean that railway undertakings should provide passengers with appropriate assistance corresponding to the length of the delay and the time of day (or night) at which it occurs (Guidelines 2015, *op. cit.*, note 14, par. 4.4.1.)

⁵⁴ The railway undertaking will have to evaluate whether the provision of meals and refreshments is “reasonable”, taking into account criteria such as the distance from the place of delivery, the time required for and ease of delivery, and the cost (*Ibid.*, par. 4.4.1.)

ically possible; c) if the train is blocked on the track, transport from the train to the railway station, to the alternative departure point or to the final destination of the service, where and when physically possible.⁵⁵ If the railway service cannot be continued anymore, railway undertakings shall organise as soon as possible alternative transport services for passengers.⁵⁶

3. PROTECTION OF PASSENGERS' RIGHTS IN THE EVENT OF A DELAY ACCORDING TO THE PROVISIONS OF RAILWAY TRANSPORT CONTRACTS ACT FROM 1996

More than 20 years ago (1996) in the Republic of Croatia, Railway Transport Contracts Act⁵⁷ was passed, governing contracts on passenger⁵⁸ transport⁵⁹ in domestic rail transport and in international rail transport, unless otherwise provided by an international contract (RTCA, Art. 1). Railway undertaking's⁶⁰ liability for damages to the passenger in a case of delay or traffic interruption⁶¹ is governed by the provisions of Art. 16, 18 and 20 RTCA. According to Art. 16 RTCA, the railway undertaking or the person working on the transport at its request is responsible for damages to passengers resulting from a train delay or traffic disruption. The railway undertaking shall not be liable for damage caused by train delays or traffic disruptions if it manages to prove that the train delays or traffic disruptions

⁵⁵ Regulation (EC) No 1371/2007, Art. 18(2). It is important to note how, according to the data of the Report from 2013, *op. cit.*, note 15, par. 2.6., more than 40 % of Member States have exempted their domestic services which constitute more than 94 % of passenger rail travel from this article

⁵⁶ Regulation (EC) No 1371/2007, Art. 18(3)

⁵⁷ Railway Transport Contracts Act, Official Gazette No. 87/1996, entered into force on 24 October 1996 (RTCA).

⁵⁸ Passenger is a person who is entitled to transportation by contract (RTCA, Art. 4(1), point (3))

⁵⁹ In contract on passenger transport the railway undertaking agrees to transport the passenger to the designated station, and the passenger agrees to pay the railway undertaking the appropriate transport compensation (RTCA, Art. 5)

⁶⁰ The railway undertaking is company HŽ – Croatian Railways and other legal entity performing rail transport (RTCA, Art. 4(1), point (1))

⁶¹ If a passenger due to a train delay, for which he is not responsible, during transport loses connection to a port or due to the lack of a train or traffic disruption is prevented from continuing the journey (traffic interruption), he is entitled to: a) to require from the railway undertaking to transport him to the station of destination by the first following train or, if the first following train is not suitable, to otherwise transport it without charge; b) to require from the railway undertaking to return him with his luggage free of charge to the departure station for the first suitable train and to return the paid transport compensation without reduction; c) to cancel the further journey and to require from the railway undertaking to refund the transport compensation without reductions for an undivided part of the journey; d) to request the extension of the period of validity of the transport document for the duration of the circumstances under a); e) to request payment for the overnight stay at the B category hotel or other appropriate facility, if it is possible to continue the journey the next day (RTCA, Art. 14)

were not caused by his intent or gross negligence.⁶² The basis of a railway undertaking's liability is its presumed, qualified guilt, with the possibility of discharge if it manages to prove that the damage suffered was the result of a fault which does not cover the railway undertaking's intent or gross negligence. It is important to point out that the provisions of Art. 17 prescribe the exemption of the carrier from liability for damage that may result from a train delay if the cause of that train delay could not have been foreseen, avoided or prevented.

The railway undertaking shall be liable for damages due to train delays or traffic interruptions up to double the amount of the transport compensation if the delay or interruption of the journey was not caused by his intent or gross negligence.⁶³ It is a case of the limitation of liability, with loss of privilege in the case of qualified guilt when his liability is unlimited up to the full amount of the damage. In fact, if the railway undertaking fails to prove that the damage is not the result of the described behaviour, it will not be able to limit its liability, e.g. it will be liable to the full amount of the damage incurred.⁶⁴ Regarding the basis of liability, for damages caused by a train delay or traffic disruption when the so-called further damage⁶⁵ arises, the railway undertaking shall not be liable (in principle) if it proves that the delay or traffic interruption was not caused by its intent or gross negligence. If the train delay or traffic interruption is caused by the intent or gross negligence of the railway undertaking, it shall be liable up to the full amount of the damage, unlimited liability.⁶⁶

The passenger loses the right to make a compensation claim for damages due to the train delay or traffic interruption if he does not submit a compensation claim within 30 days from the time the journey was completed or should have been completed (RTCA, Art. 20).

