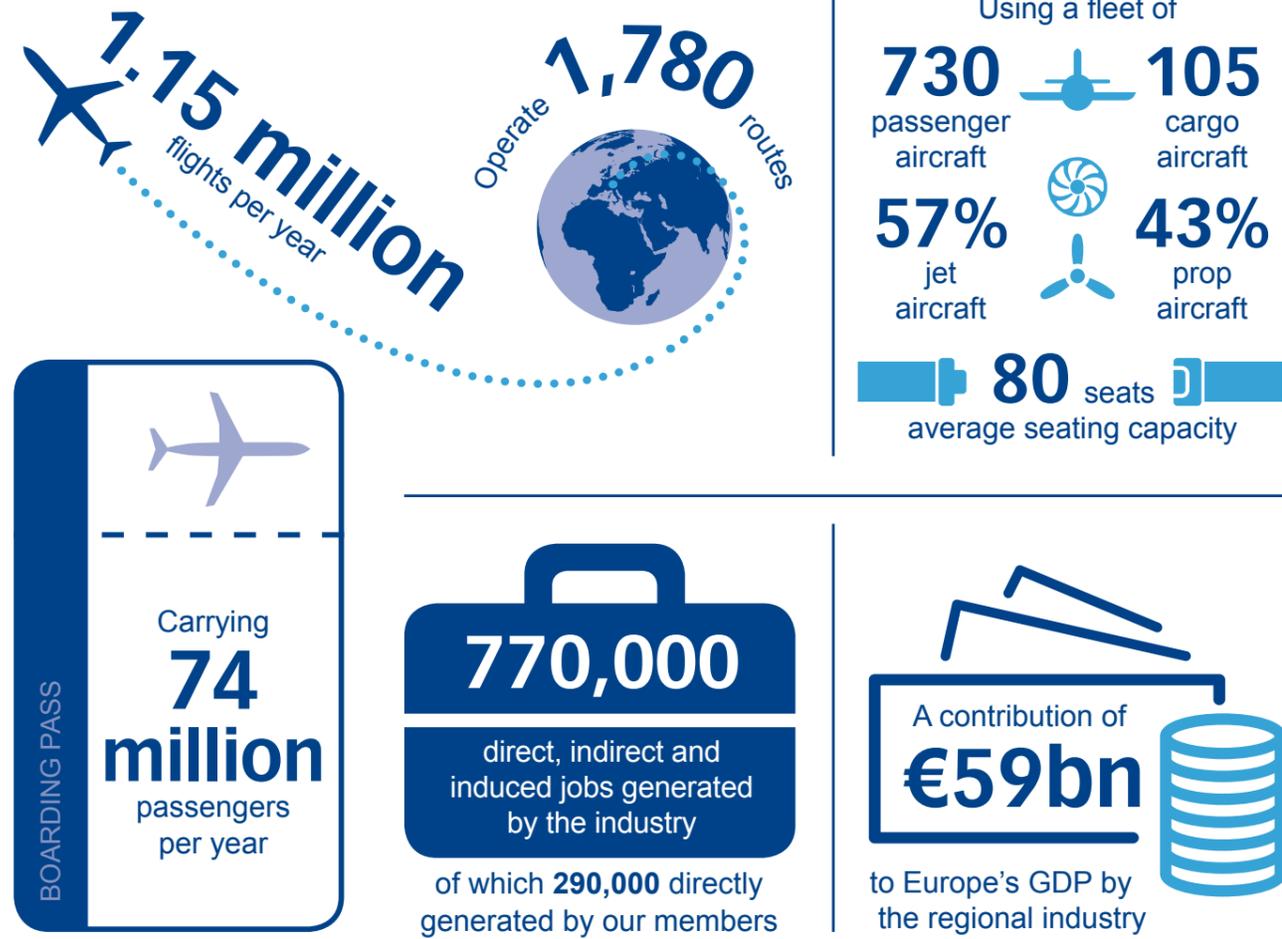


An ERA study into Regulation EU261: passenger compensation for delayed or cancelled flights

Does it really protect the passenger?



ERA MEMBERS IN NUMBERS



ERA MEMBERS



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TESTIMONIALS

“ A hugely flawed assumption behind EU261 is that airlines do not care about their passengers, which ignores the highly competitive market that ensures that all airlines place great emphasis on customer service. Even so, we would not object to a revised regulation that would be fair to both passengers and airlines. Regulating for compensation amounts as much as 10 times the paid fare is clearly unbalanced and unfair. It will, and has, put airlines out of business, close down connectivity routes, have a massive impact on regional economies and most threatening of all, EU261 threatens safety. The future, unless EU261 is revised, will be a consolidated market controlled by a handful of big airlines, low fares and competition will be gone, and the European project will be fractured irreparably as connectivity is lost. ”

Andrew Kelly,
Group Director Corporate Affairs, ASL Airlines and President, ERA



“ Luxair fully understands that in case of disruption to our flights we need to take utmost care of our passengers and provide for their immediate needs until satisfactory solutions are found. We are also willing to compensate passengers for their inconveniences suffered. It is our obligation to provide customers with the quality service we promised. However, it cannot be that we have to pay compensation amounts that are not related to what customers have paid for their tickets, and often considerably more. In 2018 we paid out more than €3m in compensation. This represents more than one per cent of our revenue margin. Knowing that revenue margins for regional airlines are seldom higher than four per cent, this constitutes an essential risk of airline failures at a time where airlines face highly-volatile cost positions – such as fuel – and yield pressures. ”

Martin Isler
Executive Vice President Airline, Luxair



“ For Binter, protection of passengers and respect for their rights is a priority. We understand that current regulations lack proportionality, objectivity and consistency (or could be improved) in their application and the cost for airlines greatly affects their results, which ultimately has a negative impact on customer service, quality standards and even connectivity. ”

Miguel A. Suárez, CCO
Binter Airlines



“ EU261 is causing direct and tangible damage to the range of services available to consumers and it is pushing up regional air fares. Loganair has cancelled services on rural routes in Scotland as the liability for customer welfare due to weather disruptions outweighs any economic return from those routes. Beyond the increase in fares and reduction in services, the regulation is also acting against customers' interests as it is creating more flight cancellations as we seek to protect subsequent flights from delays to mitigate overall exposure to compensation claims. Connections to and from regional points are also being inhibited as minimum connection times are being increased to reduce compensation liabilities arising from missed flight connections. As the regulation is now clearly detrimental to the interests of both consumers and the airline industry, it is high time for change to be implemented. ”

Jonathan Hinkles, Managing Director
Loganair



“ My biggest issue with EU261 is not that passengers receive compensation, but the fact that this is a serious safety threat – fully recognised by all responsible persons in the industry as a risk except the authority (EASA) and the EU politicians. It is shameful and irresponsible beyond anything I have experienced during my 30 years in the aviation industry. ”

Captain Jesper Rungholm
CEO/Founder, DAT Group



“ Regional airports are putting hundreds of local communities not just on the European map but also on the global one. They are essential – and in most cases irreplaceable – engines of economic regeneration and development. Today, there is no escaping the fact that to develop tourism, attract inward investment and create local jobs, an airport is a vital part of the equation. ”

Olivier Jankovec
Director General, ACI EUROPE



“ Connectivity is the key for economic and social wellbeing of all European citizens. It is important for both, big airports or hub and regional airports. Hubs cannot function properly if they are not being 'fed' by flights coming from all corners of the European continent. Regional airports, especially those located in remote areas in Europe, rely on aviation to be connected with the economic heart of Europe to secure welfare in the regions. ”

Sergi Alegre Calero
President, ARC



“ EU261 represents a further disadvantage for domestic routes as the charges have a disproportionately higher impact on less expensive routes. Compensating €250 on a flight that costs €50 is clearly absurd. Brexit has placed UK aviation in a unique situation that presents risks, but also opportunities. Leaving the EU offers the potential for the UK to address this iniquity and for further reforms to be made to the current regulatory framework for airlines. The UK should use this opportunity to establish a less stringent regime for domestic flights. ”

Christine Ourmières-Widener
Former CEO, Flybe



“ In 2018, the turnover for Tus Airways was €18m. The total sum paid by the airline in passenger compensation was €950,000. This figure represents more than 5 per cent of the airline's total turnover. ”

Because of this, in 2019 Tus Airways cancelled all routes where profitability was uncertain and all routes with a high probability of flight delays due to a potential long taxi at the airport, ATC strikes, heavy traffic routes, and overloaded airports with new last minute 'calculated take off times'.

All of this minimised the airline's service to the public. Tus aircraft will now operate two rotations a day per aircraft instead of the three to four rotations a day last summer. Only 50 per cent of aircraft will be in operation every day and the rest of the fleet is standing by to ensure smooth on-time performance. We also had to dramatically reduce the number of the airline employees (more than 60 per cent fewer compared to last year). No need to explain what happened to the flight tickets price on all routes we stepped away from. ”

Michael Weinstein
Director Corporate Affairs, Tus Airways



“ The Conference of Peripheral Maritime Regions (CPMR) – following the request of its member regions – has introduced in 2017 air transport as a working priority. Air transport emerged as an area of interest, because of its crucial role for the social and economic development, connectivity and accessibility of peripheral and maritime regions. The CPMR areas of work are: Public Service Obligations, state aid to airports and airlines, airport slot regulation and the greening of the aviation sector. ”



EXECUTIVE SUMMARY

ERA (European Regions Airline Association) represents 51 European airlines, many of which operate regional and intra-European flights. They are predominantly small and medium-sized enterprises (SMEs) providing essential connectivity and logistical support to Europe's regions. EU261 bears significantly more heavily on them than on larger airlines, especially in light of how the regulation has been interpreted by the Court of Justice of the European Union (CJEU). This is both anti-competitive and unfair. This additional exposure and its existential threat to regional operators has until today been ignored by the EU laws, though the Canadian Air Passenger Protection Regulations took a different path: SOR/2019-150 which has just been published recognises and protects regional carriers in terms of the amount of compensation payable.

The tension between safety and compensation for delays and cancellations is also explicitly recognised in the Canadian regulation and needs to be addressed by the EU.

We have entitled this study 'An ERA study into Regulation EU261: passenger compensation for delayed or cancelled flights. Does it really protect the passenger?' The reason is that the current regulation as it stands and after subsequent interpretations by the CJEU entails:

- risk of losing connectivity and interlining;
- risk of regional and small airlines disappearing;
- risk of services to remote regions;
- damage to the national economies of certain countries; and
- concerns about safety.

This ERA study has been published to complement the current review being conducted by the Steer Group on behalf of the EU, given that we consider it does not recognise separately regional carriers and therefore will not provide a proper, full evaluation of the particular impact upon regional operators and as a result their needs will not be fully understood by the EU.

We have assembled a group of experts with outstanding reputations in their various disciplines whose pro bono reports are included and who support the following observations:

- EU261 as drafted has been rewritten by successive decisions of the CJEU which have significantly eroded the defence of 'extraordinary circumstances'; redefined delay as being synonymous with cancellation and created an obligation to pay compensation in respect of it; created a limitation period of up to 10 years in certain European states enabling passengers, and claim farmers/chasing agencies in those states, to make claims for delays occurring in the distant past. No impact assessment has been undertaken with regard to these decisions.

Their affect upon carriers is considerable and have led, amongst other factors, to several small and medium-sized European airlines ceasing business.

- EU261 as amended by the CJEU is an existential threat to regional carriers as a group, without whom connectivity and logistical support for the regions and local communities would be lost.
- EU261 imposes almost double the cost per passenger on regional carriers than others and is, therefore, discriminatory and anti-competitive. These costs result in cancelled routes, reduced opportunities for new services, and the deterioration in financial health of regional operators.
- Airline employees are aware of the cost consequences of delay and cancellation imposed by EU261. Despite the best of intentions, the inherent human tendency of confirmation bias can result in decisions by individuals which stretch the limits of operations; in part at least to preserve their jobs. Whilst regional carriers would never jeopardise safety to stay in business, studies show that the increased cost of EU261 cases is adversely impacting safety margins. The EU has undertaken no enquiry into these studies or, it would seem, the vulnerabilities of confirmation bias.
- EU261 assumes that the cost to carriers it creates can be recouped from third parties causing the delay or cancellation. This assumption is misconceived and fundamentally flawed. It ignores the fact that a recovery is often impossible, because there is no-one from whom a recovery can be made due to the applicable law or the standard contractual allocation of risk in the aviation industry, such as those contractual exclusions that operate in favour of airports and ground handlers, which regional carriers are powerless to renegotiate.
- In 2013 the Commission proposed a revision of EU261, including proposals aimed at reducing its most costly aspects for carriers. However that revision has languished and because of the length

of time that has passed since its publication, the Commission has now commissioned a further report by Steer on EU261. Regrettably, the request for this report does not identify regionality as a core issue to be investigated failing to include a regional carrier as one of the airlines to be studied in depth, and is unbalanced in considering a small number of carriers on the one hand and a significant panoply of consumer interests on the other, including those with a direct financial interest in maximising short-term compensation over long-term European cohesion,

regional connectivity and industrial success. This ERA report has therefore been prepared to focus on regional carriers and provide a full assessment of the impact of the regulation on these operators. Furthermore, the lack of focus upon SMEs – as regional carriers invariably are – means that any resultant report will not be able to satisfy the impact assessment requirements of the EU's own guidelines and associated toolbox, nor will any impact assessment based upon it.

