

ECTAA position on the review of Regulation 261/2004

Article 3 – Scope - Passenger claims

The Commission proposal presented in 2013 provided a new wording both in the preamble and the article 3 which will entitle passengers the choice of presenting claims under Regulation 261/2004 or under the Package Travel Directive (PTD)¹, but they may not claim under both for the same rights. The preamble notes that passengers should not be concerned about how airlines and tour operators allocate such claims between themselves.

ECTAA agrees that passengers should not be entitled to make double claims. However **ECTAA would like to stress that the obligations under Regulation 261/2004 must remain with the airlines. The Regulation 261/2004 and the PTD are two separate legal instruments.** The rights deriving from these two legal instruments are similar but not the same:

The circumstances triggering the rights under the two legislations are different. By way of an example, Regulation 261/2004 foresees a right to refund in case of a delay more than 3 hours or schedule change of more than 5 hours after scheduled departure, whereas the Directive 2015/2302 grants such a right if there is a significant change to the contract terms, including change to flight schedule. However, whether a change is considered 'significant' depends on the circumstances of the journey (purpose, length, etc.).

Moreover, the objectives of the rights granted under the two legislation differ: Whereas Regulation 261/2004 should be seen to offer standardized and immediate measures to reduce the trouble and inconvenience caused by the passengers facing a travel disruption (based on case law C-344/04), Directive 2015/2302 offers assistance and compensatory measures, where applicable, based on the individual damage caused to the traveler, to be assessed on a case-by-case basis. For example, if a flight is delayed by 3 hours, the passengers would be entitled to the standardized compensation from the airline for the inconvenience caused by the delay (250/400/600€ depending on distance) and to compensation from the tour operator for damages (loss of vacation time, services not used, etc.) which are assessed on an individual basis.

Thus, while ECTAA agrees that customers can present a claim for assistance and compensation under Regulation 261/2004 and under the package travel Directive, **it should be clear that customers cannot address a 261/2004 claim to the tour operator or vice-versa a PTD claim to the airline.**

ECTAA strongly calls for the following amendments:

Preamble 6:

Regulation (EC) No 261/2004 also applies to passengers that have booked their air transport as part of a package travel. However, it should be clarified that passengers may not cumulate corresponding rights, in particular under both this Regulation and Council Directive 2015/2302. The passengers should

¹ Directive (EU) 2015/2302 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC - [link](#)



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be able to choose under which law they introduce their claims, but should not have the right to cumulate compensation for the same problem under both legal acts. ~~Passengers should not be concerned about how air carriers and tour operators allocate such claims between them.—~~

Article 3 § 6:

This Regulation shall also apply to passengers transported according to package travel contracts but shall not affect the rights of passengers under Council Directive 2015/2302. The passenger shall be entitled to present claims under this Regulation **to the airline** and under Council Directive 2015/2302 **to the tour operator**, but may not in relation to the same facts cumulate rights under both legal acts if the rights safeguard the same interest or have the same objective. This Regulation shall not apply in cases where a package tour is cancelled or delayed for reasons other than cancellation or delay of the flight.

Article 4 – Denied Boarding – Sequential use of coupons

ECTAA very much welcomes the new paragraph 4 of Article 4 which extends the rights granted in case of denied boarding due to overbooking (care, assistance and compensation) to passengers who are **denied boarding on grounds that the passenger has not taken the outbound journey of his/her round trip or did not pay an additional charge for this purpose** (so-called 'no-show' of the passenger).

ECTAA would support an **extension of this right to passengers denied boarding on the grounds that they did not use all the legs of a multi-coupon ticket in sequential order**. Today airlines oblige passengers to accept the terms and conditions of carriage, which stipulate that the passenger must use all coupons of a multi-coupon ticket in sequential order. They also prohibit travel agents / intermediaries from selling customers multi-coupon tickets but with the aim of only using certain segments of the ticket. However, often a multi-coupon ticket, for example Frankfurt – London – New York, is cheaper than just the segment London – New York. If the customer decides to use only some segments of a ticket, then the airlines reserve the right to invoice the travel agent the difference between the fare applicable to the multi-coupon ticket and the more expensive fare applicable to the actual segments used by the passenger, or to deny the passenger boarding unless he pays the fare difference. The travel agent however has no influence or insight how a customer uses a ticket.

Article 23§2 of Regulation 1008/2008 stipulates that air fares must be granted to the public without any discrimination based on the nationality or the place of residence of the customer or on the place of establishment of the air carrier's agent or other ticket seller within the Community. Today a resident in London cannot buy the ticket Frankfurt – London – New York and only use the London – New York segment, otherwise he risks being denied boarding or being required to pay the difference in fare.

Thus, ECTAA believes that **airlines should be discouraged from applying such unfair conditions on passengers by bringing such types of denied boarding into the scope of Regulation 261/2004 and prohibiting airlines to raise an additional charge for this purpose, in line with the new Article 4§4. Moreover, travel agents / intermediaries should not be required to pay a penalty or the fare difference when passengers decide to use only certain segments of a multi-coupon ticket, as this is not under their control.**

ECTAA would welcome an extension of denied boarding rights under Article 4 paragraph 4 as follows:

Paragraphs 1, 2 and 3 shall also apply to return tickets where the passenger is denied boarding at the return journey on the grounds that he/she either:

- the passenger did not take the outward journey of a return ticket or did not pay an additional charge for this purpose, or
- the passenger did not use all coupons of a multi-coupon ticket in sequential order, and the passenger or his/her intermediary did not pay an additional charge for this purpose.

