Revision of Regulation 261 / 2004

Airline Industry Perspectives

Gold-plated EU261 reform plans, a wish-list the EU can't afford

Affordability is consumers' top priority when booking air travel, especially given ongoing cost-of-living pressures across the European Union.

Gold-plated reform proposals by the European Parliament could result in the cost of EU261 more than doubling from €8 Billion to more than €15 Billion a year, with the per passenger cost rising from €5 to €10 per segment.

Excessive regulation and red tape act as a brake on the EU's competitiveness. For EU261, the administrative costs to airlines alone equate to ~€1.5 Billion a year.

The original intent in seeking to reform EU261 was to achieve a better balance between ensuring adequate protection for passengers while safeguarding airlines' ability to offer choice, value and connectivity. The proposals put forward by the European Parliament fly in the face of that.

We call on the EU institutions to refocus the air passenger rights regulation on consumers' priorities:

- Timely information when disruption occurs
- Care and assistance
- Getting to their destination "better late than not at all"

Airline industry's priorities for the trilogue discussions are:

- Increased delay thresholds – to enable and encourage flights to operate better late than not at all.
- A clear, non-exhaustive list of extraordinary circumstances – for disruption outside airlines' control.
- Ensuring pricing freedoms – to protect consumer choice and the affordability of air travel.
- Avoiding any further increase in the cost of EU261 – to protect European competitiveness.

BACKGROUND

The Single Aviation Market is one of the great success stories of the European Union. Deregulation in the 1990s stimulated innovation and competition, enabling a huge increase in connectivity with air travel becoming more affordable. The contribution of this growth in connectivity to economic integration and social cohesion within the Union cannot be overstated.

These huge gains are in peril as European aviation gets bogged down in regulation and red tape. Europe is at a crossroads. The *Draghi* report eloquently set out the economic consequences of the EU's competitiveness deficit. Aviation is not immune from these headwinds. Moreover, the affordability of air travel is once again in focus as European citizens face a squeeze in spending power due to the ongoing cost-of-living crisis.

As the backbone of the economy, the aviation and transport sectors should fully embrace their role as essential facilitators to support the EU's stability and growth in this critical period.

GOOD INTENTIONS DO NOT GUARANTEE GOOD OUTCOMES

Recalling why Regulation 261 / 2004 needs reform

Against this backdrop, the EU institutions are once again attempting to reform Regulation 261 / 2004 (EU261). Efforts to revise EU261 are not new, indeed they have been ongoing since at least 2011. This is so long ago that some stakeholders may not be aware of the trigger for the initiative to revise EU261. Almost 15 years ago, that the Regulation was not functioning as intended and that the financial and operational burden on the European aviation industry had grown far beyond anything that had been envisaged when the Regulation was drafted. It was a stated objective of the revision, when it was launched in 2011, to ensure a more equitable balance between the interests of passengers and industry.

This starting point of the need to rebalance the regulation is important to recall as this intent has been lost in many of the latest proposals, which would make the regulation even more unbalanced and burdensome than it is now. The 3 main problems with the proposals on the table are:

- **More cost for airlines, paid for by passengers**: The Impact Analysis produced for the Commission at the time of the 2023 Consumer Package, estimated the cost to airlines of EU261cancellation and delay compensation at €8 Billion. IATA conservatively estimates that EU261 costs could double under the European Parliament proposals to in excess of €15 Billion per year. Such an increase would threaten connectivity and worsen EU's competitiveness deficit.

  In stark contrast, while EU rail passengers receive an estimated total of €300 million to €500 million per year in compensation, the cost of the EU air passenger compensation framework (EU261) is completely disproportionate to this figure. This imbalance is especially egregious considering that, by volume, Europeans travel significantly more often by train than by aircraft.

  In addition, policy measures in other areas, such as the implementation of the Green Deal will already drive an increase in ticket costs over the next few years. To mitigate this impact, policymakers must adopt a holistic strategy. Failure to consider these measures collectively will only compound the financial burden and severely deteriorate the EU's competitiveness.