RECOMMENDATIONS

As it stands, EU261 threatens to decimate the regional airline industry; it is anti-competitive, unfair to regional carriers, and is not fit for the purposes for which it was intended. To achieve those purposes and to preserve regional aviation, we would recommend:

- 1 Operators with an annual passenger load of 2.5 million or less in the preceding year should be subject to reduced compensation of 50 per cent.**
- 2 There should be a complete exoneration from compensation on PSO routes, subsidised or regulated, to avoid reduction of connectivity.**
- 3 There should be a cap on the liability towards passengers limited to the proportion of the airfare that the operator bears (that is, compensation per flight and not per journey).**
- 4 Extraordinary circumstances should account not just for the one flight directly affected but for the whole flight programme for the day to acknowledge the knock-on effect on subsequent flights.**
- 5 There should be a complete exoneration if delays or cancellations arise for any safety-related reason (in line with the recently-approved Canadian regulation).**
- 6 To allow the airline enough time to perform all the necessary operational checks, the time threshold should be extended from three to five hours.**
- 7 The regulation should provide that an airline incurring costs and expenses as a result of the application of the regulation may not be prevented from recovering such costs and expenses by any contractual provision excluding or limiting liability.**



Montserrat Barriga
Director General
ERA



Sean Gates
Legal Counsel
ERA



FOREWORD

Gallagher Aerospace is one of the world's leading providers of aerospace insurance and risk advisory services. To date we represent in the region of 40 per cent of airlines globally and in our capacity as risk specialists we see a myriad of emerging and existing risks that threaten the aviation sector. As risk advisors, few issues concern us more than the increasing, and often fatal, impact of European Regulation (EC) 261/2004 (EU261).

In the current landscape, airlines already face a multitude of ever-increasing costs. Rising fuel prices, crippling Air Passenger Duty and an endless list of taxes often leave little in the way of margins. Add to these costs vastly disproportionate penalties for EU261 for late and cancelled flights and many carriers are beginning to feel the pressure to break even.

Gallagher Aerospace has been working directly with a diverse range of carriers operating different aircraft and operating systems to understand just how badly the regulation is impacting carriers. Analysing data direct from airlines at a granular level has allowed us an unparalleled insight into the true effect of the regulation. In this review alone we have analysed in the region of 170,000 rows of flight data, including 135,000 flights, 30,000 rows of customer data and more than 1,500 delays or cancellations.

What our findings show consistently is that EU261 is having a crippling effect on airlines' finances. It is no exaggeration to say in recent times a carrier can expect expenditure on EU261 compensation, and care and assistance costs, to double year on year regardless of the size of the operation. For the airlines involved in this

report alone, the amount spent on passenger claims has increased by 326 per cent since 2016 and when the penalty is an average 296 per cent more than the price the passenger paid for the ticket, it is clear the regulation is unsustainable and inequitable.

This review focusses on the smaller carriers where the effect is critical. Regional airlines have a unique service offering in Europe and often have a close tie with local communities that rely heavily on their services. At the same time, these operators run on much smaller budgets than their full service and LCC rivals. Paying three times the ticket price for a cancellation wipes out revenue many times over and threatens the ability of regional airlines to cover their costs on any given route.

Our analysis of EU261 focusses on several participating ERA member airlines and the consequences the law is having on their finances. We have worked in close collaboration to review data direct from these carriers to fully understand the impact the regulation is having. The review will demonstrate the disparity between ticket price, revenue and compensation payments, the effect EU261 has had on punctuality and finally a comparison with other legislative frameworks.

What will become very clear is that in its current form the regulation is harming smaller operators on a scale that is entirely unsustainable. If action is not taken to amend the punitive charges for EU261, it is inevitable that more airlines will collapse. This will perhaps be the ultimate irony; a law that was designed to assist passengers will be directly responsible for removing the services that so many European travellers rely on.

➤ EU261 DATA AND ANALYSIS

PARTICIPANTS

The review has received 170,000 entries of flight data and 30,000 rows of customer data from four participating airlines. The dataset and our analysis is comprised of:

135,000+
2018 flights analysed

7.24m
Passengers carried

74
Number of aircraft operated

12.48 years
Average fleet age

209
Destinations

METHODOLOGY

The analysis carried out in this review was run from flight and customer data as provided by participating airlines. In each case we received granular level information that includes:

- Flight data including a flight number, original departure location and arrival location as well as an actual departure and arrival location. For each entry we received the number of seats used on flight and the actual arrival time versus scheduled arrival time.
- Customer data including anonymised individual passenger identification and flight numbers, date of the claim being made and the amount.

For each participating airline we applied our standard framework of EU261 analysis as summarised below:

- Analysis of flight data to determine participating airlines' total EU261 exposure, the main causes of delays and cancellations and the worst affected routes, airports and aircraft.
- Analysis of customer data to determine the amount airlines have paid in compensation as a result of

Our analysis so far has focussed purely on the compensation a passenger can claim in the event of delayed or cancelled flight that qualifies under the regulation. It is important therefore to note that the costs presented in this paper will always be subject to increase with additional expenses outlined as above.

One of the main objections by regulators examining EU261 is the lack of information on the impact of the law. Our approach satisfies this concern by using direct data to draw as accurate a picture of EU261 as possible. Granular level data from airlines allows us access to delay codes that determine if a flight qualifies for EU261 and why a flight is late. This is the only way

delayed and cancelled flights, including weekly, monthly and annual levels of incurred compensation.

- Performance of a matching exercise between flight and claims data to identify any significant data anomalies.
- Conceptual analysis using ticket price information and aviation fuel price data to provide an indicator of airline revenue against EU261 exposure (and/or compensation paid).

Omitted from our analysis were the following:

- Duty of care costs such as hotels, refreshments and transfer charges even though these more than double the financial impact of EU261.¹
- Increased infrastructure costs. Most airlines have had to invest heavily in systems to respond to passengers or full-time legal assistance to process erroneous and false claims.
- Emergency lease costs. For smaller operators it is financially impossible to have standby aircraft waiting and therefore wet leasing aircraft at short notice is often the only option. This comes at a cost, in some cases a six-figure sum.

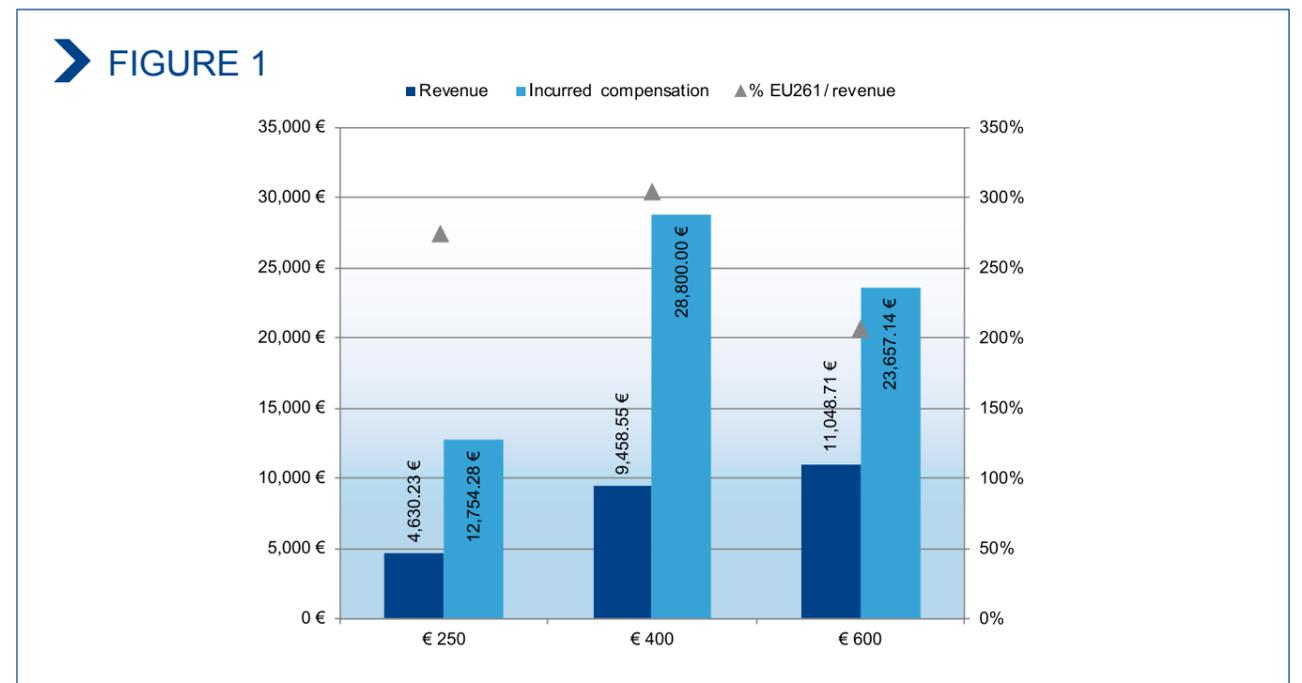
to understand the exact reason for a delay as no other entity aside from the airline holds this information.

This approach also avoids disparities and inconsistencies in EU261 findings that other reports have fallen victim to. To date, most airlines have been asked to provide high-level summaries of delays and cancellations and will often report this information in a different manner. Some may provide information on just delays for example, whilst others can only supply cancellation information. Our approach working with granular-level data from airlines avoids these traps and provides consistency and accuracy.

1. Regulation (EC) No.261/2004 of the European Parliament and of the Council, Article 9, Right Care.

FINDINGS AND RESULTS

EU261 COMPENSATION INCURRED PER FLIGHT VS REVENUE PER FLIGHT

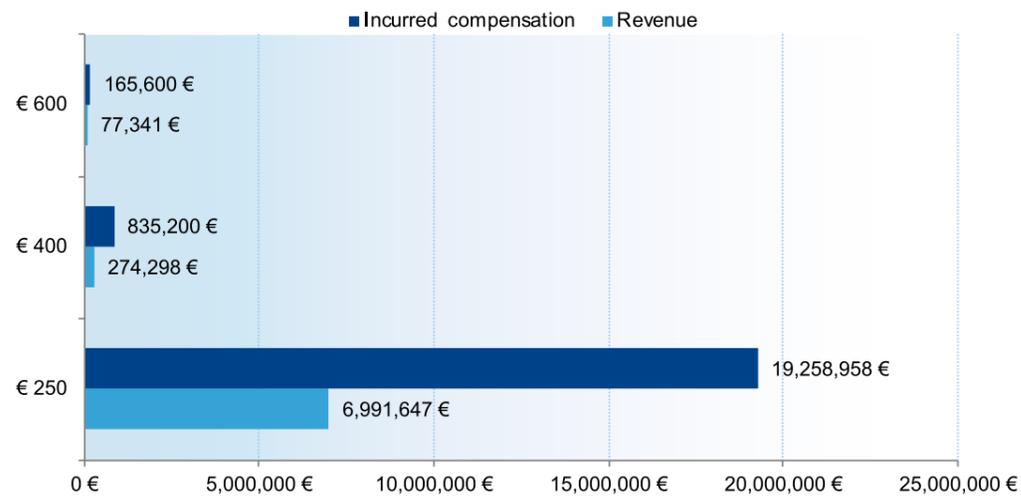


- The above analysis focusses on compensation incurred by airlines for delayed and cancelled flights that qualify for EU261 versus the revenue made on that flight.
- Our results have been divided into each bracket of compensation that can be claimed by a passenger depending on the length of travel, as follows:
 - Flights 0–1,500km: €250 per passenger.
 - Flights 1,500km–3,500km: €400 per passenger.
 - Flights 3,500km+: €600 per passenger.²
- Figure 1 shows the disparity between the amounts of revenue made on a flight versus the amount of compensation incurred during a delayed or cancelled flight as calculated by the number of passengers on board. Revenue has been calculated either directly from airlines' own figures or from publicly-available sources and averages €90.20 per ticket per passenger.³
- Our results show that in each EU261 compensation band, the amount incurred is significantly more than the revenue made on a given flight. For example:
 - €250 flights: compensation is on average 275.46 per cent more than the revenue made on a single flight.
 - €400 flights: compensation is on average 304.49 per cent more than the revenue made on a single flight.
 - €600 flights: compensation is on average 214.12 per cent more than the revenue made on a single flight.
- In total, compensation incurred is at 275.9 per cent more than the ticket price. Across all bands of compensation this equates to a €2.59 penalty for every €1 of revenue made on claimable flights.
- In real terms, this often means that airlines who have experienced a delay on a high-frequency route have to run subsequent flights on time for at least another two to three rotations before the cost of EU261 is covered. Most regional airlines (and the carriers in this report) operate high-frequency short-haul routes that are typically less lucrative than long-haul operations. This has a profound impact when it comes to revenue versus incurred compensation, as seen in Figure 2.

2. Article 7, Right to Compensation.

3. IATA DDS.

FIGURE 2



- Figure 2 shows that the majority of regional flights are in the €250 bracket. Revenue earned is at €6,991,647 and the amount of compensation incurred and owed by airlines to passengers is €19,258,958.
- The statutory period of limitation in most European countries ranges from two to six years. In theory, this means that the amount incurred in Figure 2 could be claimed at any point in that timeframe making it incredibly difficult for an airline to budget accordingly.
- It is important to highlight that EU261 is a cost that is in addition to traditional costs incurred on a flight. The above omits fuel charges, staff salaries, landing costs, flight control charges, airport or ground handling fees.

