

## **APRA RECCOMENDATIONS ON**

Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002.

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## **APRA Recommendations Regarding Draft Guidelines 261/2004**

### **Introduction**

APRA is the European Association bringing together Passenger Rights Advocates throughout Europe, advocating an Air Passenger Regulation that offers legal certainty, improves conditions and truly protects the European traveler. Through one of its members, APRA possesses a database, analyzing some 13 million flight and weather statistics every day, making the database more comprehensive than the ones used by air traffic regulators and even the airlines themselves. Collectively, APRA possesses many years of experience in passenger rights litigation as experts on the Regulation 261/2004. APRA advocates an Air Passenger Regulation that offers legal certainty, improves conditions and truly protects the European traveler.

### **Overall impressions of the guidelines**

APRA welcomes the guidelines as they summarize and explain crucial Rulings by the ECJ in matters relating to the interpretation of Regulation 261/2004 and passenger rights in general. APRA largely agrees with and supports the ECJ Rulings as they have, by and large, been fair towards both consumers and airlines. Nevertheless, our analysis of the Draft Guidelines has resulted in a number of questions and remarks on specific articles within the guidelines. These will be set out below.

### **Recommendations**

#### ***Article 3.2.6 Rights associated with cancellation***

*Cancellation of a flight gives a right to reimbursement, re-routing or return as defined in Article 8 of the Regulation, a right to 'care' as defined in Article 9 and, under Article 5(1)(c), a right to 'compensation' as defined in Article 7. The underlying principle of Article 5(1)(c) is that compensation is to be paid if the passenger has not been informed of the cancellation sufficiently in advance.*

*However, compensation does not have to be paid if the carrier can prove, in accordance with Article 5(3), that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.*

*When a flight is finally cancelled after having been delayed by at least five hours and if the passenger has already exercised his or her right to reimbursement following a delay according to Article 6(1)(c)(iii) and Article 8(1)(a), he or she should be contacted by the operating carrier and receive compensation in accordance with Article 7.*

In accordance with article 6.1 iii of the Regulation, passengers are eligible for complete reimbursement of the price of the airline ticket when a flight is delayed for more than 5 hours, referring to article 8.1(a):

*1. Where reference is made to this Article, passengers shall be offered the choice between:*

*(a) — reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant*

In article 3.2.6 of the draft guidelines, the Commission suggests that:

*When a flight is finally cancelled after having been delayed by at least five hours and if the passenger has already exercised his or her right to reimbursement following a delay according to Article 6(1)(c)(iii) and Article 8(1)(a), he or she should be contacted by the operating carrier and receive compensation in accordance with Article 7.*

EU claim argues that a passenger should be eligible for compensation as soon as it is known that the flight will be delayed by 5 hours or more and the passenger chooses to no longer take this flight, as the damage suffered from a 5-hour delay is as big as the damage of a cancelled flight. In other words, a five-hour delay should be seen as equal to cancellation and therefore give right to compensation. Whether the airline chooses to actually cancel the flight or not is irrelevant in this context.

## ***Article 5.2. Right to reimbursement, re-routing or rebooking in the event of denied boarding or cancellation***

As regards the following excerpt:

*As a general principle, the choice offered to passengers under Article 8(1) is to be made once, when the passenger is informed about the cancellation of the flight. As soon as the passenger has chosen one of the three options under Article 8(1)(a),(b) or (c), the air carrier no longer has any obligation linked to the other two options, and any right to compensation according to Article 7 also ceases*

APRA believes the Commission may have made an interpretation error, as in the case of a cancellation, the passenger always has a right to care in accordance with articles 8 and 9, as well as compensation, in accordance with article 7.

## **Article 5.4.2. Compensation, denied boarding and connecting flights**

*Passengers on connected flights must be compensated where, in the context of a single contract of carriage with an itinerary involving directly connecting flights and a single check-in, an air carrier denies boarding to some passengers on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight. In contrast, if passengers have two separate tickets for two consecutive flights and delay of the first flight means that they are unable to check in on time for the following flight, the following air carriers is not obliged to pay compensation. However, if the delay of the first flight is over three hours, the passenger would in fact be entitled for compensation from the carrier operating this first flight, but not from the carrier operating the following flight, which has denied boarding due to late check-in.*

This article of the guidelines is based on case C-321/11 Rodriguez as it explains that passengers have a right to compensation if they are denied boarding on the second leg of their flight, which was caused by a delay on the first leg. APRA argues that the Rodriguez case has been superseded by the C-11/11 Folkerts case, which considers the entire flight from departure to final destination, making denied boarding to the second leg of the flight irrelevant. Should the European Commission wish to maintain article 5.4.2 of the guidelines, APRA advises clarification as regards to which airline is responsible. APRA argues that it should not matter whether a flight consists of two separate tickets (in case of an alliance), as the airline of the first flight is responsible for causing the delay.

## **Article 6.4. Airport congestion due to bad weather conditions**

*In accordance with Recital 14 of the Regulation, the case of an operating air carrier being obliged to delay or cancel a flight at a congested airport, due to bad weather conditions resulting in capacity shortages, would stem from extraordinary circumstances.*

This article of the guidelines seems to be a Commission opinion as it is not based on any ECJ ruling. In fact, APRA has rulings by the Dutch Courts in which it is decided that airport congestions, even if these were initially caused by bad weather conditions, cannot be classified as being the result of extraordinary circumstances without limits. As certain airports deal with bad weather on a very regular basis, it is unjust towards the passenger to use bad weather in the early morning as a reason for delays in the late afternoon.

## ***Article 9.1. Jurisdiction under which action can be brought under the Regulation***

*For flights from one Member State to another Member State, carried out on the basis of a contract with a single air carrier which is the operating carrier, a claim for compensation under the Regulation can be brought, at the applicant's choice, to the national court which has jurisdiction over either the place of departure or the place of arrival, as stated in the contract of carriage, in application of Council Regulation (EC) No 1215/2012 ('Brussels I'). Under Article 4(1) of Brussels I passengers also retain the option of bringing the matter before the courts of the defendant's (air carrier's) domicile.*

APRA wishes to verify whether this article of the guidelines will be applied when a passenger booked a package via an agency and falls within the scope of the Package Travel Directive (90/314/EEC). APRA argues that a passenger purchasing a package travel in his own country, should be able to bring a claim for compensation to the national court for the country where he purchased his package.