

Summary

The European Commission (EC) is in the process of a review of Regulation 261/2004 (EU261) which governs passengers' rights in relation to airlines, in particular those arising from cancellations and delays. With this paper, ERA wishes to make a substantial contribution to the ongoing debate. We urge all parties to adopt a wider vision for transportation generally, to avoid the unintended consequences that have followed and continue to threaten regional aviation, because of the judicial rewriting of the existing regulation). The overarching demands of competition, sustainability and regional development and ensuring essential connectivity must be taken into account, and, there is a need for an intermodal approach to passenger rights, rather than one which imposes exclusively on air transport the most draconian consumer rights regulations.



The COVID-19 pandemic has, in particular, significantly damaged the finances of regional carriers. EU261 in its current format has the capacity for destroying regional airlines, which will ultimately harm consumers, economies and employment in Europe's regions.

The goal of decarbonisation must be achieved as a matter of urgency and we should consider reimagining how passengers pay and interact with the airlines from a system based on punctuality to one based on environmental impact. The aviation industry in Europe has recognised this with its publication of *Destination 2050 – A route to net zero European aviation*. We agree that passengers' rights to compensation in the event of cancellation and/or delay originating in circumstances over which airlines have some measure of control, must be respected. However, the substantial financial cost of moving towards sustainability significantly reduces the capacity of airlines to bear increasing financial burdens,

arising from more and more adverse interpretations of EU261.

In the area of passenger rights, it is widely recognised that airlines are regulated far more strictly than other modes of transport. One of the reaffirmed goals of the EC is to foster multimodality, which is believed to offer substantial benefits both in terms of connectivity and CO₂ emissions economies. One of the layers of multimodality is an integrated regulatory framework encompassing all transport modes, to offer the same level of protection to a passenger journey. The inconsistency of regulations governing different transport modes which are comparatively adverse to aviation is in stark conflict with the need for both intermodality and a level playing field from a competition perspective. The latest proposal that airlines mutually guarantee passenger compensation in the event of a carrier's bankruptcy is onerous and represents an existential threat to regional carriers. There are good reasons why such an obligation is uninsurable, which should be a red light to regulators currently considering this approach.



ERA would also urge that there is a vital requirement for predictability in regulation, in the interests both of suppliers and consumers. The existing regulation has been changed beyond recognition by successive rulings of the ECJ. Significant decisions have been routinely adverse to industry, as well as unpredictable by all parties and arbitrary. The regulation has been repeatedly rewritten by the Court without reference to the impact of those decisions on other issues including competition, connectivity, safety and sustainability. Amendments, as opposed to interpretation of the regulation, should remain the prerogative of the executive and legislative branches of government, which has obligations of fairness, transparency and impact assessment.

Sustainability

To achieve sustainability, airlines and the aviation industry have to invest significantly. Siphoning funds from industry by increasing compensation obligations as well as increasing air traffic control (ATC) costs and airport charges defeats that goal.

In the spring of 2021, five associations representing the European aviation industry published *Destination 2050 – A route to net zero European aviation*. This report identifies a roadmap for the sector to decarbonise significantly by 2030 and to reach net-zero CO₂ emissions by 2050.



Industry proposes to achieve this by making very substantial investments in technology and operational improvements, the use of sustainable aviation fuels (SAFs) and smart economic measures. These improvements include the introduction of hybrid-electric and hydrogen-powered aircraft on inter-European routes by 2035, which would necessarily accelerate the fleet renewals of airlines operating in Europe

The adoption of SAFs has already contributed to the reduction of CO₂ emissions, and industry is looking to decrease CO₂ emissions by 80 per cent based on lifecycle emissions by 2050. SAFs cost between two and seven times more than conventional jet fuel. Inevitably adoption of SAFs will increase costs.