DELAY RATE AND EU261 DELAY RATE

- The penalty for a delayed or cancelled flight for EU261 often implies that airlines on-time performance will have significantly improved to avoid such disproportionate charges. One of the drivers of the regulation was to improve punctuality across Europe.
- Table 1 illustrates the percentage of total flights for a given year that are delayed beyond 15 minutes and beyond three hours. It also shows the percentage of flights that are delayed over 15 minutes or three hours that qualify for EU261.

TABLE 1

	>=15m	>=3h	EU261 & >=15m	EU261 & >=3h
2016	13.80%	0.25%	12.20%	0.22%
2017	12.07%	0.23%	10.96%	0.20%
2018	16.33%	0.57%	13.21%	0.48%

- General performance by the carriers in this report is good, with the majority of three-hour plus delays only occurring on average on 0.48 per cent of all flights.
- Table 1 shows there is little correlation between the legislation and the punctuality rate of airlines involved in the study. In fact, for 2018 the number of delays exceeding 15 minutes actually increased from 12.07 per cent to 16.33 per cent. In relation to EU261 qualifying flights over three hours the increase was from 0.20 per cent to 0.48 per cent.
- For every delayed or cancelled flight it is the responsibility of the pilot to allocate a delay code to that flight. The delay codes are provided by IATA.⁴ Each airline will have their own set of delay codes that specify the exact reason for a given delay. This is information that only the airline is able to see.
- Analysis of the top five reasons for delay demonstrates that the primary cause for delay is delay itself. As follows:

TABLE 2

Delay code	Reason	Percentage of flights delayed
93	AIRCRAFT ROTATION, late arrival of aircraft from another flight or previous sector	68.43%
4	Airlines own internal codes	7.76%
46	AIRCRAFT CHANGE, for technical reasons	4.61%
81	ATFM due to ATC EN-ROUTE DEMAND/ CAPACITY, standard demand/capacity problems	3.84%
41	AIRCRAFT DEFECTS	3.38%

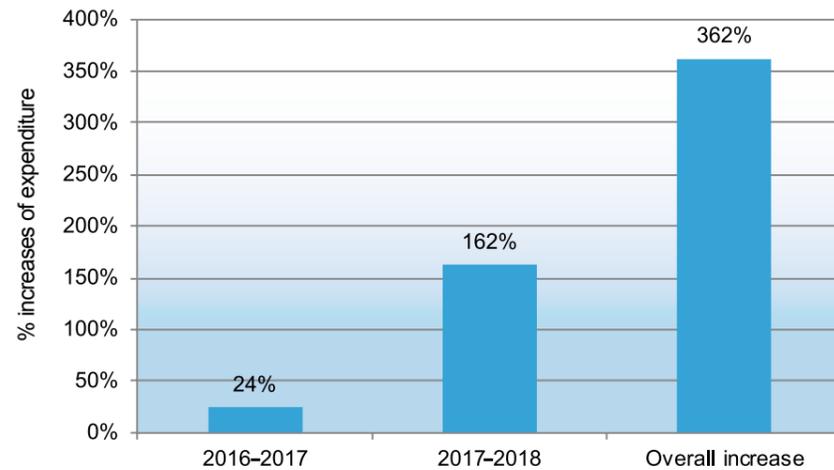
- For the majority of airlines, trying to rectify a previous delay creates further disruption in the network and accounts for nearly two thirds of all disruptions (68.43 per cent). In many cases three hours is not a long enough time period to resolve a problem.
- Many airlines in this study run high-frequency routes where an aircraft will operate the same route four to six times in a 24-hour period. One delay can quickly add up, and from the statistics we reviewed in Figure 1, the financial consequences quickly begin to mount up.
- In practice, to avoid these scenarios, airlines face the expensive and financially impossible task of having to have a reserve aircraft in waiting at each airport of operation as well as stores of spare parts ready and waiting as well as engineers at each station. This is simply not logistically or financially viable for a small carrier.
- After aircraft rotation, the next biggest contributor for delays are technical circumstances that the airline either encounters during regular operations or found during scheduled maintenance checks. If we remove aircraft rotation from our analysis, technical circumstances account for a combined 27 per cent of all delays to aircraft.
- If we combine Table 1 and Table 2 we can see there is a relative proximity in the figures for delays over three hours and delays over three hours that qualify for EU261. Given we know that almost a third of delays are technical, the information would suggest that when there is a technical circumstance three hours is simply not enough time to repair, inspect and certify an aircraft for re-entry into service.

EU261 CLAIMS RATE

- EU261 allows a passenger who has been delayed on a flight over three hours or on a flight that was cancelled within two weeks prior to departure to make a claim. As such, the amount an airline can expect to pay for EU261 depends on the number of passengers who come forward to receive their EU261 compensation.
- For the airline, checking whether the passenger was on the flight in the first place, whether the flight was delayed or cancelled and whether the reason for the disruption qualifies under EU261 is a very time-consuming task. Many airlines devote significant hours and investment into managing applications for compensation and responding to passengers in a timely manner (even if this means giving 50 per cent of the compensation to a claims company).⁵ Some airlines cannot even afford applications and have to manually check every item.
- Figure 3 shows the percentage increase in the amount airlines are spending on EU261 since 2016.

5. A copy of AirHelp's service charges can be found at <https://www.airhelp.com/en-gb/price-list/>.

4. A copy of IATA's "Standard IATA Delay Code (AHM730)" can be found at IATA <https://www.eurocontrol.int/sites/default/files/content/documents/official-documents/facts-and-figures/coda-reports/standard-iata-delay-codes-ahm730.pdf>.

FIGURE 3


- Figure 3 demonstrates the typical trend we see when it comes to the amount airlines spend on EU261 year on year. As the above graph demonstrates, the amount being spent on compensation has risen by 326 per cent since 2016.
- The premise of the law is for the passenger to make a claim, which has until now left airlines with some respite. However, we are now entering an environment where it is more likely that most, if not all passengers, will make a claim for compensation.
- Other alternative passenger rights frameworks differ significantly in the number of passengers that benefit, the amounts that can be claimed and the waiting period before a passenger is eligible to make a claim.⁶
- For the purposes of comparison and further discussion we have run flight and customer data over different passenger rights frameworks and metrics. This includes extension of the current three-hour waiting period or changes in the amount airlines could pay out in compensation.

ALTERNATIVE PASSENGER RIGHTS LEGISLATION

- EU261 is not the only passenger rights legislation in Europe or worldwide. Outside the EU, EU261 was copied in Israel, Turkey and most recently in Canada with equivalent passenger rights legislations.
- In each example we have illustrated a direct comparison with EU261 in its current form, for airlines in this review, as well as the revised alternative passenger rights framework. We have also included the amount these airlines would have incurred in compensation along with the number of passengers that would be entitled to make a claim.

COMPARISON 1 – EU261 WITH QUALIFYING FLIGHTS ELIGIBLE FOR COMPENSATION AFTER FIVE HOURS

- As it stands, airlines in this review have incurred liability in the region of €20.2m in compensation with 93,206 passengers eligible to make a claim. This analysis is based on EU261 in its current form as follows:
 - Flights 0–1,500km: €250 per passenger.
 - Flights 1,500km–3,500km: €400 per passenger.
 - Flights 3,500km+: €600 per passenger.
- The graphic on the next page applies EU261 in its latest form with an increase in the waiting period before which passengers can make a claim for qualifying delays from three hours to five hours. Cancellations that are not extraordinary circumstances are included as normal.
- Comparison 1 shows a decrease in incurred compensation by 79 per cent. The number of passengers entitled to make a claim also drops by 77,000.
- This means there is close to €16.03m in compensation for flights delayed in excess of three hours but below five hours.

6. Regulation (EC) 1371 and Regulation (EU) No. 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway.

Current EU261 regulation


€20.2m

Incurred compensation


93,206

Passengers entitled to claim

EU261 with waiting period increased from three hours to five hours


€4.17m

Incurred compensation


16,143

Passengers entitled to claim

COMPARISON 2 – EC1371 RAIL PASSENGER RIGHTS

- Regulation (EC) No. 1371/2007 on rail passenger rights and obligations follows the price that a passenger paid for the ticket.
- 25 per cent of the ticket fare if the train is between one and two hours late.
- 50 per cent of the fare if the train is more than two hours late.
- Comparison 2 details the amount airlines in this review pay under EU261 versus the amount passengers would have received when applying EC1371 parameters.
- Under the rail passenger rights legislation, the amount of passengers that would have benefited from some form of compensation would have increased 180 per cent.
- The amount airlines would have incurred halves to €11.1m, a 45 per cent reduction in the incurred compensation.

Current EU261 regulation


€20.2m

Incurred compensation


93,206

Passengers entitled to claim

Regulation amended to mirror EC1371


€11.1m

Incurred compensation


261,342

Passengers entitled to claim

COMPARISON 3 – CANADIAN TRANSPORT AGENCY'S PASSENGER RIGHTS BILL

- Under the Canadian Transportation Act, the Canadian Transport Agency has suggested new legislation to implement passenger rights in Canada.
- The new legislation proposes (carriers who have transported less than one million passengers in each of the two proceeding years) the following penalties for delayed or cancelled flights for small airlines:
 - CA\$125 (or €85) for delay of three to six hours.
 - CA\$250 (or €170) for delays of six to nine hours.
 - CA\$500 (or €340) for delays of nine hours or more.
- Comparison 3 focusses on the length of time that a flight is delayed by, rather than the distance a flight has flown, in contrast to EU261. We have applied the framework in euros for the purposes of this analysis.
- Under the Canadian framework for delayed flights, the airlines in this review would have incurred \$12.8m in compensation and 51,147 passengers would have benefited from some form of compensation.
- This model represents a 37 per cent reduction in incurred compensation and a 45 per cent reduction in the number of passengers who could claim when compared with EU261.

Current EU261 regulation


€20.2m

Incurred compensation


93,206

Passengers entitled to claim

EU261 amended to mirror Canadian Passenger Rights


€12.8m

Incurred compensation


51,147

Passengers entitled to claim

COMPARISON 4 – (EU) NO 1177/2010

- Regulation (EU) No. 1177/2010 concerns the transport of passengers by sea and inland waterway.⁷
- Article 19 states that in respect of delays compensation is linked to the ticket price. For passengers facing a delay at the final destination, the minimum level of compensation shall be 25 per cent of the ticket price for a delay of at least:
 - One hour in the case of a scheduled journey up to four hours;
 - Two hours in the case of a journey of more than four hours, but not exceeding eight hours;
 - Three hours in the case of a scheduled journey of more than eight hours, but not exceeding 24 hours; or
- Six hours in the case of a scheduled journey of more than 24 hours.
- If the delay exceeds double the time set out in points (a) to (d), the compensation is 50 per cent of the ticket price.⁸
- Applying this framework to the airlines in this review provides interesting results. The total incurred compensation more than halves to €7.27m whilst the number of passengers benefiting from compensation rises from 93,206 to 217,691.
- This represents a 64 per cent reduction in the amount airlines incur in compensation if aviation passenger rights followed Regulation 1177. The number of passenger with an eligible claim jumps dramatically by 133 per cent.

CONCLUSIONS

- EU261 is the only European passenger rights legislation in force that has predefined, statutory amounts of compensation with no relation to the value of the ticket. EU181 (bus/coach), EU1371 (rail) and EU1177 (maritime) limit the liability to the operator to a percentage of the ticket value.
- Within the above comparative frameworks, there is a correlation between time before compensation is due and the amount incurred.
- There has been much debate surrounding EU261 on how long it takes to remedy an issue found on an aircraft before takeoff. It's clear for the airlines analysed that increasing the delay period greatly reduces the amount of compensation incurred, as shown in Comparison 1 which applies a five hour delay period before a passenger can claim. The results are dramatic with €16.03m of compensation removed. This also suggests that 81 per cent of all available compensation for the airlines reviewed falls within the three to five hour delay bracket.
- It is interesting too that when compensation is tied to the ticket price there is a trade off between the number of passengers that benefit and the financial risk that an airline incurs, demonstrated in Comparison 2. In some regards the rail regulation could be seen as a 'win-win' as more passengers could receive a pay out and the airlines reduce their financial burden with a fair and proportionate penalty. This is even more profound in Comparison 4 when looking at maritime passenger rights with 124,485 more passengers eligible to claim compensation and a 64 per cent reduction in the amount an airline would incur. This raises serious questions for those airlines that compete with ferry services who are not operating with anywhere near the same financial penalties that the airlines in this review face.
- There is also an additional burden for non-Eurozone carriers that have resulted from fluctuations in the euro exchange rate. For example, in 2004 the GBP to euro exchange rate was GBP1.00 to €1.50 whereas today it is GBP1.00 to €1.09. The €250 compensation for UK carriers is therefore 38 per cent more expensive.
- Evidently there is a middle ground in passenger rights legislation that takes into account both passenger compensation, the amount claimable and the time it takes to resolve a delay. Comparison 3 and the proposed Canadian model takes into account all of these variables as well as the relative size of the carrier. Whilst still applying an arbitrary fixed amount, the penalty is less, recognising the difference between smaller operators and larger, more established airlines. In addition, the limitation of how much a passenger can claim by time would lessen the burden of compensation incurred by 37 per cent for airlines in the review, whilst still benefiting a significant number of passengers.

CONCLUSIONS – A LAW IN DESPERATE NEED OF CHANGE

EU261, as our research has shown, has had a disastrous and damaging impact on the small airlines included in this review. It is rather confusing why the European Commission settled on punitive levels of compensation at €250, €400 or €600, but the net result has been to create unsustainable financial liabilities on these airline's balance sheets.