- **Impact on airline operations and business models**: Some of the proposals, such as those to limit commercial freedoms (e.g. freedom to unbundle the product and sell ancillaries) hit the heart of airlines' operations and their commercial decisions. These areas should not be subject to prescriptive rules that do not account for the complexity of the airline business or the range of business models.

- **More red tape –** The first 20 years of EU261 have been characterized by an unprecedented number of court cases and legal challenges at both national and European levels. The 80+ judgements of the Court of Justice of the European Union (CJEU) related to EU261 are surely a record for a single piece of EU legislation. Rather than stemming the tide of case law, by introducing so many novel concepts into the regulation, the latest proposals would simply set the stage for the next 20 years of CJEU cases.

  The Steer study estimated the administrative costs to airlines of EU261 as equivalent to ~0.6% of total airline operating costs, equating at ~€1.5 Billion. These costs, deriving from the significant burden of proof associated with many provisions in the regulation, are sure to be mirrored by a similar level of costs to NEBs and the many other entities engaged in claims processing. This cost is a deadweight loss to the European economy and will only rise under the latest proposals.

These factors can only translate to higher airfares for passengers. In an industry with margins as slim as the airline sector, there is no margin to absorb additional costs on this scale. Essentially, EU261 is a redistribution – with compensation to those passengers who suffer disruption being paid for by all passengers, without them ever opting in to the "protections" afforded by EU261 in the first place.

Ultimately, EU261 is so problematic because it fails to consider the operational and commercial realities of the airline industry or its diversity. For example. there are many different types of routes (long-haul, short-haul, regional, public service obligations) with distinct characteristics but also many interdependencies within the European aviation network. There is no 'one-size-fit-all' approach.

Time to focus on what passengers really want

During the trilogue process, We encourage the EU institutions to focus on what passengers really want. There is ample evidence of this from polling and other social research.

Affordable travel is passengers' number one priority. This finding is very consistent over time, but passengers' price sensitivity will only be enhanced during the current cost of living crisis. Policymakers should have this priority at the forefront of their minds as they consider the various proposals being discussed. Any measures which increase the cost of travel will affect affordability.

Passengers are equally clear what their priorities are in the event of disruption, as reported for example in the 2020 Steer Factfinding study. Passengers want:

- Access to clear and timely information,
- Care and assistance appropriate to the duration of the disruption,
- Onward travel to their destination in comparable conditions to their original travel.

Compensation does not feature as a priority, yet it is a huge expensive feature of EU261 and one that is paid for by all passengers to benefit only a relatively few consumers.

We encourage the institutions to refocus their discussions on the 3 elements highlighted above as part of a targeted EU261 that delivers what consumers want while eliminating much of the administrative complexity of the regulation, and certainly without increasing it further.

INDUSTRY PRIORITIES FOR A BALANCED EU261 FRAMEWORK

Building on consumers' priorities, there are a number of features of the proposed revision would affect airlines' ability to deliver the connectivity, choice and value that consumers want and that European economies need. These are:

Facilitating journey recovery

- Increased delay thresholds – to enable flights to operate better late than not at all
- A clear, non-exhaustive list of extraordinary circumstances – for when an operation cannot be recovered due to reasons outside airlines' control.
- Operationally viable rules for rebooking and rerouting.

Ensuring affordability

- Safeguarding pricing freedoms as a fundamental element of the Single Aviation Market

Reducing red tape

- Reducing administrative costs – automated compensation would increase the complexity of applying EU261

Facilitating Journey Recovery

Increased delay thresholds

Most consumers would prefer to arrive "better late than never" in the event of disruption. Increased thresholds would grant airlines a reasonable timeframe to resolve technical issues safely, source replacement aircraft and crew if needed or rebook passengers on alternative flights as a last resort, rather than cancelling flights altogether.

When disruption occurs, especially at an outstation (i.e. away from a home base) or a remote area, airlines broadly have two options: a) address the source of the problem if feasible e.g. carrying out repairs in case of a technical issue or b) arrange for a replacement aircraft and/or crew to be flown to the outstation as a substitute, subject to the availability of maintenance facilities or replacement aircraft. The latter option takes time to arrange and execute, including the flight time from the airline's home base to the outstation. In any event, it is a costly option as a "duplicate" flight is required. If the airline would be required to pay compensation in addition to the time and expense of sending a replacement aircraft, it may not make financial sense for it to do so, even if it would enable passengers to get to their destination earlier than would have otherwise possible.