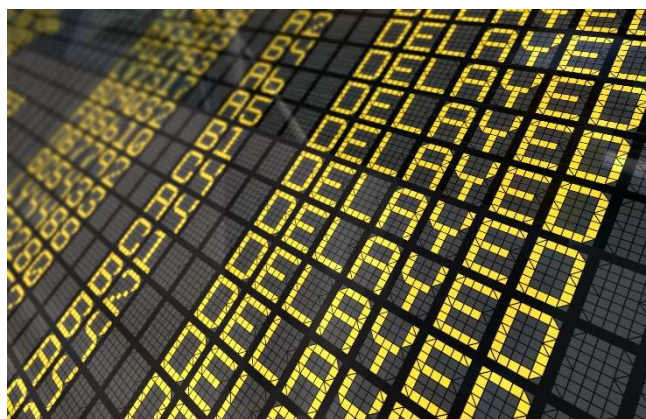
The final cost of decarbonisation is still the subject of detailed analysis, but the increased costs tied to the strengthened EU Emission Trading System (ETS), the increased cost of fuels available at airports in the EU (the ReFuelEU initiative), a new energy tax for airlines (the Energy Taxation Directive), and the implementation of the latest ATM and flight planning innovations, as well as the cost of implementing fleet renewal research and

development all represent increasing costs for airlines.

The industry is, as of today, calibrating the necessary investments and financial mechanisms and will be able to quantify these soon as part of the *Destination 2050* project. Additionally, the provisions of EU261 as judicially rewritten increase the pressure on airlines to arrive on time, flying faster or less optimal trajectories and thereby increasing fuel burnt and CO₂ emissions. A review of the impact of the regulation would necessarily take this and the other factors mentioned above into account.

Recent judicial activity

As explained in our 2019 report on EU261, the ECJ has already rewritten the regulation in several ways. It has extended its application by changing Article 6 so that the delay in departure is now the delay in arrival (Sturgeon); whittling away the defence of extraordinary measures (for example, by excluding the ramming of an aircraft by a ground handling vehicle, the unforeseeable grounding of an aircraft due to technical problems and the consequences of wildcat strikes by flight crew); as well as introducing a wholly new definition of extraordinary measures to exclude events inherent in the normal exercise of the activity of the air carrier (Wallentin). These decisions have expressly amended rather than interpreted the Regulation, without any consideration of their wider impact.



Since our report, further decisions of the ECJ have eroded the protections of carriers. In *D.Z. v. Blue Air*, the Court disentitled a carrier from denying carriage to a passenger without the appropriate visa for entry at his destination. This ignores the fact that airlines bringing passengers into a country without entry visas are obliged in most

states to pay for their accommodation and repatriation.

Most egregiously, in *Air Help v. SAS*, the Court held that an official strike organised by the union of an airline's staff to secure pay increases was not an extraordinary circumstance, handing a sledgehammer in industry relations to employees' unions. The Court stated that the air carrier "remains able to assert the undertaking's interest, so as to reach a compromise that is satisfactory for all the social partners", completely ignoring the fact that a union armed with the option of imposing unlimited EU261 obligations on a carrier has untrammelled dominance in any negotiations. Further, in a recent ruling of the ECJ against DAT, the airline was held responsible for delays resulting from a wildcat strike by a third party's employees, over which it had no control or prior knowledge.

Intermodality

It has long been recognised in the EC that the integration of transport systems carries many benefits particularly, but not exclusively, in the area of sustainability.

As we set out in our 2019 report, there are gross disparities between the treatment of different modes of transport as to the rules for compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay. This disparity has not been addressed by the EC since the publication of its own 2002 report highlighting the problem, and has been exaggerated by the 'consumer friendly' decisions of the ECJ in aviation cases, consistently weakening air transport and eroding intermodality.



Any revision of EU261/2004 should be focussed on a new, consistent and tightly-drafted regulation

governing all modes of transport, designed to foster intermodality, with a view to facilitating sustainability across all transport systems, and a more efficient integration of transport modes. It is our understanding that it is in the best interest of the consumer to look at the transport system in an integrated manner and level the playing field between transport modes.

Conclusion

ERA calls for a comprehensive review of the regulation of passenger rights, including a comparison to different transport systems to ensure fairness and predictability. This review should recognise that the costs anticipated and accepted by industry in its *Destination 2050* report will take priority over the imposition of any additional financial burdens on airlines at this crucial time.

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