The carriers in this review are indicative of ERA's members. It is entirely unfair that smaller carriers, who perform such a vital service to underserved locations in Europe, should be paying passengers 296 per cent more in compensation than the passenger paid for the ticket in the first instance. This disparity has harmed and will continue to harm the carriers in this review in a most damaging way, typically requiring three to four flights to cover the expense of a single delayed EU261 qualifying flight. When 68 per cent of EU261 flights are delayed due to an earlier incident it is not hard to see how dire the financial consequences are on high-frequency routes

The simple truth is that smaller-sized operators cannot be expected to have the same significant resources at hand to combat delays and cancellations as their low-cost and full-service carrier rivals.

Having an aircraft on immediate standby, employing a full-time contingent of dedicated EU261 in-house lawyers or investing in state of the art automated online systems to process claims cannot be funded with comparatively smaller revenues.

Delays and cancellations will always be a feature of the airline business and carriers do their best to make sure every flight runs on time and to schedule. However, under the current legislation, three hours is not a sufficient amount of time to remedy a delay, especially if technical. Given that we know close to one third of all delays are due to technical circumstances, the question must be asked: do we really want to put the kind of pressure that EU261 creates on those responsible for making sure that aircraft are operating safely?

Whilst time is running short on the safety front, it is also putting pressure on the general health of all airlines in Europe. Most carriers in this review make the majority of their revenue in the summer months where costs incurred over the less busy winter period are met and paid off. However, with passengers claiming in greater numbers, a 326 per cent increase since 2016, and with the disparity with ticket price being so vast, the ability for an airline to cover its costs in summer and create enough profit to survive into the next year is coming under severe pressure.

The situation is made all the more hopeless by the complete lack of consistency that the European Commission has demonstrated when it comes to passenger rights in other forms of transport. There appears to be a vendetta against the airline industry and as our analysis shows if airlines were treated the same as rail companies not only would compensation and therefore the financial burden decrease by 45 per cent but the number of passengers benefiting would increase by 180 per cent. Applying maritime passenger right regulations the difference is even more dramatic, a 64 per cent decrease in incurred compensation with 133 per cent more passengers able to claim. Why does the European Commission insist on penalising airlines so unfairly?

It is almost hard to believe that EU261 has been allowed to persist in its current form for so long. Passenger rights and the general health of the European airline industry are inextricably linked and the Commission needs to find balance between the two. If it chooses to continue with disproportionate and unsustainable levels of compensation penalties, as demonstrated, Europe only stands to lose more airlines and by default reduced services across the continent. Or, it can accept that the legislation in its current format is unfair and unfit for purpose. We sincerely hope it's the latter.

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7. Regulation (EU) No. 1177/2010 of the European Parliament and of the Council, 17.12.2010
8. Ibid, Article 19



My name is Peter Jorna and my profession is the application of psychology and human engineering to aviation systems and associated work.

I am a teacher and Professor at Cranfield University (UK) and also at Shanghai Jiao Tong University (China). My professional career included 18 years at the Netherlands

Aerospace Laboratory (NLR) in Amsterdam where I was head of the flight division; managing helicopters, operational military research, human factors and flight simulation departments. Since 2008 I have been an independent expert for the EU and the aviation industry, including flight deck certification for COMAC in China. I helped in the creation of many EU research studies (including on aircraft maintenance innovation and work processes) with many partners both in Europe, the US and now in China. For over 10 years I was a board member and President of the European Association for Aviation Psychology (EAAP).

Human behaviour and so-called performance-shaping factors are not only an important safety factor in terms of accidents and incidents, but also a big positive safety factor in making the overall system work properly and safely.

I have been asked whether the financial impact of EU regulation could influence the behaviour of otherwise safety-conscious employees of an airline –

notwithstanding their employer's insistence on compliance with high standards of safety practices – to take less than ideal steps to avoid delays because of their awareness of the significant financial implications for their employer of delays in operations.

That was a very interesting and also rather a disturbing question, as I recently came across a website that promised compensation when my aircraft was delayed. The amount was up to €600 each time! A relatively small aircraft such as the Airbus 320 carries up to 180 passengers, so 180 multiplied by €600 will create a cost factor of €108,000 to pay out after a delay of more than three hours. That is a lot, especially as airlines are known to be marginal businesses. But someone has made a business out of making claims by providing passengers with a very easy and tempting claims process. A sum of €600 is nice to have for anyone. But reading this caused some concerns for me.

Being an aviation psychologist with close to 40 years of experience, my first thought after reading the information on this claims website was “did they forget about the catastrophe in Tenerife in 1977”?

In this incident, two Boeing 747 aircraft collided on the runway, killing 583 passengers. Trying to avoid unnecessary costs for the airline played a role in these deaths. The aircraft were diverted and had to leave again within a certain timeframe to prevent problems with legal duty time limitations. Again, an example of legislation with good intentions, but with negative side effects.

➤ THE PSYCHOLOGY OF EU261



The behaviour and strategies of crew can be influenced, consciously or subconsciously.

In Tenerife, a KLM aircraft was cleared for takeoff, while a Pan Am aircraft was taxiing down the active runway. There was a thick fog, with no or very limited outside view. The messages from the tower to the two aircraft were unclear. The KLM crew nevertheless started the takeoff roll and collided with the Pan Am 747 which was still on the runway. Why did the pilot take such a risk during foggy conditions without visual confirmation of a free runway?

The captain of the KLM 747 aircraft cleared for takeoff was an excellent pilot – one of the best at the airline. But he was also in my opinion what is known as a ‘company man’. That is somebody who feels connected to the job and aligns their identity with their profession. He would have been very aware that any further delay would necessitate a change of crew, unloading the passengers, putting them in hotels, and so on. A big hassle to organise, awkward for the passengers and very costly! So, one can easily imagine that the captain would feel rushed and under pressure to leave on time.

Under such circumstances, psychology has taught us that so-called ‘decision biases’ come into play. One is that from all the data or information available, a person will prefer the information that supports their present need, strategy, decision, wish, and so on. Information that is contrary to these ideas is not easily picked up. Information needs to be very salient or impressive to break such a decision bias, in this case a ‘confirmation bias’. Many accidents demonstrate this phenomenon. So, in the case of Tenerife, there was fog and bad communication with only a single radio channel and in non-standard English at the time. Nevertheless, the captain assumed he was sure that it was OK to go for takeoff. It did indeed save the airline the fine as duty times were not broken, but the decision killed a lot of passengers and damaged the reputation of a good captain and safe airline. It was arguably the worst accident ever in aviation.

Did anybody in the EU team consider this disaster and the complex role of workers who are motivated to do a good job and fight for their pride and jobs? Were psychologists consulted? Or was Tenerife considered as an exception or a unique incident? Or didn't they know about it?

This brought to mind other well-known, but maybe not widely known, experiences in psychology that could shed some light on how people are influenced by external pressures such as rewards and fines.

My colleague Helen Muir, Professor of Aerospace Psychology, at Cranfield University investigated the



behaviour of passengers when evacuating an aircraft cabin in distress. Thanks to her, aircraft are now equipped with wider escape hatches and other safety provisions such as guidance via floor lighting. One of the methodological problems of experimental simulation of such evacuations is the motivational level of the participants. It makes a difference if there is a real fire or if you get a signal from an experiment leader to move forward through the cabin in an orderly fashion.

Muir's team thought about the right stimulus effects on behaviour and invented a reward scheme. Every tenth passenger or so that escaped would receive a small monetary reward. The effects on escape behaviour were astonishing and shocking at the same time. Passengers were not polite any more – and that is an understatement. They climbed over seats, pushed others away. The videos of these experiments are a bit frightening but still important as teaching material on how easy it is to influence human beings, even with small sums of money.

Safety needs have always been and are an important human motivator right after being fed, able to sleep and so on, as identified by Maslow's well-known hierarchy of human needs. At the bottom of the pyramid are physiological needs, followed by personal safety, security and employment, then love, esteem and last the highest level of self-actualisation.

So, employment, esteem and self-development are important human factors also, or maybe especially for airline staff. They are proud of their work as I have observed many times. The same holds for me!

People often work in teams and peer pressure in such a context can be strong. The conformity experiments of Asch showed that people tend to follow the opinion of the group even when it is obvious that the group is mistaken. Test subjects had to make simple decisions on the lengths of lines, sticks and the like, that were presented to them whilst being in a group. The group consisted of informed participants who made statements that were common to the group, but not actually correct. The group decision was still often followed by the test subject in the group. So, people tend to conform to what the rest of the group is saying and doing.

The response might be that the airline's management can issue a strong message that safety always comes first. Of course that is right. One accident like Tenerife could ruin a company easily. The persuasiveness of a higher-ranking individual can also be strong – as demonstrated by some nasty experiments. The Milgram experiment (1963) succeeded in pushing test subjects to give lethal electric shocks to others, situated in another room. Just wearing a white doctor's coat and instructing subjects that it was important for the study was sufficient to convince test subjects to use dangerously high electricity levels. Even when the recipient of the electricity was screaming. Obedience and avoiding conflict are strong emotional factors, but luckily for mankind, averaged over the experiments 57 per cent of the subjects did not fully obey. So, there will be individual differences in how people will respond to outside pressure. But still, many will.

Working not only involves being confronted with the opinions and beliefs of others, but also with their emotional states. What happens if your co-worker is angry, fatigued, demotivated or depressed? The experiments of Schachter and Singer (1962) revealed that the physiological state of one person will be observable by another who subsequently interprets this and adds a cognitive label. So, people copy and transfer emotional states. They join the crowd.

These are all lessons from the past that came to mind after reading the website offer to provide me with compensation after the delay of my flight. Nice for the passenger but will it affect the safety of aviation?

If we look at what psychology teaches us, there will be definite changes in behaviour of staff. Managers will make statements on paper that safety must come first, but people work with other humans and not with pieces of paper.

I think that everybody is aware that time pressure in doing your work can have a negative effect on the accuracy of the work delivered. Not at first, as people can invest extra effort in keeping performance up but only for so long. This very basic effect is called the ‘speed–accuracy trade off’.

It is normal and natural behaviour for workers to protect their work and income and they will really try to prevent unnecessary costs for their airline if they are aware that bankruptcy is around the corner. Numerous airlines have failed financially in the last 12 months. Given the fact that most workers are highly motivated to keep their jobs and income, it is natural for them to do everything in their power to do best for what they think is best at that moment.

Aviation is a serious business and very, very safe. It is always looking for improvements, such as equipment monitoring by computers in the aircraft. Mechanics are able to see and review the issues listed and decide on the spot to either clear it with a single delete action or create an official repair requirement. There are many instances where individuals will make such judgements.

What is the question to ask now with respect to the pros and cons of this legislation?

- Is EU261 good for passengers? Probably, but even €600 is not life changing.
- Is EU261 good for safety? Very likely NOT and an accident really is life changing ...

As an experienced aviation psychologist, I would therefore recommend reconsidering EU261 and thinking twice about what is important versus what is nice.

The European Association for Aviation Psychology (EAAP) can help in this situation with further psychological expertise. Please contact them for additional support.

Professor Peter Jorna
Researcher and aircraft passenger



The application of Regulation EU261 (compensation to passengers after delays or cancellations), with its concomitant financial consequences for airlines, is a major factor in the pressure our members are confronted with. In the interests of flight safety, we regard it as essential that the source of this pressure be mitigated, particularly on regional and other carriers operating with fewer financial resources, upon whom the regulation places comparatively greater pressure.

As licenced engineers, our job is to ensure that aircraft released to service are safe to operate. For years we have been lobbying the EU and EASA to stop national airworthiness authorities from allowing an administrative release to service process; a process which hinders the licenced engineer from assessing and supervising technical work performed on aircraft. Unfortunately, we can prove these procedures are still being used today.

A further alarming consequence of financial pressure is the delay in reporting technical faults on aircraft. Many are not reported until the risk of delay or cancellation is low. This normally means after the last flight of the day, usually at a base where maintenance can be easily performed. The consequence is that aircraft are flying with technical faults that have not been assessed by a licenced aircraft engineer as required by EU regulations.

The President of Aircraft Engineers International, Ola Blomqvist, is clear in his statement regarding this problem: "I can categorically state that our members are placed under pressure to release aircraft to service sometimes in circumstances which are marginal. I am also worried about the absence of any effective 'whistle blower' protection, and the mistrust in reporting systems, preventing these instances from being reported to the authorities."



Ola Blomqvist
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➤ LICENCED AIRCRAFT ENGINEERS UNDER PRESSURE – A THREAT TO AIR SAFETY

I am a Director at Baines Simmons, the aviation safety consulting and training division of Air Partner plc. We specialise in aviation regulations, compliance and safety, with a focus on aviation regulations, compliance and safety management. Baines Simmons is not financially impacted by EU261 and my comments are purely concerned with the impact that this regulation is having on aviation safety. We are not being paid for this work.

