

**A4E'S POSITION ON THE COMMISSION'S PROPOSAL FOR THE REVISION OF REGULATION  
261/2004 ON AIR PASSENGER RIGHTS**

**SUMMARY**

This paper sets out a position for the proposed review of the Regulation 261/2004 on Air Passenger Rights for A4E in its campaign to make air passenger rights clear and simple to implement.

A4E considers the revision of Regulation 261/2004 extremely important in terms of legal certainty and a fair balance of consumer and industry interests, and urges the EU Council to proceed with the file. The current Regulation 261/2004 is too detailed and prescriptive and, at the same time, too vague on essential points. This continues to generate numerous Court rulings across the EU, with judges interpreting the Regulation in various and often extensively different ways.

In addition, A4E is highly concerned that the revision of Regulation 261/2004 is blocked by the dispute about the status of the airport of Gibraltar. A4E urges the EU to separate the revision of the Air Passenger Rights Regulation from the political file in order to implement the revision. This file has been held up for too long.

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*Airlines for Europe (A4E) is Europe's largest airline association, based in Brussels. Launched in January 2016, the association consists of Aegean, airBaltic, Air France KLM, Cargolux, easyJet, Finnair, Icelandair, International Airlines Group (IAG), Jet2.com, Lufthansa Group, Norwegian, Ryanair, TAP Portugal, Travel Service and Volotea, and plans to grow further. With more than 550 million passengers on board each year, A4E members account for more than 70 per cent of the continent's journeys, operating more than 2,700 airplanes and generating more than EUR 100 billion in annual turnover.*

## INTRODUCTION

A4E supports the review of the legislation to make the rules fairer, clearer, and easier to apply. There are positive elements in the European Commission's proposed revision of the Regulation, including the trigger points for compensation after long delays, a list of extraordinary circumstances, attempts to limit the financial liability for airlines as "insurers of last resort", and the principle of the right of redress.

On the other hand, one should not forget that the main goal of the regulation is a high degree of consumer protection. A high degree of protection should not be sought solely in the right to compensation. Compensation is a last resort when the actual inconvenience cannot be prevented or minimized, while the main goal is to prevent disruption, delay and inconvenience for passengers. Getting the revision right is therefore very important for airlines and consumers alike. It is also crucial to support the development of a sustainable aviation industry in Europe and promote the connectivity of European airports.

A4E shares the general points set out in the airline industry's joint position<sup>1</sup>, but at this advanced stage of the legislative process, focus on the essential points is needed. In order to achieve a better outcome for consumers, certain essential points in the proposal should be retained and some specific provisions should be amended.

## THE DEFINITION AND LIST OF EXTRAORDINARY CIRCUMSTANCES

The introduction of an annex clarifying "extraordinary circumstances" is a much-needed improvement. A clear definition and a binding, non-exhaustive list of extraordinary circumstances will lead to greater clarity for all. Such a list must be as comprehensive as possible to ensure that all stakeholders have clarity about what is, and what is not extraordinary, in the widest set of scenarios.

A separate, short and precisely defined list of unexpected flight safety shortcomings, in line with common understandings of what constitutes technical defects beyond an airline's control, is equally important. Such problems are more frequent, and whilst very often they do not mean that an aircraft is unable to fly, stringent safety regulations require any issues to be fixed before take-off.

A4E therefore supports a clear distinction between unexpected flight safety shortcomings and other so-called "force majeure" situations.

## TRIGGER POINTS

*Article 1, § 5 amending Article 6, § 2a of Regulation 261/2004*

Disruptions to a flight programme take time to recover and many delays are unresolvable within 3 hours, particularly when disruption occurs out of the air carrier's base. Where there is a clear connection between the disruption and the delay, air carriers should be afforded the necessary flexibility to recover the programme and operate flights.

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<sup>1</sup> *Joint AEA/ELFAA/ERA/IACA/IATA position on the Commission's proposal for the revision of Regulation 261/2004*, April 2013, <https://www.iata.org/policy/Documents/revision-261-joint-industry-position-paper.pdf>

A threshold for long delays at 5 hrs, as the Commission proposes, is not an arbitrary number, but essential in giving airlines the ability to minimise the effect of disruptions to the benefit of passengers, to recover a flight programme and bring all passengers to their final destinations. This is particularly the case considering that airlines shall be explicitly obliged by the revised Regulation to compensate for missed connections.

