# ERA – Call for evidence for impact assessment "Better protection for passengers and their rights"

**17 January 2022**

ERA welcomes the opportunity to comment on the European Commission's call for evidence on the review of the passenger rights regulation and wishes to make a substantial contribution to the ongoing debate.

Over the last 30 years, the air travel single market has been a great achievement of the European Union: successive regulatory packages have made it possible for any European airline to operate anywhere in Europe, allowing for strong growth in air travel. As a result, connectivity has increased, the quality of services has improved and prices have gone down, all to the benefit of passengers.

The European Commission (EC) is in the process of a review of Regulation 261/2004 (EU261) which governs passengers' rights in relation to airlines arising from cancellations and delays.

ERA urges all parties to adopt a wider vision for transportation generally, and to avoid the unintended consequences that have damaged and continue to threaten regional aviation because of the judicial rewriting of the existing regulation The overarching demands of competition, sustainability, 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 revision of Regulation 261 based on the 2013 proposal should remain an absolute priority. These are (1) to have a clear binding non-exhaustive list of extraordinary circumstances (2) to trigger passenger rights only after 5-, 9- or 12-hours delay (3) no compensation for missed connections of less than 90 minutes (4) obligations clearly distinguished between operating and marketing carrier (5) cap on duty of care and assistance.

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. We for instance disagree with the ECJ ruling concerning SAS in March 2021 and believe that labour disputes/strikes should (in the right circumstances) be treated as "extraordinary circumstances". Otherwise, labour unions will be given an unfair advantage in future conflicts over salaries and other issues. Significant decisions have been routinely averse 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.

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 the airlines at this crucial time.

The COVID-19 pandemic has significantly damaged the finances of regional carriers in particular. The effects of the pandemic and ensuing economic crisis are likely to last for many years with a return to previous air traffic levels not foreseen before 2024 at the earliest. Most airlines would not have been able to survive this crisis without public support. EU261 in its current format has the capacity for destroying regional airlines, which ultimately harms consumers, economies and employment in Europe's regions.

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 employment. Thus, regional air routes are a source of job creation for the regional airlines themselves but also for society as many jobs are created because of the establishment of these routes. However, the current EU261 text, followed by its interpretations by the ECJ, is proving to have negative social effects by directly impacting on the creation of new employment. Moreover, the EU261 places a disproportionate economic burden on regional carriers, which often operate with small aircraft, making several rotations per day, and therefore affect competitiveness of those operators.

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 European Commission is to foster multimodality, which is believed to offer substantial benefits both in terms of connectivity and $CO_2$ 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.
On airline insolvency, the risk in non-crisis times is low. Existing instruments and voluntary measures – such as the Scheduled Airline Failure Insurance – protect passengers against the consequences in the rare instances where an airline ceases operations. In addition, consumers are also protected against the risk of airline insolvency through the requirements on financial fitness and oversight by licensing authorities under Regulation No (EC) 1008/2008. Indeed, governmental authorities have a duty to check financial fitness and thus limit the possibility of airline bankruptcies. Such an insolvency scheme would reduce the competitiveness of European airlines, resulting in less choice and connectivity and higher fares for consumers.

To further reduce the risk of airline insolvency upstream, ERA believes that the revision of Regulation 1008/2008 should be used to ensure more consistent and effective implementation of the requirements on the financial oversight of airlines. This could be accompanied by guidelines to ensure that these rules are implemented consistently across the EU as well as information campaigns at EU and national level to raise awareness among consumers of the options that are already available to protect themselves.

From the perspective of Passengers with Reduced Mobility (PMR), ERA calls to have a clear definition of service dogs, mobility and medical equipment. For such definitions, the existing EU PRM legislation should strive to align with the legislation of non-EU countries to ensure that PRM passengers can easily transit to connecting flights of non-EU carriers. A divergent interpretation of such rules could thus hamper their freedom of movement. Additionally, ERA argues that there is a need for a clear definition on liability for transport of mobility equipment from the airport terminal to the aircraft and the liable party in this respect. It is relevant to review the different liability rules as to who should load wheelchairs and medical equipment on board aircraft within a specific timeframe in relation to the scheduled departure time in order not to cause delays. These rules should take into account when asserting responsibility, liability and operational feasibility that wheelchairs and other medical equipment have become heavier and more technologically complex (drive and mechanic systems).

ERA believes that the Commission needs also to take a strong position allowing airlines to directly engage with their customers and encouraging customers to contact the airline before engaging a claim agency. Currently, claim agencies proceed against transport operators and in the case of a successful claim, withhold up to 30 per cent of compensation received from the consumer. There needs to be an explicit right of recourse against the party responsible for causing disruptions enabling the airline (or other actual transporter) to recover any damages suffered.

Finally, ERA believes that the case of a cancelled flight for which the passenger has booked a seat through an agency that has since gone bankrupt also deserves to be reviewed. Airlines cannot be expected to pay twice (to the agency and to the passenger): either the burden should be placed on the intermediary or the intermediary should be obliged to share this information with the air carrier. More specifically, new legislation should address the reality in the travel industry, namely that burdens, responsibility and hence liability on communication with passengers are often placed on the operating air carrier whereas the law does not foresee any right for air carriers to obtain such passenger information if they have booked through an intermediary such as a travel agent. Travel agents often withhold such information making it impossible to airlines to contact their passengers.

Moreover, the legislation should explicitly provide for the possibility of temporarily suspending certain provisions in case of massive disruptions (such as COVID) for environmental reasons so that airlines do not fly empty to keep their slots. Otherwise, airlines will indirectly always be encouraged to operate half empty flights, which is unacceptable from an environmental point of view.

The goal of decarbonisation must be achieved as a matter of urgency, and we should consider reimagining how passengers pay and interact with airlines from one 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' right 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 the increasing financial burdens arising from more and more adverse interpretations of EU261.

The final price of decarbonisation is still the subject of detailed analysis, but the increased costs tied to the strengthened EU Emission Trading System (ETS), the increased price 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 the financial mechanisms and will be able to quantify these soon as part of *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 $CO_2$ emissions. A review of the impact of the regulation would necessarily take this and the other factors mentioned above into account.