⁶² RTCA, Art. 18(1)

⁶³ RTCA, Art. 18(2)

⁶⁴ See Jakaša, B., *Novi Zakon o ugovorima u željezničkom prometu*, Privreda i pravo, no. 6, 1974, p. 39

⁶⁵ In the event of delay, the railway undertaking shall only be liable for damage which is normally the foreseeable consequence of the fact of delay. These could be, for example, the additional costs incurred by the passenger as he missed a further connection to his final destination or had to wait unplanned for a continuation of the journey, then the cost of the stay, hotel expenses, food, payment of a higher amount of fare, etc. – Grabovac, I., *Temelj odgovornosti u prometnom pravu*, Književni krug, Split, 2000, p. 96

⁶⁶ Grabovac, I., *Prijevozno ugovorno pravo Republike Hrvatske*, Književni krug, Split, 1999, p. 135

4. PROTECTION OF PASSENGERS' RIGHTS IN THE EVENT OF A DELAY UNDER THE ACT ON RAILWAY SERVICES MARKET REGULATIONS AND ON RAIL PASSENGERS' RIGHTS PROTECTION FROM 2017

On July 1, 2013 the Republic of Croatia became an EU Member State and from that date the implementation of Regulation (EC) No 1371/2007 to which the Railway Act from 2013⁶⁷ directly refers began. According to Art. 62(1) of the Railway Act from 2013, the rights and obligations of rail passengers are regulated by Regulation (EC) No 1371/2007, however, transitional and final provisions (Art. 65(10) Railway Act from 2013) prescribe a deferred application of Arts. 15 -18 of Regulation (EC) No 1371/2007 on minimum passenger rights in case of a delay until 3 December 2014 with the possibility of extending the deferred application (decided by the Minister).⁶⁸ Considering that even after 3 December 2014, according to Art.1 of the Decision on the postponement of the period of application of Regulation (EC) No 1371/2007 on rail passengers' rights and obligations,⁶⁹ the beginning of the period of application of Arts. 15 - 18 of Regulation (EC) No 1371/2007 was prolonged, i.e. postponed for a further 5 years (until 3 December 2019), on 4 December 2019 the final implementation of the abovementioned provisions began in the Republic of Croatia as well.

With the entry into force of the Act on Railway Services Market Regulations and on Rail Passengers' Rights Protection from 2017⁷⁰ the legal framework for the implementation of Regulation (EC) No 1371/2007 in the Republic of Croatia has been established. In Chapter IV of the Act "Protection of Passengers' Rights" the Croatian legislature has prescribed the competence of the national regulatory authority to perform regulatory and other tasks in the field of railway services, e.g. Croatian Regulatory Authority for Network Industries (Regulatory Body) to act in the following matters in the field of the protection of passengers' rights: a) enforcement of Regulation (EC) No 1371/2007; b) acting *ex officio* in the protection of passengers' rights;⁷¹ c) resolution of a dispute at the request of passen-

⁶⁷ Railway Act from 2013, Official Gazette No. 94/2013, 148/2013. On 6 April 2019 entered into force the new Railway Act from 2019, Official Gazette No. 32/2019 and Railway Act from 2013 ceased to apply

⁶⁸ See more Marin, *op. cit.*, note 31, p. 51

⁶⁹ Decision on the postponement of the period of application of the Regulation (EC) No 1371/2007 on rail passengers' rights and obligations, Official Gazette No. 120/2014, entered into force on 10 October 2014 (Decision)

⁷⁰ Act on the Regulation of Railway Services Market and the Protection of Passenger Rights in Rail Transport from 2017, Official Gazette No. 104/2017, entered into force on 2 November 2017 (Act)

⁷¹ The authority of the Regulatory Body to act *ex officio* is standardised by the provision of Art. 29 Act by virtue of which the Regulatory Body has the power to initiate *ex officio* proceedings and to order

gers regarding the complaint to the railway undertaking's Consumer Complaints Commission (Commission)⁷² and d) inspection in the area of protection of passengers' rights, which is performed by Regulatory Body performing the functions as public authority.⁷³

The full implementation of Regulation (EC) No 1371/2007 in the Republic of Croatia came only on 4 December 2019, when the provisions of Art. 36 of the Act prescribing misdemeanour liability in the area of protection of passengers' rights in rail transport entered into force. According to Art. 36 (2), points (8 - 9) of the Act, a fine in the amount of 30,000.00 to 100,000.00 HRK shall be imposed on the legal person if (as a) railway undertaking: a) did not immediately provide the passenger with a choice between rights of reimbursement of the full cost of the ticket, continuation or re-routing (Regulation (EC) No 1371/2007, Art. 16) when it was expected that the delay in arriving at the final destination under the contract of carriage would be greater than 60 minutes; and b) the compensation of the ticket price was not paid within 30 days after the submission of the request for compensation (Regulation (EC) No 1371/2007, Art. 17 (2)) in case of unannounced delays more than 60 minutes.