The priority for stranded passengers is to get to their destination with as little delay as possible. Cancellation is the worst option airlines try to avoid. A trigger point lower than 5 hrs will certainly cause more cancellations and generate consumers' frustration, since airlines will be forced to isolate disruption and cancel affected flights in order not to propagate delays to the rest of their programme.

Instead, a threshold of 5 hours would provide airlines a necessary time margin to manage disruption properly and take necessary action to operate all flights and bring all passengers to their final destinations.

### **KNOCK-ON EFFECTS / CONSEQUENTIAL DELAYS**

*Article 1, § 4(b) amending Article 5, § 3 and Article 1, § 5 amending Article 6, § 4 of Regulation 261/2004*

The provision that extraordinary circumstances can be invoked only for the flight on which the disruption occurred and the flight immediately following it, fails to recognise the realities of scheduled air transport operation, in which necessary reactionary delays can have a much longer-lasting impact. Again, airlines practically being forced to cancel flights instead of progressively eliminating a delay.

Should there be a limited period in which extraordinary circumstances and unexpected flight safety shortcomings can be invoked, it should offer airlines sufficient incentive and flexibility to get their schedules back to normal. This means taking account of the fact that disruptions can ripple through a chain of flights.

In this context, application of extraordinary circumstances should extend to cases where there is a causal link between the original disruption and any other flight that is also affected by the delays or cancellations.

### **MISSED CONNECTIONS**

*Article 1, § 6, introducing Article 6a of Regulation 261/2004*

It is crucial that the calculation of delay compensation is done on a flight basis to ensure that feeders are not badly impacted and interlining is preserved. Not only small original carriers would suffer but also large hub carriers with most of their passengers in transit. This would be the opportunity for the EU to show it is serious in promoting connectivity which is central in its communication on European aviation strategy. The delay should therefore be measured at the end of each flight and not at the end of the journey.

This is essential to avoid discrimination between passengers on the same flight, to preserve the attractiveness of European airports, to support the development of co-modality, to maintain carriers' cooperative system of interlining agreements, not imposing a disproportionate burden on a feeder

airline, and to ensure consistency of regulation with global industry standards which determines the rules of distribution of responsibility between airlines.

### TIMEFRAME FOR RE-ROUTING

*Article 1, § 8 amending Article 8, § 5 of Regulation 261/2004*

A4E supports the right to re-routing. However, the proposed timeframe of 12 hrs is too short as it does not give airlines sufficient time to re-route a passenger, particularly for low frequency destinations with few alternative travel options. For flights due to depart in the evening it may not be possible to process re-routings in the time available. Often there are local environmental restrictions (e.g. airports closing during the night) that complicate such efforts.

The right to re-routing should therefore be 24 hrs effective operating time, excluding night-time operating bans. In addition, there should be a limit on cost or class of service.

### CLAIMS AND COMPLAINTS

*Article 16a, § 6, amending Article 16 of Regulation 261/2004*

An unintended consequence of Regulation 261/2004 has been the emergence and recent exponential growth of the 'EU261 claims harvester' industry, in which third parties seeking to involve themselves in the EU 261 claims process. These third parties are often unregulated, or minimally regulated, and employ aggressive marketing techniques, including 'cold-calling' of passengers with a view to getting passengers to claim through them. They damage the relationship between passengers and airlines by representing to passengers that airlines' claims procedures are onerous and stressful, and they can reduce the amount of compensation the passenger receives by deducting up to 50% of the EU261 compensation that would otherwise have been payable to the passenger.

A4E proposes that it should be confirmed that the entitlement to claim EU261 compensation is personal to the passenger (or group of passengers) affected. In addition, passengers (with the obvious exception of those that do not have capacity to submit a claim for themselves) may be required by airlines to submit claims directly to airlines and allow airlines the time recommended in the Interpretative Guidelines on Regulation EU261<sup>2</sup> or prescribed by applicable law (whichever is the lesser) to respond directly to them before engaging third parties to claim on their behalf. This would not restrict passengers from consulting legal or other third party advisers before submitting their claim directly to airlines.

In addition, A4E strongly supports the dispute resolutions mechanisms established in the EU under the ADR Directive and is concerned that the practices of these third parties hinder the spirit of such mechanisms.

Finally, in light of the increasing divergence of rules between member states, a time-limit for bringing actions for compensation for flight cancellation should be determined by the Regulation at two (2) years to be consistent with the Montreal Convention and avoid confusion for the passengers in the EU.

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<sup>2</sup> European Commission Interpretative Guidelines on Regulation (EC) No 261/2004, C(2016) 3502 Final, June 2016.