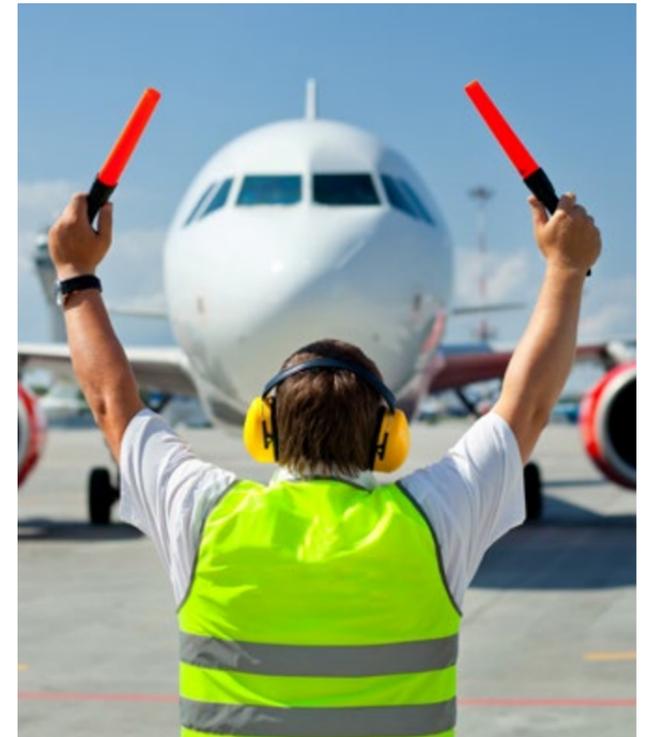
We partner with the world's leading civil and defence aviation organisations to improve safety performance. Our role is to advance best practice, shape safety thinking and drive continuous improvement to safety performance through our consulting, training and outsourced services.

My sole objective in penning this piece, is to improve aviation safety, something I have been personally striving to achieve for the last 25 years. We have worked with numerous airlines on safety performance initiatives over the last 17 years and during that time have listened to thousands of people that are directly involved in, or support commercial flight operations.

Initially, during interviews and conversations with a range of different airline staff, we were told about the ways people avoid delays that would incur compensation. In order to better understand the scale of the problem, Baines Simmons ran a confidential online survey in excess of 300 front-line staff at a number of operators and related aviation companies, asking a series of questions about perceptions, behaviours and decision making. In order to validate the answers provided, we asked respondents to give examples of such behaviour which confirmed our initial concerns.

The evidence we have gathered to validate the informal reports of some EU261-motivated unsafe behaviour can be illustrated with a simple analogy. Imagine you jump into a taxi at an airport and ask the driver how long it will take to get to your destination, and they respond, "It depends on traffic, but around 25 minutes." What do you think would happen if you responded, "Get me there in 25 minutes and I will pay you double"? Some drivers may be motivated to take risks, particularly if traffic is heavy. The risk taking is likely to be at or beyond the margins of legality, with personal driver judgement being the limiting factor.

Now suppose that you say, "OK I will use you, but if it takes more than 45 minutes, you have to pay me ten times the normal fare." If you could find a driver willing to take the financial risk, what would happen if the roads were gridlocked, or there's a lengthy diversion or they get a slow puncture or an engine warning? Now imagine that the driver works for a company that



is struggling financially or that they are at the end of a long shift and should be heading home. Again, some drivers will take risks under such perceived pressure.

I am sure that if I questioned a number of taxi drivers I would get a range of responses ranging from "There's no way I'm going to risk my license or life for any amount of money", through to "I'm a great driver and have never had an accident, so that won't be a problem", or "I don't take risks, I never exceed the speed limit by more than 20 per cent, but I have used the emergency stopping lane on the autobahn a few times when I've needed to."

I am not qualified to provide a psychology-based explanation for the different ways in which individuals may react to pressure to meet a deadline or impending financial loss, even if the pain is felt by an employer and not the individual. Let's just call it a human factor motivated by fear or loyalty, reinforced by experience of getting away with it, or that everybody does it – it's a norm and it's not a problem. Humans respond to pressure, make personal judgements based on their individual perceptions, are immersed in cultures and will take risks when they perceive that the rewards or penalties outweigh the risks. As humans, why would pilots be any different from taxi drivers – particularly if they are aware that the stakes are higher for their airline? From our work and as confirmed by the survey, we know this to be the case.

➤ THE IMPACT OF EU261 ON AVIATION SAFETY

Aviation safety is ensured by implementing and protecting multiple defences within organisations and machines to ensure that no single system failure can result in an unwanted outcome. When risks are being taken, sometimes routinely as a result of perceived pressure, then the safety system is eroded. This robust, multi-layered defence system has served us well, but nevertheless, a continuous and unpredictable erosion of the defences results in reduced safety margins.

Aviation accidents are now extremely rare, testament to systems of multiple defences and the effective maintenance of a safety culture. However, when accidents do occur, investigators find combinations of contributing factors, conditions, decisions or behaviours, each individually innocuous, but when combined with others they lead to bad outcomes. To date, we are not aware of any accidents that have their cause, even as a contributing factor, from the perceived pressure created by EU261. That is not to say that the regulation has not influenced behaviour or decision making before an accident, it's just that the causative link has not been made.

The results from our survey indicate widespread concern that EU261 is having a negative impact on safety; that the safety defences embedded in Standard Operating Procedures, aircraft system integrity and measures implemented to mitigate the human factor

are being eroded. We saw evidence of this throughout the responses we received, with the following high-level results:

- 67 per cent of respondents, professionals in their field, felt that the regulation had had a negative impact on aviation safety.
- 10 per cent of respondents stated that they had reported safety concerns relating to the regulation.
- 20 per cent stated that their employers had taken action to counter the safety threat from the regulation.
- 75 per cent of respondents feel that compensation is not justified when the reason for the delay is an unforeseen aircraft technical failure or event impacting aircraft safety.
- 49 per cent of respondents believe that EU261/2004 has had a negative impact on their organisation's safety culture.

There was wide variability between respondents, sometimes even from people employed by the same operator; some reporting an absolute commitment from leaders to safety standards, explicitly discouraging risk taking, whilst others within the same organisation had a perception of management pressure to avoid delays.

Some pilots categorically stated that the regulation has had no impact on their decision making and others gave examples of what they perceived to be risk-taking behaviour. Such is the nature of humans that their actions are driven by the situation at the time, their personal perceptions and past experience. Others are more susceptible to peer pressure or consciously do all they can to avoid significant financial penalties for their airline, possibly motivated by personal job security or financial fears.

Some people point to Safety Management Systems (SMSs) and state that appropriate mitigations to any safety threat, including this regulation, should be locally implemented. I say to them, many have tried to treat hazards within deeply flawed systems with reminders, training and good leadership, however the single truly effective safety risk mitigation is to permanently eliminate the root cause. That's simply the reality of 'Murphy's Law'.

Based on our real-world experience over the last 17 years, Baines Simmons has proven that to truly influence safety standards, recognition that humans, including taxi drivers and pilots, respond in an infinite number of unpredictable ways to situations and perceived or real pressure and this affects their behaviour and decision making. The most effective way to eliminate the threat to aviation safety known as EU261, is to amend the regulation to enable aviation professionals to delay aircraft when necessary for safety reasons, without financial penalty, whilst at the same time, taking steps to reduce delays for passengers, as far as practicable. It must be recognised that it is impossible to rectify all faults or aircraft damage within three hours and that this impractical EU261-imposed deadline has harmed safety standards.

It's time to deal with this major threat to safety. Thank you to the hundreds of aviation professionals that supported this work.



Robert Simmons
Director
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➤ EU261 – A LEGAL PERSPECTIVE



INTRODUCTION

Regulation (EC) No.261/2004⁹ (EU261) is one of the most controversial pieces of legislation ever produced by the EU. It is testament to this that it has given rise to 29 cases before the CJEU to date – more than any other piece of EU legislation. However, whilst it has been perceived by passengers affected by denied boarding, cancellation and long delays as a great benefit, as it now stands, just over 13 years after its entry into force,¹⁰ it represents a considerable, and unfair, burden for carriers.

The provenance of EU261 can be traced back to the common rules for denied boarding (in aviation) established by the EU in 1991 (91DB Regulation).¹¹

This provided for certain rights in the event of denied boarding¹² in terms of reimbursement or re-routing,¹³ 'minimum' compensation¹⁴ and care and assistance.¹⁵ As the European single aviation market¹⁶ gained strength, and the promotion of consumer protection was given priority by the Amsterdam Treaty,¹⁷ the EU sought to build upon this by extending regulation to both cancellation and delay.¹⁸ EU261 was the result of this initiative. Its recitals record its objectives to be "ensuring a high level of protection for passengers" and that because "the number of passengers denied boarding against their will remains too high, as does that affected by cancellation without prior warning and that affected by long delays", the EU should raise the standards of

9. Regulation (EC) No.261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No.295/91.

10. On 17 February 2005: see its Article 19.

11. Council Regulation (EEC) No.295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport. For the purposes of this Regulation "denied boarding" was defined as a refusal to accommodate passengers on a flight although they have a valid ticket, a confirmed reservation on that flight, and presented themselves for check in within the required time limit and as stipulated: Article 2(a).

12. That is, a refusal to accommodate passengers on a flight although they have a valid ticket, a confirmed reservation on that flight, and presented themselves for check in within the required time limit and as stipulated: Article 2(a).

13. Article 4(1).

14. Article 4(4).

15. Article 6(1).

16. As created by the EU's 'Third Package': Council Regulation (EEC) No.2407/92 on licensing of air carriers; Council Regulation (EEC) No.2408/92 on access for Community air carriers to intra-Community air routes; and Council Regulation (EEC) No.2409/92 on fares and rates for air services.

17. See Amsterdam Treaty of 1997, Article 153, which states that "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers ... Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities."

18. Interestingly, in its Communication from the Commission to the European Parliament and Council, Protection of Air Passengers in the European Union of 21.06.2000 (COM(2000)365), in which it proposed the reform that resulted in EU261, the EU Commission recognised that it may also be necessary to protect passengers using other modes of transport and stated an intention to study their rights "in due course" but went on to state that "It is justifiable, however, to begin by strengthening the rights of air passengers because the Community has advanced much further in creating a single market for air transport of passengers by road and rail": see its para 10. The aviation industry therefore seems to have been singled out on the basis of being a victim of success.

protection given to passengers, in essence, by adopting the new regulation.¹⁹ It follows from this, and the recitals more generally, that an, if not *the*, essential purpose of EU261 is twofold: to deter carriers from denying boarding, cancelling flights and causing long delays (so as to reduce the number of affected passengers), and to give passengers protection when this happens nonetheless.²⁰

When considering EU261, it is relevant to distinguish between the regulation as approved by the EU's legislative process and the regulation as now in effect as a result of its interpretation by the CJEU. This is because the latter has altered EU261's scope and effect considerably.

RIGHTS/OBLIGATIONS AS DRAFTED

EU261 gives passengers rights against, and imposes the obligations in respect of those rights upon, the operating air carrier.²¹ In order to ensure its observance, it provides expressly that these obligations cannot be limited or waived.²² It is therefore not open to carriers to contract out of them.

The regulation applies to passengers departing from an airport located in the territory of an EU member state,²³ as well as to passengers departing from an airport located in a third country bound for an airport situated in the territory of an EU member state on an EU carrier²⁴ (unless the passengers received benefits or compensation and were given assistance in that third country).²⁵ EU261 therefore regulates denied boarding, cancellation and delay in departure by an EU carrier for a flight into the EU, not just departing from an EU airport.²⁶ Legally, this is explicable on the basis that the EU can regulate all activity of all carriers occurring within the territorial jurisdiction of its member states and also has personal jurisdiction to regulate the actions of EU carriers wherever they are.

DENIED BOARDING

EU261 uses the term 'denied boarding' to mean a refusal to carry passengers on a flight notwithstanding them having confirmed tickets and meeting the check-in requirements for it, unless there are reasonable grounds

to do so.²⁷ It provides²⁸ that if a passenger is denied boarding against their will then the operating carrier must:

- assist that passenger by offering them the choice of: (a) a reimbursement (within seven days) of the price they had paid for the unused travel (and a return flight to the first point of departure, if applicable); or (b) re-routing to their final destination, under comparable transport conditions, (i) at the earliest opportunity; or (ii) at a later date at the passenger's convenience, but subject to availability (Article 8 Remedies);
- immediately compensate them, by paying: (a) €250 if the flight was to be for up to 1,500km; (b) €400 if it was an intra-EU flight of more than 1,500km or any other flight of between 1,500–3,500km; and (c) €600 for any other flight; but with the potential for a 50 per cent reduction if the passenger is re-routed so that they arrive at their final destination by no more than a specified time after their originally scheduled arrival time (Article 7 Compensation);²⁹ and
- assist that passenger by giving them interim care and assistance in terms of the provision, free of charge, of: (a) meals and refreshment in reasonable relation to the waiting time, and two telephone calls, telex or fax machine messages, or emails; and (b) hotel accommodation and transport between the airport and that accommodation where a stay of one or more nights or additional to that intended by the passenger becomes necessary (Article 9 Care & Assistance).³⁰

Importantly, there are no exceptions to these rights/obligations: they are clearly intended to be, and are, a deterrent to airlines from overbooking their flights, or from otherwise seeking to displace passengers who present themselves for a flight at the applicable check-in time with a confirmed ticket.

These rights/obligations are in broad terms the same as those under 91DB Regulation, save in relation to compensation. EU261's provisions in that regard are in marked contrast to its predecessor, in a way that is adverse to carriers.