For this reason, we strongly supports increased delay thresholds as a key win for both passengers and airlines. Throughout the revision process, we have advocated thresholds of 5 and 9 hours in line with previous proposals from the Council, with an additional 12-hour threshold for the longest flights. Nonetheless, the thresholds proposed in the Council agreement would be a small improvement on the *status quo* and they should be retained.

For any route with a flight time of longer than the delay threshold an airline would be liable for delay compensation even if it had a replacement aircraft and crew ready to go the moment a stranded aircraft touched down at the outstation. For example, the average sector length on the Stockholm – Barcelona route is 3 hours 30 minutes. With the original proposal of a delay threshold of 5 hours for intra-EU flights, there is a credible chance that a replacement could be sent if needed. With a 4-hour threshold, this may just be possible if the issue is diagnosed and notified prior to arrival. However, with a 3-hour threshold as proposed by the Parliament there is no realistic chance of a replacement being made available within the required timescales. Clearly, for extra-EU routes there is no chance at all.

Therefore, we call on the institutions to retain the thresholds set out in the Council Agreement as a pro-consumer change and to keep open the option of a further extension to 5 and 9 hours at a later date.

Extraordinary Circumstances

The lack of a clear definition of "extraordinary circumstances" in the original text of the Regulation has led to numerous court cases and inconsistencies in the application of the Regulation across the EU. There have been no fewer than 80 judgments of the Court of Justice of the European Union (CJEU) relating to the Regulation, which must be a record for a single piece of EU legislation. A significant proportion of these cases relate to extraordinary circumstances.

A binding list is needed in order to create legal certainty and to prevent further litigation. A binding list will also promote consistent enforcement of the regulation across all Member States. The list needs to be non-exhaustive to give National Enforcement Bodies (NEBs) s the flexibility to assess other qualifying events, which can occur but are not mentioned in the list, on a case-by-case basis. To this effect, it is worth noting that non-predictability is a major part of what makes a circumstance 'extraordinary.

The recognition of incidents that are relevant for flight safety is welcome to ensure that the industry can continue to give priority at all times to ensuring flight safety. The tests that need to be met in order for an event to qualify as an "unexpected flight safety shortcoming" should be clearly stated to give certainty to all stakeholders and to avoid this question being decided by judges.

The proposal to limit the possibility for airlines to invoke extraordinary circumstances to only one subsequent flight in a rotation instead of three as established in the position of the Council does not allow carriers to safely recover from a delay. It risks further incentivising airlines to cancel flights as a mitigation measure to avoid disruption to one flight impacting the rest of the operation, which ultimately does not serve the passenger's interest.

Rebooking and rerouting

We doe not support any ratification of the right to rerouting on another carrier nor the proposals to give passengers the right to rerouting using another mode of transport or to self-reroute if it cannot provide rerouting on its own services. These provisions would be unduly costly and complex for airlines to implement and would likely lead to outcomes that are not in the consumer interest.

In most instances, the most comfortable and convenient option for a passenger will be to continue on the services of the original operating carrier, whether that be on the original delayed flight or on a rescheduled itinerary. The airline (and any partners operating connecting flights) will be able to offer passengers similar levels of service as the original booking as well as certain protections in case of further disruption.

In contrast, a requirement to book with alternative airlines and transport providers, including airlines with which the airline has no partnership agreement, can be against the consumer interest. There have been instances where the rebooked itinerary has involved multiple sectors on different airlines and even changes of airport with no through-checking of baggage and no protections in the event of delay or disruption.

