

Air Passengers' Rights Regulation (EC) 261/2004

Regarding passenger rights in the event of any delays, canceled flights and/or denied boarding

Position Paper

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Summary.

- **APRA warns that the current state of the revision of the Regulation (EC) 261/2004 (EC 261) will worsen the situation for air passengers, rather than improve it.**
- **The revision needs to be updated according to current circumstances. Compensation amounts should be raised, as they have lost over 40 % of their real value since 2004.**
- **Extraordinary circumstances should not be codified as this would not do justice to the need to always consider all circumstances of each individual case.**
- **In the key cases dealt with by the European Court of Justice (ECJ), the rights of passengers were reinforced and enhanced. Any new legislative proposal must be used to codify the ECJs important rulings rather than go against them.**
- **The threshold above which passengers are entitled to compensation must, in accordance with the relevant ECJ rulings, remain uniformly at 3 hours.**
- **The notice period for cancellations in Art. 5 lit. c) of EC 261 should be increased from 2 to 8 weeks in order to compensate passengers for higher cost and additional effort when rebooking.**
- **Air carriers continuously make claims as to the high cost burden to them stemming from EC 261 without providing any proof. In reality the cost of EC261 to airlines is negligible.**
- **According to EC 261, airlines are required to rebook flights also on other airlines. In order to ensure that airlines actually comply with this requirement, violations must be punished with claims for damages.**
- **Delayed, lost or damaged luggage should be covered by the scope of EC 261.**

Introduction.

APRA is the European association bringing together passenger rights advocates throughout the continent. APRA advocates an air passenger regulation that offers legal certainty, improves conditions for, and truly protects the European traveler. While the current proposal contains some improvements, it also gravely diminishes the rights of passengers in a variety of aspects to such an extent that the revision would lead to an overall deterioration of the current situation.

Experience in recent years has shown that the basic mechanisms underlying the Regulation work. An increase of the efficiency of these mechanisms is best achieved by strengthening passenger rights. Diluting these rights would go against the core objectives of the Regulation as laid out for example in Recitals 1 (*“Action [...] in the field of air transport should aim [...] at ensuring a high level of protection for passengers”*) and 4 (*“The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonized conditions in a liberalized market.”*) of EC 261.

Endorsable Improvements.

APRA recognizes some positive elements within the current proposal to revise EC 261 and explicitly supports the following amendments:

- The European Parliament's Amendment 1, which considers flight tickets to be "**result contracts**", whereby airlines guarantee to fulfill the obligation to take passengers from one predetermined place to another with the utmost care.
- The European Parliament's Amendment 5, which will make the **no-show policy** more customer friendly by prohibiting the denial to board the return flight if a **passenger did not embark on the outward journey** of a ticket.
- The European Parliament's Amendments 10 and 11 which call for the creation of a **guarantee fund or insurance scheme** to ensure that passengers are protected when an air carrier goes bankrupt or loses its license. To further this aspect, airlines should be prohibited from claiming the purchase price for tickets until a few weeks before the scheduled departure date.
- The proposed obligation for air carriers to offer **re-routing on other air carrier's services** or other transport modes as well as the fact that passengers shall also be entitled to claims due to missed connections and tarmac delay.
- The European Parliament's Amendment 43 which states that denied boarding includes flights for which the **scheduled time** of departure has been **brought forward** with the consequence that the passenger misses that flight.
- The European Parliament's Amendment 55 which would widen the scope of the Regulation to cases of passengers traveling under **other modes of transport** in accordance with the ticket of the airline.
- The fact that Recital 8 would allow for reasonable **correction** of booking errors provided **free of charge**.
- The reasonable limitation of financial responsibility for air carriers in the case of extraordinary circumstances through the suggested amendments to Article 9 of the proposal. The reduction of these financial obligations would greatly benefit the air carriers, making it **unnecessary to further reduce their financial burden** at the cost of reducing passenger rights in other regards.
- The European Parliament's Amendment 145, which states that airlines shall **compensate their passengers first** before being able to bring any claim against the airports or service providers for lost, delayed, or damaged luggage, for which they are not necessarily responsible.
- The fact that **planned labor disputes** should not be considered as extraordinary circumstances (cf. Amendment 167).

Deteriorations.

The remit of EC 261 is to **enhance passenger** rights and ensure that air carriers are incentivized to transport passengers in a timely manner as well as to resolve any problems as quickly as possible. However, both the European Commission's proposal and the amended text adopted by the European Parliament contain elements that negatively influence air passenger rights gravely, far outweighing the potential benefits as laid out above.