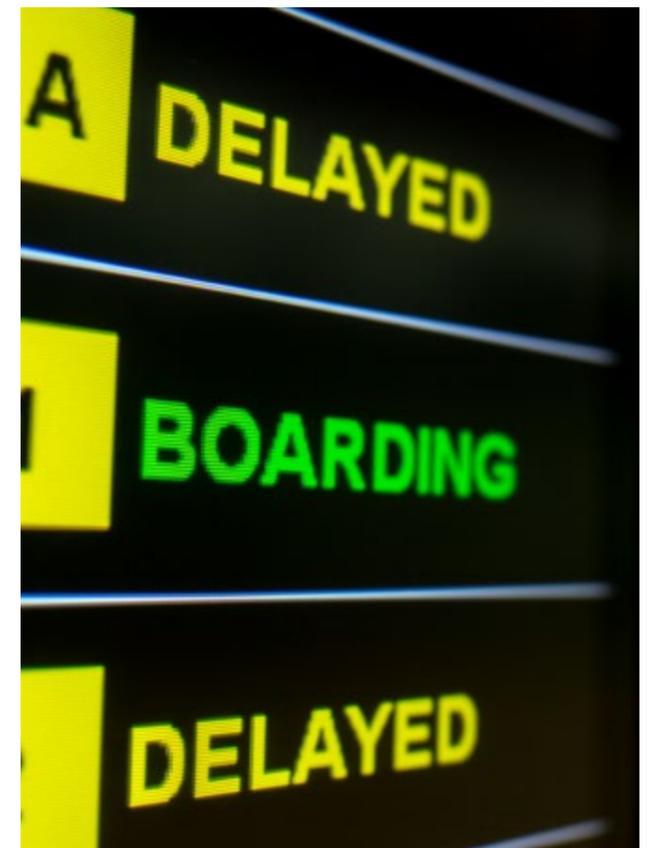
The 91DB Regulation stipulated that immediately after boarding has been denied, the carrier must pay 'minimum compensation' of €150 for flights of up to 3,500km and €300 for flights of more than 3,500km, having regard to the final destination specified in the ticket.³¹ However, it also allowed a potential reduction by 50 per cent if re-routing was provided and it results in the passenger reaching their destination with a delay of only two or four hours respectively.³² Furthermore, it contained a proviso that the compensation need not exceed the price of the ticket in respect of the final destination.³³ This was, of course, set at a time before the seminal impact on air fares following the creation of the European single aviation market and the associated rise of low-cost carriers, so that the sums specified in the regulation were less than the prevailing fares at the time.³⁴ The intention as expressed by the proviso was therefore that the compensation given was not required to be more than the total ticket price.

In contrast, the level of Article 7 Compensation in EU261 is not fixed in proportion to the price of the ticket concerned, and is not limited to the value of the total ticket price, but rather is fixed at a level determined only by flight length. Moreover, the sums are set much higher than many airline fares, especially in the low-cost and regional segments of the market. It therefore imposes a harsher sanction.

CANCELLATION AND DELAY

In the case of a cancellation³⁵ EU261 provides³⁶ that the passengers concerned shall be:

- offered the choice of Article 8 Remedies by the operating air carrier;
- given Article 7 Compensation by the operating air carrier unless specified advanced notice is given,³⁷ or if the carrier can prove that "the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable



- measures had been taken" (an Extraordinary Circumstances Defence);³⁸ and
- offered Article 9 Care & Assistance by the operating air carrier (in a case of re-routing at least a day later, including hotel accommodation and associated transportation between the airport and that accommodation).

As drafted, EU261 only regulates delay *in departure*. It provides³⁹ that where an operating air carrier reasonably expects a delay beyond its scheduled time of departure beyond a specified period⁴⁰ then it must offer the

19. See recitals 1, 3 and 4.

20. See further in particular recitals 7, 9, 10, 13 and 17.

21. That is, an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger: Article 2(b). However, it does not cover an air carrier which leases an aircraft, including crew to another air carrier, under a wet lease, but does not bear the operational responsibility for the flights, even where the booking confirmation of a seat on a flight issued to passengers states that that flight is operated by the former air carrier. *Wirth v. Thomson Airways Ltd*, Case C-532/17, 4 July 2018.

22. Article 15.

23. Article 3(1)(a). As its 1991 predecessor had done.

24. That is, to a 'community carrier', namely a carrier with a valid operating licence granted by an EU member state in accordance with the provisions of Council Regulation (EEC) No.2407/92 of 23 July 1992 on licensing of air carriers: Article 2(c).

25. Article 3(1)(b).

26. And it is not possible for an airline to contract out of its provisions: see its Article 15(1).

27. Such as "reasons of health, safety or security, or inadequate travel documentation": see Articles 2(j) & 3(2).

28. By its Article 4.

29. Article 7.

30. Article 9.

31. Article 4(2).

32. Article 4(3).

33. Article 4(4).

34. For example, the minimum price for a ticket on the Milan–Paris route dropped from more than €400 in 1992 to about €25 in 2017: https://ec.europa.eu/transport/modes/air/25years-eu-aviation_en.

35. That is the non-operation of a flight which was previously planned and on which at least one place was reserved: Article 2(l). It thus concerns cancellation of the whole flight, in contrast to the denied boarding, which applies to a passenger or passengers from a flight that is to take place without their being allowed to join it. In *Rodriguez and Others v. Air France SA* Cases C-83/10, 13 October 2011, the CJEU held stretched this definition somewhat by holding that that cancellation also covers the case in which that aeroplane took off but, for whatever reason, is subsequently forced to return to the airport of departure where the passengers of are then transferred to other flights.

36. By its Article 5.

37. That is, (a) they are informed of the cancellation at least two weeks before the scheduled time of departure; or (b) they are informed of it between two weeks and seven days before and are offered re-routing allowing them to depart no more than two hours before their scheduled time of departure and to reach their final destination less than four hours after their original scheduled time of arrival; or (c) if informed of it less than seven days before and are offered re-routing allowing them to depart no more than one hour before their scheduled time of departure and to reach their final destination less than two hours after their original scheduled time of arrival.

38. Article 5(3).

39. By its Article 6.

40. That is, (a) for two hours or more in the case of flights of 1,500km or less; (b) for three hours or more in the case of all intra-EU flights of between 1,500–3,500km; or (c) for four hours or more for any other flight.

affected passengers Article 9 Care & Assistance (in a case where the expected time of departure is at least a day later, this includes hotel accommodation and associated transportation between the airport and that accommodation); and when the delay is at least five hours, they must be offered reimbursement per the Article 8 Remedies. Importantly, as drafted EU261 does not provide for Article 7 Compensation to be payable in respect of the delay that it regulates.

There are, therefore, no exceptions to the application of Article 8 Remedies and/or Article 9 Care & Assistance obligations, and no financial cap or maximum time limits on their operation, in relation to either cancellation or delay. A carrier is, therefore, obliged to meet them even in respect of a cancellation or delay in departure that is entirely beyond its control. The most graphic illustration of this was the closure of the European airspace due to the eruption of the Icelandic volcano Eyjafjallajökull in 2010, which caused carriers to incur considerable costs in meeting these obligations over an extended period of time.⁴¹ In relation to events beyond a carrier's control this cannot be justified by reference to EU261's deterrent purpose.

In contrast, there is an exception with regard to the payment of Article 7 Compensation in cases of cancellation, that is, when the Extraordinary Circumstances Defence can be made out. As an Advocate General to the CJEU has explained, the rationale for this is that the obligation to pay compensation fulfils a "dissuasive role" where the cause of the cancellation is within the carrier's control, but does not do so where the cause is not (which it is not where it is caused by an extraordinary circumstance).⁴² That is to say, the exception is explained by EU261's purpose being deterrence: where the cancellation is caused by an event beyond the control of the carrier the legislative intent was that the carrier concerned was not required to pay Article 7 Compensation because it would be unfair to do so. Furthermore, this must especially be so given that the sum is fixed as an arbitrary amount that may be much higher than the ticket price paid by the passengers concerned (as explained above).

It follows from this that EU261 as drafted:

- imposes an increased burden upon carriers in response to denied boarding as compared to its predecessor in terms of compensation and, for EU carriers, geographic scope;
- extends that increased compensation burden to situations of cancellation, except where the Extraordinary Circumstances Defence can be made out; and
- extends the Article 8 Remedies and Article 9 Care & Assistance to cancellation, and also to situations of delay in departure.

THE RIGHTS/OBLIGATIONS AS MODIFIED BY THE CJEU

The CJEU has, however, modified EU261 in a number of respects.

The denied boarding extension

The CJEU has extended denied boarding to cover not just denials due to overbooking, but also situations where boarding is denied on other grounds, such as for operational reasons.⁴³

The *Sturgeon* extension

Significantly, the CJEU has extended Article 7 Compensation to situations of delay *in arrival*.

A basic understanding of international air law and of the EU's treaty obligations leads quickly to the conclusion that the omission in EU261, as drafted, of an Article 7 Compensation right/obligation in relation to the delay that it regulates, was deliberate. It is so because seeking to impose Article 7 Compensation for delay would trespass upon the territory of the Montreal Convention 1999,⁴⁴ which regulates liability for damage occasioned by delay in the course of international carriage by air as part of an exclusive legal regime.⁴⁵

At the time EU261 was made, the EU and all of its member states were party to the Montreal Convention and, moreover, the EU had applied it to all carriage by EU air carriers.⁴⁶ As such, the Montreal Convention formed part of the EU legal order and the EU was, and is, obliged to give effect to that convention, and to ensure that any secondary EU legislation (such as EU261) is consistent with it.⁴⁷ Any such trespass was at least reduced by EU261 being drafted so that there was no Article 7 Compensation for delay.⁴⁸

That this was a deliberate omission is confirmed by the fact that at no stage during the formal legislative process was it even proposed that a compensation provision should be applied in cases of delay. It is further confirmed by the recitals to EU261, which refer to the need to compensate passengers in the context of both denied boarding and cancellation, but not when referring to delay.⁴⁹ It is also consistent with the EU Commission's own guidance on EU261 of February 2008.⁵⁰

Moreover, in the first case brought to it concerning EU261, the *IATA* case, the CJEU proceeded on the same basis, holding that EU261 is consistent with the Montreal Convention because the Convention governs claims for financial compensation for damage in respect of delay, whereas EU261 provides redress in the form of standardised and immediate care assistance (that is, Article 9 Care & Assistance) which "simply operates at an earlier stage" than a claim for financial compensation.⁵¹

In spite of this, in the *Sturgeon* case the CJEU held that in order to have equal treatment with passengers whose flights are cancelled, passengers are entitled to Article 7 Compensation for delay *in arrival* "where they suffer, on account of a flight delay, a loss of time



equal to or in excess of three hours, that is, when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier", unless the operating air carrier can prove an Extraordinary Circumstances Defence.⁵² This decision has proved highly controversial,⁵³ and has attracted much criticism from legal commentators.⁵⁴ Quite simply, it is incompatible with the Montreal Convention and the CJEU's own decision in the *IATA* case.⁵⁵

41. In *McDonagh v. Ryanair Ltd*, Case C-12/11, 31 January 2013, the CJEU held with reference to this incident that there are no circumstances so extraordinary as to displace the operation of these obligations.

42. *Finnair Oyj v. Lassooy* (above), at AG[60]-[61].

43. *Finnair Oyj v. Timy Lassooy*, Case C-22/11, 4 October 2012, in which passengers were displaced in order to "spread the pain" of an earlier cancellation by allowing passengers from that flight to be carried in their place on the flight in issue. It will also include a situation where, in the context of a single contract of carriage involving a number of reservations on immediately 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: *Cachafeiro v. Iberia, Líneas Aéreas de España SA*, C-321/11, 4 October 2012. It would presumably also include a situation where the only available aircraft that a carrier can substitute in at short notice (for example to replace an aircraft that is found to have a technical fault), is smaller aircraft than that scheduled, with the result that not all passengers who were booked to travel can be accommodated.

44. That is, The Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999.

45. See its Articles 19 and 29. The former provides that "The carrier is liable for damage occasioned by delay in the carriage by air of passengers ...". The latter provides that "In the carriage of passengers ... any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable."

46. By its Regulation (EC) No.2027/97 as amended by Regulation (EC) No.889/2002.

47. *R (on the application of International Air Transport Association and European Low Fares Airline Association) v. Department of Transport*, Case C-344/04, 10 January 2006, at [35]-[36] (IATA). See also the Advocate General's opinion in *Bogiatzi v. Deutscher Luftpool Luxair SA*, Case C-301/08, 25 June 2009, at [48].

48. It is arguable that there was a trespass nonetheless for the reasons raised by the carriers in the *IATA* case and in the citations given as examples of criticism of the decision in the *Sturgeon* case, as to which see below.

49. Compare recitals 9 and 10 and 12 and 13 with 17.

50. See Answers to Questions on the application of Regulation 261/2004, Information Document of Directorate-General for Energy and Transport, of 17 February 2008. Its question is "Do airlines have compensation obligations in the case of long delays". Its answer to this is "No ... no financial compensation is to be paid for delays under the Regulation. ..."

51. *IATA* (above), at [39]-[48]. See also the Advocate General's Opinion in that case at [18], who proceeds on the express basis that there is no Article 7 Compensation obligation in respect of delay.

52. *Sturgeon v. Condor Flugdienst GmbH and Böck v. Air France SA*, Joined Cases C-402/07 & C-432/07, 19 November 2009, and confirmed in *Nelson v. Deutsche Lufthansa AG and The Queen (on the application of Tui Travel Plc and others) v. Civil Aviation Authority*, Joined Cases C-581/10 & C-629/10, 23 October 2012. For these purposes the concept the arrival time is the time at which at least one of the doors of the aircraft is opened: *Germanwings GmbH v. Henning* Case, C-1452/13, 4 September 2014.

53. This was particularly so because of the unexpectedness of the ruling, the issue not having been raised by the parties and being decided without giving them any opportunity to be heard on the point.