The proposal to allow passengers to self-rebook and claim expenses up to 400% of the original cost of the ticket is both disproportionate and unworkable. It is disproportionate because it could cost several hundred Euros for short-haul flights while for a long-haul premium ticket, the costs could run to tens of thousands of Euros. It is unworkable because significant numbers of passengers rebooking off a rescheduled flight will further incentivize airlines to cancel flights rather than focusing on facilitating journey recovery. We recall that passengers' priority is to arrive at their destination better late than not at all. Air carriers should be encouraged to make this happen wherever and as soon as possible and should not be penalized for maintaining connectivity.

Ensuring Affordability

Safeguarding pricing freedoms

Airline pricing freedoms are a fundamental component of the Single Aviation Market and have brought enormous benefits to consumers. They are not simple a matter of legal small print. Pricing freedoms underpin airlines' ability to offer a range of fare products adapted to consumers' needs and, critically, to offer the make affordable fares available to the most price sensitive customers. This includes defining the scope of services such as baggage allowances, in-flight meals, and seat selection. Moreover, pricing freedoms are enshrined in many Air Service Agreements, and interference with pricing freedoms clauses would violate these freedoms.

Cabin luggage

We oppose the proposals to mandate a free cabin baggage allowance beyond a personal item fitting under the seat. There is no evidence that consumers are demanding such a regulatory change, given that 90% of passengers declared in the Eurobarometer that they are very well informed about baggage allowances. Moreover, millions of passengers already choose to fly without a large cabin trolley, further indicating that price-sensitive consumers value the ability to only pay for those amenities that they require for their journey.

Overhead locker space is a scarce resource. Charging for larger cabin bags is an efficient method for rationing limited overhead bin space and encouraging operational efficiency, facilitating a faster boarding experience and better punctuality. Where more passengers are looking to take more bags onboard than the overhead bins can accommodate this can cause significant delays and additional stress for both passengers and cabin crew; in the worst case, it is possible that there may be an increase in disruptive behavior.

No-show policy

A passenger who does not fly the different legs in an itinerary in sequence is in breach of the conditions of carriage as set out in the air transport contract. These conditions exist for the benefit of all passengers and enable airlines to offer lower average fares.

In particular, sequential coupon rules for indirect itineraries are critical for safeguarding indirect connectivity for peripheral regions that rely on connections at hub airports for access to European and global markets. In the absence of such fare fences, unscrupulous passengers looking to avoid the premium for flying non-stop would book “hidden city” tickets without any intention to use the connecting legs. Airlines would be forced to remove the discount on such connecting itineraries which would, at best, cost genuine customers more and, at worst, threaten the viability of some feeder routes altogether.

Reducing red tape

As noted already, the administrative cost of EU261 is huge, equivalent to up to €1.5 Billion per year for airlines alone, without taking into account the costs of NEBs and other relevant agencies. In line with Europe-wide targets to reduce red-tape, the objective of all three institutions should be to rebalance and simplify the regulation in order to reduce the massive administrative burden.

However, we are concerned that the proposals being put forward by the Parliament go in exactly the opposite direction and will lead to a further significant increase in the cost and complexity of applying the Regulation. In particular, we are opposed to mandating the automated distribution of a claim form. Having reviewed this proposal thoroughly and considered multiple implementation options, the only conclusion is that it would lead to a significant increase in ineligible claims, resulting in unrealistic expectations of the system and additional processing costs. We consider that positive action by the passenger is a key requisite for rights to be triggered.

Care and Assistance: Automated provision of care and assistance would prevent passengers from choosing the option that works best for them given their specific circumstances and preferences.

Compensation: Compensation claims are often complex and need to be assessed on a case-by-case basis, including assessment of whether extraordinary circumstances might be involved. Moreover, it is clear from the language of the Regulation that it is claim-based, i.e., passengers must submit a claim to the airline to be entitled to compensation.

Reimbursement: Reimbursement is very different to care and assistance and compensation in that any reimbursement is payable to the purchaser of the travel and not the passenger. A requirement for reimbursement to be automated may operate against the consumer interest and leave passengers stranded away from home or lead them to lose out on other services that had been booked concurrently with the flight, for example in the case of a package holiday. Furthermore, an automated reimbursement requirement would run contrary to the provisions of the Regulation which gives the passenger the choice between a reimbursement or rerouting.