

## **The Regulation Works!**

### **An analysis of the Impact Assessment On Proposal for the Amendment of Regulation 261/2004 on Air Passengers Rights**

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## 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 statistic every day, making the database more comprehensive than the ones used by air traffic regulators and even the airlines themselves. Based on these data, APRA has made a factual analysis of the Impact Assessment Accompanying the document *'Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air'*, the findings of which are presented below.

Our main conclusion: The Regulation works!

## Background

In February 2010, the European Commission ordered a report, evaluating the functioning of Regulation 261/2004, by independent transport consultancy *Steer Davies GLeave*<sup>1</sup>. This report concluded that there were compliance issues by air carriers with the Regulation, as well as ineffective and inconsistent implementation by a number of Member States. Shortly thereafter, as most Europeans will remember, the volcanic ash cloud of April 2010 closed down large parts of the European airspace. In 2013, the Commission tabled a proposal<sup>2</sup> amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. The proposal was accompanied by a comprehensive Impact Assessment<sup>3</sup>, attempting to analyse the extent and underlying reasons of the observed shortcomings of the legal framework as well as possible solutions. **However, figures held by APRA show that crucial conclusions of the Impact Assessments are based on incomplete or inaccurate facts.** Below we will outline important conclusions of the Impact Assessments and why they are flawed.

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<sup>1</sup>[http://ec.europa.eu/transport/themes/passengers/studies/doc/2010\\_02\\_evaluation\\_of\\_regulation\\_2612004.pdf](http://ec.europa.eu/transport/themes/passengers/studies/doc/2010_02_evaluation_of_regulation_2612004.pdf)

<sup>2</sup>[http://www.europarl.europa.eu/registre/docs\\_autres\\_institutions/commission\\_europeenne/com/2013/0130/COM\\_COM%282013%290130\\_EN.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2013/0130/COM_COM%282013%290130_EN.pdf)

<sup>3</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0062:FIN:EN:PDF>

## The Impact Assessment

The document states that:

*'When it comes to compliance with regulatory obligations, there are in theory two counteracting forces at work. On the one hand, enforcement (both sanctioning policy and individual enforcement) should give a direct incentive to airlines for compliance. On the other hand, costs induced by the Regulation that cannot be recovered in an appropriate manner could lead airlines to try to find ways to avoid granting passengers their rights. The 2010 and 2012 external studies, the 2011 Commission Communication and the contributions to the public consultation confirm that the observed lack of compliance is encouraged by a combination of two factors:*

- (1) An insufficiently effective and uniform enforcement regime across Europe, and;*
- (2) Certain costs of the obligations imposed by the Regulation constitute strong disincentives to compliance. (p.13)*

### 1. The myth of increased cancellations

**It is stated in the Impact Assessment itself that** *'Delay data are broken down by cause or by carrier type but cannot be broken down at the same time by carrier type and by delay cause. For cancellations, no official data are available; therefore estimates were made on the basis of the data provided by some of the interviewed air carriers.'* (p.18, footnote 19).

**Yet it continues that** *'The financial compensation can have a disincentivising effect [...]*

*1. The Sturgeon judgement has fixed a one-trigger time threshold of 3 hours for compensation in cases of delay. However, many delays cannot be resolved within the three hours fixed in the judgement and this – in combination with the next point – strongly discourages airlines from complying, as suggested by airlines and their associations during the consultation. In addition, as shown in section 7.2.1 (on p. 55), a short time threshold may increase the number of cancellations.'* (...) p. 19. **Despite this lack of important supporting data, the Commission concluded that the number of cancellations was very likely to rise. This conclusion is not based on facts but a 'guesstimate' at best.**

The conclusion that cancellations would increase was based on the report *'Sensitivity analysis of airline schedule optimization (ASO) advanced model'* by Danica Pavlovic. In this paper the ASO model (software system) provides a proposal for a new flight schedule in situations when a carrier's flight schedule is disrupted which could minimize the negative effects of the disruption. **However, the negative effects discussed in the paper did not include the EC Regulation and focussed solely on airline profit maximisation against the operational costs of delays and cancellations.** The report **did not conclude that the number of cancellations would automatically increase if**

the 'penalty' for delays would increase. In the proposed model, the 'optimal' solution (in the case where delays incur a higher penalty) provided by the system would be to ensure that by changing the rotation of the fleet both the priority and non-priority flights would be performed on time.

Whilst considering **option 2: Balancing stronger enforcement policy with economic incentive**, the impact assessment considers that *'It avoids cancellations that risk arising under a strict application of the 3-hour delay for compensation for delay. Indeed, airline schedule optimization models show that a short threshold may increase the number of flight cancellations where airlines reduce the knock-on effects of delayed flights on the subsequent flights by cancelling one or several flights to reposition the aircraft for a next flight.'*(P. 56) whilst referring to the aforementioned ASO report.

**The combination of limited data and the misinterpretation of the ASO report make conclusions of increased cancellations false. In fact, since the Judgment in joined cases C-581/10 Nelson and Others v Deutsche Lufthansa AG and C-629/10 TUI Travel and Others v Civil Aviation Authority the number of non-extraordinary cancellations in The Netherlands, Germany and United Kingdom (EUclaim case study countries) has only decreased! (see Annex 1)**

## 2. Marginal Financial Implications

The Impact Assessment states that:

*'The proportion of passengers claiming compensation for cancellations and delays ("claim rate") is assumed to slowly increase over time under the influence of information campaigns, the work of commercial claim services and, potentially in some Member States, introduction of provisions allowing collective action to claim compensation on the part of a group of consumers. Almost the entire compliance costs is carried by airlines, **although the biggest part will ultimately be borne by the passengers through higher fares.*** (P.22)

The average cost of the current Regulation in a 'regular year' is approximately between €1 and €3 per passenger, depending on the claim rate. In the new Regulation, this estimation is between €1 and 2€. The actual current average is €1.63 so **any potential gains can only be very marginal. On the passenger side however, a decrease of benefits by 11% (!) is expected compared to the existing Regulation. APRA believes therefore that the marginal potential gains for the airlines are disproportionate to the losses in benefits for the passenger, whose protection is the Regulation's primary purpose.**

**Conclusion.**

Whilst the improvement of passengers' rights in any way shape or form is to be welcomed, APRA is not convinced by the Impact Assessment accompanying the proposal to amend Regulation 261/2004. In fact, Based on the evidence given above and the figures in the annex of this document, contradicts key predictions and assumptions made in the document and one can only conclude that the current Regulation works in terms of passenger rights and passenger compensation.

*See annex 1 The myth of Increased Cancellations Dispelled: Three Case Studies (NL, DE, UK)*