54. See for example Kinga Arnold and Pablo Mendes de Leon, 'Regulation 261 (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a Change?', *Air and Space Law* 35 (2010), 91-112; John Balfour Aviation, 'Liability for Delay: the Court of Justice of the EU rewrites EC Regulation 261/2004', *Air and Space Law* 35 (2010), 71-5.; Ludger Giesberts and Guido Kleve, 'Compensation for Passengers in the Event of Flight Delays', *Air and Space Law* 35 (2010), 53-64; Radošević, 'CJEU's Decision in Nelson and Others in Light of the Exclusivity of the Montreal Convention', *Air and Space Law* 37 (2013) 95-110.

55. As to which see: Robert Lawson and Tim Marland, 'The Montreal Convention 1999 and the Decisions of the ECJ in the Cases of IATA and Sturgeon - in Harmony or Discord?', *Air and Space Law* 36 (2011), 99-108; Paul Stephen Dempsey and Svante O. Johannsson, '*Montreal v. Brussels*: The Conflicts of Laws on the Issue of Delay in International Carriage by Air', *Air and Space Law* 35 (2010), 207-24; David McClean, 'EU Law and the Montreal Convention of 1999', *Air Passengers Rights: Ten Years On*, ed. Bobek and Prassl (2016), 57-64.

In practical terms, the effect of the *Sturgeon* extension has been profound, in that it has increased considerably the potential availability of Article 7 Compensation to passengers and thereby the financial burden of EU261 upon carriers in respect of situations way beyond the legislative intent, that is, situations of delay. The number of claims against carriers for Article 7 Compensation has soared accordingly.

It must be noted in this context that the Article 7 Compensation is fixed at an arbitrary sum and that the liability in respect of it arises at one fixed but arbitrary moment, namely the three-hour mark, regardless of the length of the flight (or flights⁵⁶) concerned. It is difficult to see how such an arbitrary rule could be said to meet EU261's deterrent purpose: it cannot deter a carrier from incurring a delay of less than three hours and, once the three-hour mark is reached, it cannot then deter the carrier from mitigating that delay any further (or at least beyond what would give the potential 50 per cent discount). It also has the perverse result that some passengers positively cheer once they know their delay in arrival will be more than three hours due to the monetary windfall that this



potentially gives them – the fixed compensation often being considerably more than the fare they have paid.

The effect of the *Sturgeon* extension has been compounded in further respects by the following other decisions of the CJEU.

Territorial extension

The CJEU has extended the territorial scope of EU261. It has held that because compensation is payable for delay (of three hours or more) in arrival at "final destination",⁵⁷ where there are directly connecting flights the operative delay is in reaching the ultimate destination of that sequence of flights⁵⁸ and, in terms, that this is so even if the second (or subsequent) flights are entirely outside the EU and if the delay only arises outside the territory of EU member states;⁵⁹ and even if the carrier concerned is not an EU carrier.⁶⁰ This means that Article 7 Compensation may be payable even if a flight departing the EU sets off on time and arrives at its destination on time (or does so less than three hours late), if the passenger's ticket includes a directly connected flight and they miss the connecting flight or are delayed in reaching their final destination because the connecting flight is cancelled, they are denied boarding on that flight or it is delayed in arrival for more than three hours.⁶¹ This is particularly important for feeder airlines (as ERA member airlines often are) because they may be subject to claims covering a flight sequence in which their own flight would not give rise to any EU261 liability but where liability arises due to what happens further down the line.

Emasculation of the Extraordinary Circumstances Defence

The CJEU has also severely limited the circumstances in which an air carrier is able to invoke an Extraordinary Circumstances Defence. To make this good, it is necessary to consider separately the two constituent elements of this defence: (1) "extraordinary circumstances"; and (2) which could not have been avoided even if "all reasonable measures" had been taken.

EU261 does not contain a definition of what constitutes "extraordinary circumstances", but its recitals state that they "may ... occur in cases of political instability,

meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier" and should be deemed to exist "where the impact of an air traffic management system in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft ...".⁶² These might be thought to have a consistency to them, with all covering situations that are beyond a carrier's control. However, the CJEU has interpreted this phrase in a way that produces a much more chaotic and unfair result.

The CJEU has held that there may be an extraordinary circumstance in the case of: damage to an aircraft caused by a bird strike⁶³ or a foreign object lying on an airport runway,⁶⁴ where there is an airspace closure due to volcanic ash,⁶⁵ or when the grounding of an aircraft is due to a hidden manufacturing defect.⁶⁶ In these respects it is entirely correct: they are all circumstances that are, in fact, beyond the control of the carrier (and for which it would therefore be unfair to require it to pay compensation in respect of any resultant cancellation or long delay).

However, the CJEU has also held that there is not an extraordinary circumstance: when an aircraft is hit by a ground handling vehicle,⁶⁷ where an aircraft is grounded due to an unexpected technical problem which is not attributable to poor maintenance and even though it was not detected during routine maintenance checks,⁶⁸ or when there is a 'wildcat strike' called by flight crew.⁶⁹ All of these are situations that are also, in fact, beyond the control of the carrier and their exclusion from the Extraordinary Circumstances Defence cannot therefore form part of the "dissuasive role" that Article 7 Compensation was intended to play in fulfilment of EU261's deterrent purpose.

Moreover, the first two clearly fall within "unexpected flight safety shortcomings", which the recitals to EU261 state may amount to extraordinary circumstances (and can therefore be taken to have been intended to qualify according to the regulation as drafted). It is unfortunate that the CJEU has excluded them from the scope of the Extraordinary Circumstances Defence nonetheless; most especially as a long delay or cancellation is often attributable to these types of causes.

More importantly, although the CJEU has sought to justify its decision in these cases by what it considers to best enhance consumer protection, what must be in the most fundamental interests of consumers of air services is protecting their flight safety.⁷⁰

It is particularly unfortunate, to say the least, that the CJEU's approach creates a potential conflict between the interests of safety (which militate against a flight proceeding) and commercial interests (which may put unnecessary pressure on the carrier proceeding with a flight so as to avoid incurring any Article 7 Compensation obligation and by doing so risk compromising flight safety).⁷¹

The CJEU has also sought to justify the distinction between these two classes of decision on the basis that those held not to amount to "extraordinary circumstances" concern causes that are "inherent in the normal exercise of the activity of the air carrier", whereas those which do qualify are not. But this is an unreal, if not incoherent, distinction. For example, surely the risk of a bird strike or other foreign object damage is just as much an inherent risk in the operational life of a carrier as an unexpected and unpreventable technical problem?

In any event, these decisions mean that, in practical terms, the circumstances in which a carrier will be excused from their obligation to pay Article 7 Compensation are now comparatively few and far between.

If a qualifying delay in arrival or cancellation is not caused by such "extraordinary circumstances" then it does not matter if the carrier had taken all reasonable measures to avoid that delay or cancellation. Its obligation to pay Article 7 Compensation will engage in any event. But even if it does amount to an "extraordinary circumstance," the carrier will only escape this obligation if it can also prove the "all reasonable measures" element of an Extraordinary Circumstances Defence. This places a further burden on carriers in terms of resources that they must devote to this purpose.

In this regard the CJEU has held that when organising a flight, a carrier must take account of the risk of delay connected to the possible occurrence of such circumstances and provide for a certain reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to

56. As to which see the next section.

57. As that term is defined in Article 2(h), namely as "the destination of the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight ...". In *Dawson v. Thomson Airways Ltd* [2015] 1 WLR 883, the English Court of Appeal considered whether *Sturgeon* was consistent with the Montreal Convention, and although it felt "much sympathy" for the argument that it was incompatible it nevertheless said it was bound to apply *Sturgeon* due to its obligation to follow the CJEU on questions of European law imposed by section 3(1) of the (UK's) European Communities Act 1972.

58. But outward and return flights are to be treated as being distinct for this purpose: see *Emirates Airlines – Direktion für Deutschland v. Schenkel*, Case C-173-07, 10 July 2008.

59. *Air France SA v. Folkerts*, Case C-11/11, 26 February 2013.

60. *Wegener v. Royal Air Maroc SA*, Case C-537/17, 31 May 2018.

61. In so holding, the CJEU appear to have overlooked completely, or disregarded, that this extension involves an assumption of exorbitant extra-territorial jurisdiction by the EU. There is certainly nothing in its judgements to suggest that it considered this issue.

62. Recitals 14 and 15.

63. *Pěšková v. Travel Service a.s.*, Case C-315/15, 4 May 2017.

64. *Germanwings GmbH v. Pauels*, Case C-501/17, 4 April 2019.

65. See *McDonagh* (above).

66. *Wallentin-Hermann v. Alitalia – Linee Aeree Italiane SpA*, Case C-549/07, 22 December 2008.

67. *Siewert v. Condor Flugdienst GmbH*, Case C-394/14, 14 November 2014.

68. *Van der Lans v. Koninklijke Luchvaart Maatschappij NV*, Case C-257/14, 17 September 2015. See also *Wallentin-Hermann* (above).

69. *Helga Krüsemann and Others v. TUIfly GmbH*, Joined Cases C-195/17, C-197/17 and others, 17 April 2018.

70. Indeed, article 153 of the Amsterdam Treaty (above) equates the two expressly.

71. See: Jochem Croon and Jim Callaghan, 'Punctuality or a Safe Flight: Which Should Have Priority?', *Air and Space Law* 43 (2018), 53–60.

an end; although it is not required to thereby make "intolerable sacrifices" in the light of its capacities at the relevant time.⁷² Similarly, the CJEU has held that the fact that minimum rules on maintenance of aircraft have been met cannot in itself establish that "all reasonable measures" have been taken,⁷³ and that a carrier must take control measures to prevent the presence of birds.⁷⁴ In light of the guidance in these decisions, a carrier must allow for some contingency within its flying programme in order to cater for the unexpected, which in turn may mean using aircraft or crew at less than their optimal efficiency/potential profitability. When added to the increased likelihood of exposure to Article 7 Compensation payments, this constitutes a potential 'double whammy' to the economic health of air carriers.

THE CARRIER'S BURDEN

It follows from the above that in comparison to what it said as drafted, EU261 as it now stands has:

- an extended geographic scope (to events outside of the EU);
- an increased compensation burden upon carriers in relation to cancellation, through a limitation of the situations in which the Extraordinary Circumstances Defence exception can be used in practice; and
- an extended compensation burden upon carriers to include situations of delay in arrival at final destination of three hours or more, subject only to the same emasculated Extraordinary Circumstances Defence.

Cancellation and delay are much more common occurrences in carriage by air than denied boarding. These expansions therefore impose a significant additional economic burden upon carriers. Furthermore, the increased compensation liability is one that goes beyond the deterrent purpose that EU261 did, and should, have by extending the payment obligation to instances of cancellation and delay (and for that matter, denied boarding for operational reasons) that are in fact beyond the carrier's control, and even if they have a

safety-related cause. This is particularly impactful because the amount of compensation payable may be considerably more than the price of the passenger's ticket, leaving the carrier to bear a potentially sizeable loss, especially when Article 8 Remedies and the cost of Article 9 Care & Assistance obligations are also taken into consideration.

The practical problem of a carrier's resultant financial exposure is made worse by the fact that EU261 does not prescribe a timeframe within which a claim for Article 7 Compensation must be brought. The time limit for bringing any such action is therefore to be determined in accordance with the rules on the limitation of actions of the member state having jurisdiction.⁷⁵ However, these are varied and often long. So, for example, the applicable time limit for a claim in England is six years,⁷⁶ whilst in Spain it is 10 years.⁷⁷ A carrier therefore remains exposed to claims for a considerable time, not knowing when or whether they will be made.⁷⁸

Advocates of prioritising the need for passenger compensation might argue that EU261 preserves the carrier's right to seek reimbursement of what it pays in compensation or to meet its other EU261 obligations "in accordance with applicable law".⁷⁹ However, in practice this is often illusory either because there is no-one from whom a recovery can be made (for example when a part fails through wear and tear that is not preventable or detectable), because any right is negated by contractual exclusion (for example, most airports have terms and conditions that preclude any liability for any loss they may have caused, as do ground handlers) or because the applicable law does not permit recovery of pure economic loss. The carrier is therefore left with the responsibility.

2013 PROPOSED REVISION OF EU261

After having carried out a consultation process and impact assessment, the European Commission published a proposal for the revision of EU261 in 2013 (2013 EU Proposed Revision).⁸⁰

This included an express introduction of the right to compensation in cases of long delay and a modification to the Extraordinary Circumstances Defence, in part to take into account the CJEU's decisions on EU261, but also to add a non-exhaustive list of circumstances that are to be regarded as extraordinary. In order to "Better take into account the financial capacities of the air carriers" it also introduced some measures with "the aim to reduce the most costly aspects" of EU261, namely:

- an increased threshold before the Article 7 Compensation obligation arises, to five hours for all journeys within the EU and all journeys to or from third countries of up to 3,500km, and a higher threshold for journeys of further bands of distance;
- in the case of delays and cancellations due to extraordinary circumstances, a limit on the right to accommodation (as Article 9 Care & Assistance) to three nights with a maximum of €100 per passenger per night (save for certain categories of person); and
- in view of "the specificities of small-scale (regional) operations", the exclusion of the right to accommodation (as Article 9 Care & Assistance) for passengers of flights of less than 250km on aircraft with a maximum capacity of 80 seats (save on connecting flights and for certain categories of person).