Furthermore, by Art. 36(2), points (10 – 12) of the Act, a fine in the amount of HRK 30.000,00 to HRK 100.000,00 shall be imposed on the legal person if they (as railway undertaking or station manager⁷⁴): a) do not inform passengers about

railway undertaking, station manager, ticket vendor and tour operator to comply with the obligations laid down in Regulation (EC) No 1371/2007 and other regulations governing passenger rights. In the procedures under consideration, the railway undertaking, station manager, ticket vendor and tour operator are obliged to participate and fully cooperate with the Regulatory Body and submit all necessary information, documentation and statements. According to the imposed measures to the railway undertaking, station manager, ticket vendor and tour operator - these entities are obliged to act

⁷² The rights of passengers to make a written complaint to railway undertaking are governed by Art. 30 Act. In fact, where a passenger considers that his/her rights as a passenger have been violated, he/she has the right to make a written complaint to the railway undertaking for the protection of his/her rights, which is regulated by Regulation (EC) No 1371/2007, this Act and other regulations governing passenger rights within 30 days of learning about an action, process or omission of an action that the passenger believes violates his or her rights. In respect of a timely filed complaint, railway undertaking is obliged to provide the passenger with a written reasoned decision on the complaint within 30 days from the receipt of the complaint (which must include instructions for further action), and the passenger is entitled within 30 days from the date of delivery written decisions from railway undertaking, submit a complaint to the Commission in accordance with the regulation governing consumer protection. The Commission is obliged to provide a written response to the passenger within 30 days from the day of receiving his complaint, which must include instructions on how to proceed before the Regulatory Body

⁷³ Act, Art. 28

⁷⁴ Station manager means an organisational entity in a Member State, which has been made responsible for the management of a railway station and which may be the infrastructure manager (Regulation

the situation (delay) and the estimated departure/arrival time as soon as such information were available to railway undertaking (Regulation (EC) No 1371/2007, Art. 18(1)); b) do not offer to passengers provided services free of charge (Regulation (EC) No 1371/2007, Art. 18(2)) and c) do not offer alternative transport services for passengers as soon as possible, if the railway service cannot be continued anymore (Regulation (EC) No 1371/2007, Art. 18(3)). Solutions, featured in Art. 36(2), points (8 – 12) of the Act, entered into force on 4 December 2019⁷⁵ presenting measures which strengthen passenger rights in rail transport.

5. CONCLUSION

In a systematic way, this paper analyses the European and Croatian legal provisions on passengers' rights in case of a train delay. The quality of the standardisation and the uniform application of the provisions on rail passengers' rights and obligations at European level is not conducive to the fact that a large number of EU Member States has exempted some provisions of Regulation (EC) No 1371/2007 from application in domestic transport. This resulted in a different legal protection of passengers' rights in some EU Member States over the past 10 years (from 3 December 2009 when Regulation (EC) No 1371/2007 entered into force). The paper points to the normative regulation of the liability issue of a railway undertaking for damages to passengers in case of a train delay according to Croatian legal acts: RTCA from 1996, Railway Act from 2013 and Act from 2017. A legal analysis of the provisions in question was presented, with particular emphasis on the extent of the protection of passenger rights in the Republic of Croatia, as a full member of the EU, considering that the Republic of Croatia has delayed the application of Regulation (EC) No 1371/2007 in respect of the liability of the railway undertaking for a train delay until 3 December 2019. The author concludes that the Croatian legal provisions are in line with current international and European legal sources. Specifically, European law has introduced the COTIF-CIV provisions in Annex I to Regulation (EC) No 1371/2007, thereby becoming an integral part of Regulation (EC) No 1371/2007 applicable to national (domestic) and international rail transport of passengers in EU Member States.

Although the provisions of Regulation (EC) No 1371/2007 on the liability of the railway undertaking for damages caused by passenger delays indicate the application of the CIV Rules (which exclude its liability in case of *vis majeure*), the provisions within Regulation (EC) No 1371/2007 itself do not prescribe the pos-

(EC) No 1371/2007, Art. 3(1), point (5))

⁷⁵ See Act, Art. 40

sibility of exempting the railway undertaking from liability to make a refund (payment of compensation) to a passenger in the event of a delay resulting from vis majeure. It is possible to say that this can be understood as some form of conflict between the content of provisions of Regulation (EC) No 1371/2007 (which provide greater protection of passenger rights in case of delay as they do not allow for the exemption of the railway undertaking from liability in case of vis majeure) and CIV Rules. However, that was exactly the intention of the European legislature. Indeed, the main goal of adopting Regulation (EC) No 1371/2007 was to ensure greater protection of passenger rights in railway transport, so the intentional non-application of vis majeure clause (which is applied in maritime, land and air transport) should contribute to greater competitiveness of rail transport in relation to other transport modes.

The author has analysed in detail the legal effects of applying the above provisions in practice, especially pointing to the judgement of the CJEU in Case C- 509/11 on the ticket price compensation in the event of a delay whereby the railway undertaking is not allowed to be exempt from its obligation to pay compensation in the event of a delay where the delay is attributable to force majeure. In view of the above, taking into account the justification of harmonisation of passengers' rights in all transport modes and the requirements of legal certainty, the author supports the European Commission's position on the proposed amendments to Regulation (EC) No 1371/2007 regarding the introduction of force majeure clause in Art. 17 of Regulation (EC) No 1371/2007.

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