First of all, the current proposal is overly focused on the alleged financial burdens of air carriers. Recital 11 suggests increasing the **thresholds above which delays give rise to a right to compensation**. While air carriers keep complaining about the allegedly high costs, they **have never provided any evidence of the actual financial impact** of EC 261, nor of any data to corroborate an increase in cancellations.

Even the Commission's own Impact Assessment¹, which estimates the cost of EC 261 in its current version to be 10.4 million euros (aggregated for all air carriers, NPV 2015 to 2025), predicts only a very marginal cost decrease by 0.6 million euros if the suggested changes are adopted. With an average of 959,4 million flights being subjected to EC 261 per year (between 2010 and 2020)², the proposed **threshold increase** would lead to a **decrease in cost of 0,01 cents** per flight. Such a negligible difference does not justify a reduction in air passenger rights.

Furthermore, in a Commission working document³ on the impact of the 3-hour delay compensation, it was stated that less than 1 percent of medium-haul flights and **0.4 percent** of short-haul flights were affected by the obligation to pay compensation.

The **proposed raise of the thresholds for delay compensation based on arrival time and distance (Article 6) is a huge step backwards**. The circumstances that originally led to the codification of a three-hour threshold for delays as being acceptable have not changed. Raising this threshold, which has been confirmed by the ECJ in the Sturgeon and Böck, Nelson and Folkerts cases, would be a mere handout to airlines.

While a **precise definition** of the term "**extraordinary circumstances**" is sensible and would increase legal certainty, the proposed exhaustive listing of these circumstances would make it impossible to address new developments and would thus lead to a weakening of passengers' rights. The large number of supreme court decisions by national and European courts on the interpretation of EC 261 clearly shows that even supposedly similar and easily differentiated cases actually **require genuine case-by-case decisions**.

¹ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0063:FIN:EN:PDF>

² <https://www.statista.com/statistics/1118397/air-passenger-transport-european-union/>

³ https://ec.europa.eu/transport/themes/passengers/doc/sec_2011_428_staff-working-paper.pdf

Necessary Additions.

Compensation amounts in Article 7 (1) of EC 261 were set in 2004, have not been adjusted for nearly 20 years and have **lost over 40 %** of their former value. In the light of the current inflation-crisis, APRA calls for an increase of these amounts to **€ 400, € 600 and € 800**. The **notice period** for cancellations in Art. 5 lit. c) of EC 261 must be increased from two to **eight weeks** in order to give passengers a realistic chance to rebook.

Checked luggage has become an additional service for the airlines. In view of the 2022 luggage chaos and subsequent poor treatment of passengers, there is a clear need for passenger rights protection in this area. Well-defined protection should be established, including rules for **compensation of lost, damaged, or delayed luggage**, with defined waiting times and minimum compensation levels. The value of luggage should not be arbitrarily decided by the airlines. Instead, a **minimum compensation of € 400** in case of lost luggage is prudent. Furthermore, a minimum **€ 300 instant compensation** should become effective for a luggage delay of more than 48 hours, to alleviate the cost burden on the passenger for immediately having to replace essential items.

Despite the current provision in Art. 8 I lit. b) of EC 261, airlines still often **refuse to rebook flights on other airlines**, forcing passengers to arrange for alternative transportation themselves and at their own financial risk. However, being able to use the earliest possible alternative transportation is crucial to the passengers, as this can determine the success or failure of their trip, especially for very short trips. In order to ensure that airlines actually comply with these requirements, passengers should be granted a (lump-sum) compensation entitlement, passengers should be granted a (lump-sum) **compensation** entitlement in the event that an airline violates this obligation. Airlines often do not respond at all when passengers file their claims directly with them, forcing them to seek legal assistance to enforce their rights. Without the airline's collaboration passengers are unable to determine whether they are entitled to a claim. **Airlines should** be required to **pay** all the passengers' **legal expenses** if they do not respond within **two weeks**.

Conclusion.

Whilst the improvement of passengers' rights in any way shape or form is to be welcomed and whilst well-intended at the time of its original drafting, the **negative effects** of the proposal in its current and amended form far **outweigh the potential positive effects** on air passenger rights. The proposed revision of EC 261 would thus de facto harm air passengers rather than help them. APRA strongly advises a **re-drafting of the revision**, reflecting the clear need for stronger air passenger protection and enforcement.

Experience shows that airlines will only refrain from canceling flights that are not fully booked at short notice if this is economically unattractive for them. **Adequate lump-sum compensation**, which must be paid for delays of more than **three hours**, will motivate airlines to fulfill their contractual obligations and thus are the most effective means of achieving the objectives of the Regulation.