Although far from perfect, the 2013 EU Proposed Revision represented a step in the right direction, that is, towards a fairer balance between the interests of passengers and carriers. Nevertheless, it has not been taken forward⁸¹ and after an impasse of six years it must be doubted if it ever will be – if it is, it probably deserves a renewed consultation process to take in the lessons learnt in respect of EU261 in the intervening period, as well as a new impact assessment compliant with the EU's guidelines⁸² and associated toolbox.

COMPARISON WITH OTHER JURISDICTIONS

When introduced, EU261 was groundbreaking in the extent and breadth of its regulation of denied boarding, cancellation and delay; and in the size of the market that it covers. Although some states have since introduced regulation that treads at least some of the same ground (such as Brazil, India, Nigeria, Israel, Turkey and the Philippines⁸³), a very significant number of states remain without legislation providing for rights and remedies in



this area, or only with legislation of much more limited scope. So, for example, in the largest domestic aviation market of them all, the US, the only regulation relates to denied boarding and to tarmac delays,⁸⁴ whilst Japan and Australia have no specific consumer legislation with regard to aviation, and Canada only published its own Air Passenger Protection Regulations in May 2019.⁸⁵

The Canadian Air Passenger Protection Regulations are of potential interest in a number of respects, in particular:

- they only impose a compensation requirement in relation to delay or cancellation when its cause is within the carrier's control and is not required for safety purposes;⁸⁶
- where compensation is payable in respect of delay or cancellation it is for a fixed sum (irrespective of flight length), the stipulation being for payment of a minimum amount which is staggered depending on whether the passenger arrives at their destination

72. *Eglitis v. Air Baltic Corporation AS*, Case-294/10, 12 May 2011.

73. See *Wallentin-Hermann* (above).

74. See *Pěšková* (above).

75. *Moré v. Koninklijke Luchtvaart Maatschappij NV*, Case C-139/11, 22 November 2012. In relation to carriage between EU member states this means, at the applicant's choice, the state having territorial jurisdiction over the place of departure or the place of arrival of the aircraft, as those places are agreed in the contract of carriage: *Rehder v. Air Baltic Corporation*, Case-C204/08, 9 July 2009. It may also be brought in the jurisdiction of the carrier's home state if that is in the EU: *Rehder* (above) at [45].

76. *Dawson* (above).

77. *Moré* (above).

78. This not only creates an potential accounting issue, but also has ramifications in relation to data retention in so far as in order to be able to contest claims should they arise, and discharge its evidential burden in respect of them, the carrier would need to maintain its records relating to a flight/denied boarding/cancellation/delay concerned until after the limitation period has expired.

79. Article 13.

80. 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 delay of flights and Regulation (EC) No.2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, Brussels, 12.3.2013, COM(2013) 130 final, 2013/0072 (COD).

81. Allegedly due to a dispute between Spain and the UK about the status of the airport of Gibraltar.

82. Commission Staff Working Document – Better Regulations Guidelines, SWD (2017) 350.

83. Brian F. Havel and John Q. Mulligan, 'Extraterritorial Application: Exporting European Consumer Protection Standards', *Air Passengers Rights: Ten Years On* (above), 237–56, at 252–4.

84. See 14 CFR Parts 250 and 259 respectively.

85. SOR/2019-150, which come into force in stages on 15 July and 15 December 2019. See <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-05-29/html/sor-dors150-eng.html>.

86. See sections 11(1) and (2), 12(1), 12(2)(d) and (3)(d), and 19(1).

- between three and six hours, six and nine hours or more than nine hours later than the time indicated on their original ticket;⁸⁷
- those sums are CA\$400, CA\$700 and CA\$1,000 respectively for a "large carrier", which is defined as a carrier "that has transported a worldwide total of two million passengers or more during each of the two preceding calendar years", but only CA\$125, CA\$250 and CA\$500 respectively for a carrier that has transported less than this;^{88 89} and
- to receive this compensation the passenger must file a request with the carrier before the first anniversary of the day on which the flight delay or flight cancellation occurred.⁹⁰
- if there is no reimbursement, "minimum compensation" for delay of one hour or more, up to a maximum of 50 per cent of the ticket price;⁹⁴ and
- care and assistance (similar to Article 9 Care & Assistance) in the case of a delay in arrival or departure of more than 1 hour.⁹⁵

In relation to cancellation resulting in an inability to complete the intended journey the same day, there is also a right to damages comprising the reasonable costs of accommodation, as well as the reasonable costs occasioned by having to notify persons expecting the carrier; but this does not apply where the cause is not connected with the operation of the railway and/or the behaviour of a third party which the carrier "could not avoid and the consequences of which he was unable to prevent."⁹⁶

For marine passengers⁹⁷ for whom the carrier reasonably expects the departure to be cancelled or delayed for more than one and a half hours, there is an immediate choice of re-routing or reimbursement (similar to Article 8 Remedies),⁹⁸ as well as a right to care and assistance (similar to Article 9 Care & Assistance);⁹⁹ and, in the case of a delay in arrival at the final destination of a specified length in comparison to the scheduled journey time, a right to "minimum compensation" up to a maximum of 50 per cent of the ticket price.

It is difficult to see why rail and marine passengers, and their respective transport providers, should have such an inequality of treatment in comparison to their aviation counterparts.

They therefore avoid much of what might be considered the unfair aspects of the carrier's burden under EU261 as discussed above, most especially for smaller carriers.

Air carriers flying within and from (and in the case of EU air carriers to) the EU thus carry a burden not faced by carriers operating in many other parts of the world.

COMPARISON WITH REGULATION OF OTHER MODES OF TRANSPORT

Subsequent to EU261, the EU has also brought into force regulations governing the rights of passengers travelling by rail,⁹¹ and by sea and inland waterway.⁹² Both provide passenger rights, and corresponding obligations on the carrier entity, in relation to cancellation and delay in certain specified situations. However, both are much more limited than EU261 with regards to compensation.

For rail passengers the provisions for delay are:

- where the delay in the arrival at the final destination under the transport contract is expected to be more than one hour, an immediate choice of reimbursement or re-routing (similar to Article 8 Remedies);⁹³

87. See section 19(1).

88. See sections 1 and 19(1).

89. ERA footnote: as of July 2019. This is euro equivalent of: CA\$400 – €272; CA\$125 – €85; CA\$700 – €477; CA\$250 – €170; CA\$1000 – €681; CA\$500 – €340..

90. See section 19(3).

91. Regulation (EU) No.1371/2007 of 23 October 2007, on rail passenger's rights and obligations; which came into force in December 2009. It applies to all rail journeys and services throughout the EU provided by one or more railway undertakings licenced in accordance with Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings.

92. Regulation (EU) No.1177/2010 of 24 November 2010, concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No.2006/2004; which has applied as from December 2012. It applies in respect of passengers travelling on passenger services from a port of embarkation situated in an EU member state, in respect of a service operated by a union carrier as well as on passenger services from a port of embarkation outside the territory of an EU member state if the port of disembarkation is in the territory of an EU member state (and in certain respects to a cruise where the port of embarkation is situated in the territory of an EU member state): Article 2(1). But only, materially, on ships certified to carry more than 12 passengers: Article 2(2).

93. Article 16.

94. Article 17.

95. Article 18.

96. Annex I, Title IV, Chapter II, Article 32.

97. Who do not fall within the exempted classes per Article 20.

98. Article 18.

99. Article 17.



CONCLUSION

In conclusion, EU261 as it now stands provides an undoubted financial benefit to passengers directly affected by denied boarding, cancellation and long delay. However, every benefit comes with a burden and in the case of EU261 that rests with carriers. As explained above it is a heavy one, in particular because it often has to be borne even in circumstances where the cause is in fact beyond the carrier's control, and arises due to a safety shortcoming. That cannot be justified by any deterrent purpose and can be said to be unfair. The result is that air carriers are required to meet a considerable economic burden, in particular in relation to the payment of fixed compensation often far beyond the revenue they had generated from the

ticket price paid by the affected passengers. It is highly questionable whether this is in the wider or long-term interests of the travelling public in general. Whilst large carriers may be able to carry this burden due to sheer economies of scale, it places smaller, especially regional, carriers in an invidious position: they could perhaps mitigate the burden by increasing their ticket prices, but that may place them at a competitive disadvantage against their larger rivals; or it can eat away at their economic health and possibly threaten their survival, and thus reduce available air services and competition. This being so, there are good grounds for concluding that a better balance needs to be struck than EU261 currently provides.

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➤ EU261 AND PUBLIC SERVICE OBLIGATION ROUTES

Governments within the EU are permitted to subsidise the operation of air services to peripheral regions and development regions, or on routes which are unlikely to support a significant passenger load, where the service is vital for the economic and social development of the region. Also, some routes are subject to restrictions on prices or frequency and not necessarily subsidised. Such routes, either subsidised or regulated, or both, are called Public Service Obligation (PSO) routes.

An airline agreeing to operate a PSO route must abide by the terms of the grant for the route, including frequency, capacity, timing and maximum fares. None of these limitations apply to airlines operating routes not subject to a PSO.

Up until now, the fares set in respect of PSO flights take no account of the amount of compensation payable pursuant to EU261. The compensation payable pursuant to EU261 in relation to cancellation of a

flight of less than 1,500km is €250, which significantly exceeds the maximum fare permitted to be charged in relation to the overwhelming majority of PSO flights operated within Europe.

Accordingly, EU261 operates in a discriminatory, unfair and anti-competitive fashion with regard to the operators of PSO flights. As a result of the application of EU261, the appetite of operators to bid for PSO contracts is reduced, which has the potential to reduce connectivity within the European regions to the significant detriment of the communities otherwise thereby served.

The undersigned operators of PSO services therefore request that in its current review of EU261, the EU excludes its operation in relation to PSO flights, or failing that, limits the amount of compensation payable to passengers in relation to those flights to the amount of the fare paid by those passengers.

➤ EU261 AND PUBLIC SERVICE OBLIGATION ROUTES



➤ CONCLUSIONS

It is easy to sympathise with a passenger whose flight has been cancelled, most of us are frequent air passengers and therefore experience the advantages and disadvantages of air transport.

But not many of us actually run an airline and acknowledge the huge pressure managers and staff put on themselves to maintain a spot-on operation. It is in the best interest of airlines, especially the ones that define themselves as regional, to keep a good reputation within their passenger base, offering the best air service taking them safely to their destination, on time and at the lowest possible cost. Regulation EU261 is putting an unbearable financial burden on small to medium-sized airlines that operate on very

low margins, have lower average ticket prices, tighter schedules and smaller teams to deal with claims and legal and administrative procedures and costs; they are therefore disproportionately affected by the regulation. Recent airline failures are sadly reducing competition and choice in Europe. Some ERA members are already abandoning routes that are not profitable, including PSO-subsidised routes. Additionally, an airline should never be financially penalised for taking all the necessary time to carry out safety-related procedures.

Please think about competition, connectivity, cohesion and safety before responding to this question: is Regulation EU261 as it currently stands really fit for purpose?



Montserrat Barriga
Director General, ERA



➤ CONCLUSIONS

➤ RECOMMENDATIONS

As it stands, EU261 threatens to decimate the regional airline industry; it is anti-competitive, unfair to regional carriers, and is not fit for the purposes for which it was intended. To achieve those purposes and to preserve regional aviation, we would recommend:

- 1** Operators with an annual passenger load of 2.5 million or less in the preceding year should be subject to reduced compensation of 50 per cent.
- 2** There should be a complete exoneration from compensation on PSO routes, subsidised or regulated, to avoid reduction of connectivity.
- 3** There should be a cap on the liability towards passengers limited to the proportion of the airfare that the operator bears (that is, compensation per flight and not per journey).
- 4** Extraordinary circumstances should account not just for the one flight directly affected but for the whole flight programme for the day to acknowledge the knock-on effect on subsequent flights.
- 5** There should be a complete exoneration if delays or cancellations arise for any safety-related reason (in line with the recently-approved Canadian regulation).
- 6** To allow the airline enough time to perform all the necessary operational checks, the time threshold should be extended from three to five hours.
- 7** The regulation should provide that an airline incurring costs and expenses as a result of the application of the regulation may not be prevented from recovering such costs and expenses by any contractual provision excluding or limiting liability.

➤ ABOUT ERA

ERA (European Regions Airline Association) is the trade association representing the European air transport industry. ERA represents 51 airlines and more than 150 service providers including airframe and engine manufacturers, airports, suppliers and service providers from all over Europe and across the entire spectrum of the aviation industry. The power of one collective voice, representing multiple businesses, to promote and protect one industry sector is incredibly strong.

ERA works on behalf of its members to represent their interests before Europe's major regulatory bodies, governments and legislators to encourage and develop long-term and sustainable growth for the sector and industry. The association also brings members together to exchange information and learn from each other through events, forums and regular groups. A major part of ERA's role is to raise the profile and importance of its members and to champion air transport in Europe.

ERA'S VISION

Through leadership, representation and communication, ERA serves the interests of its members and promotes a healthy, safe and growing European regional airline market.

OUR SECTOR

ERA's airlines provide vital connectivity and support for Europe's regions, promoting social and territorial equality and cohesion as well as contributing to increased tourism, investment and job creation.

Our sector is an essential and crucial element of European air transport contributing hugely to economic and growth within Europe. ERA's airlines:

- carry 74 million passengers per year;
- operate 1.15 million flights;
- on 1,780 routes;
- support 770,000 direct, indirect and induced jobs (of which 290,000 are directly generated by our members); and
- contribute €59bn to Europe's GDP.

➤ ERA MEMBERS



51
airlines



19
airports



13
manufacturers



121
suppliers



European Regions Airline Association

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