Article 5 – Right to assistance in case of airline insolvency

Airline insolvencies and the lack of protection thereof has been identified as a big problem for decades now. ECTAA has advocated for a mandatory airline insolvency protection for years. On average there is one airline failing per month in Europe leaving customers (B2C and B2B) with massive losses. The coronavirus pandemic has increased the financial pressure on airlines. According to IATA² data released on October 2021, the industry is forecast to make net losses of \$52 billion in 2021 and \$12 billion in 2022.

Instead of refunds, airlines have been issuing vouchers during the coronavirus pandemic that are not protected in any form against the insolvency of the carrier. We fear to see many more airlines filing for bankruptcy soon, leaving all the issued vouchers worthless (not to mention the unprocessed refunds). **A short-term solution is needed to guarantee the vouchers and outstanding refund obligations.**

In addition, also a **long-term solution addressing the lack of airline insolvency protection is needed.** There are **several possible solutions** as presented in the past. In Denmark for example there is a **guarantee fund** that covers not only package travel contracts (legal requirement under PTD) but also air tickets. Airlines have to pay a small contribution for each passenger travelling from a Danish airport to a foreign destination. The fund covers the repatriation and also prepaid tickets apart from a small lumpsum amount. There should be no restrictions on B2B reimbursements - reimbursements must also be made to travel agencies and tour operators when tickets are part of a package.

Other possible solutions include **insurances, guarantees, escrow accounts or “sliced” payments** (down payment + final payment – like for packages). As it is the case in the Package Travel Directive, the form of an airline insolvency protection should be left to the Member States, provided that certain conditions are met:

1. All passengers have to be repatriated and refunded
2. There is a mutual recognition of insolvency schemes by Member States
3. No double imposition/obligation based on place of residence of the passenger or registration of airline
4. B2B refunds are covered (for tickets that are part of a package).

² IATA publication ‘Economic Performance of the Airline Industry’, 2021 end year report - [link](#)

National Enforcement Bodies should be involved in helping Member States to set up national systems.

The **airline insolvency protection should be integrated in the air passenger rights review**. ECTAA would support the amendment tabled by the European Parliament to the Commission proposal presented in 2013, **treating the suspension of operation due to the airline insolvency in the same way as a cancellation**, as the inconvenience triggered by these events is the same. **Passengers should thus be entitled to assistance (return flight) and refund (if ticket or part of the tickets have not been used)**.

ECTAA would support something along the lines of the EP amendment 41 to Article 5 paragraph 5 c (new):

In the event of cancellation of a flight owing to insolvency, bankruptcy, or the suspension or cessation of the activities of an air carrier, passengers who are stranded shall be entitled to a reimbursement, the return flight to the point of departure or re-routing, and to care, as provided for in Articles 8 and 9 of this Regulation. Equally, air passengers who have not yet started their journey shall be entitled to reimbursement. Air carriers shall prove that they have taken all necessary measures, such as taking out an insurance policy or creating guarantee funds, to provide for the care, reimbursement or re-routing of stranded passengers where applicable. These rights shall apply to all passengers concerned irrespective of their place of residence, point of departure or where they bought their ticket.

Article 6 – Long delay

The Commission proposal presented in 2013 provided a new right of compensation for long delays. According to the Commission proposal a right of compensation in accordance with Article 7 would be triggered when the passenger arrives at its final destination:

- (a) five hours or more after the scheduled time of arrival for all intra-Community journeys and for journeys to/from third countries of 3500 kilometres or less;
- (b) nine hours or more after the scheduled time of arrival for journeys to/from third countries between 3500 and 6000 kilometres;
- (c) twelve hours or more after the scheduled time of arrival for journeys to/from third countries of 6000 kilometres or more.

The European Court of Justice ruled in 2009 in the so-called Sturgeon Court ruling³ that the damage/inconvenience caused by a long flight delay and cancellation are the same, so passengers should be treated in the same way. It thus ruled that airlines have to pay compensation if the delay in the arrival at the final destination is of 3 hours or more. This compensation may be reduced by 50% for flights >3500km arriving between 3 and 4 hrs.

ECTAA supports the inclusion of the Sturgeon ruling including the threshold of three hours in a revised Air Passenger Rights Regulation.

³ <https://curia.europa.eu/juris/document/document.jsf?docid=73703&doclang=EN>

ECTAA strongly calls for the following amendments:

6(2) Passengers shall have a right to compensation from the operating air carrier in accordance with Article 7 where the passenger arrives at its final destination three hours or more after the scheduled time of arrival.

Article 8 – Right to refund – Processing of refunds through intermediaries and tour operators

Airlines have a refund obligation under the EU Passenger Rights Regulation (Reg. 261/2004). For indirect sales (such as sales through intermediaries and tour operators) there is a clear obligation for airlines to refund timely. This is regulated in IATA Resolution 824r, but this is not being enforced. Many airlines suspended the automatic refund process during the coronavirus pandemic resulting in delayed and non-processed refunds, at the detriment of the customers.

Only a timely refund from airlines allow travel companies to refund their customers and fulfil their refund obligations e.g. resulting from the Package Travel Directive (Reg. 2015/2302). Timely refunds by airlines that allow fulfilling refund obligations vis-à-vis customers must be enforced.

When a travel company (e.g. package travel organiser) has a refund obligation towards the customer according to the PTD (e.g. resulting from Unexpected Extraordinary Circumstances), the travel company should have an **enforceable right of redress established in the Air Passenger Rights Regulation** (see also point below on Article 13 – Right of redress).

Refunds of tickets made through tour operators or intermediaries should be processed in the same way as the payment of the ticket was done. This means that if a ticket is settled through the IATA BSP, then the refund must be settled through BSP; If a credit card (customer credit card, corporate credit card, agency credit card) is used for a ticket purchase, the refund is credited back to this card. If an airline readily accepts a payment through their website, then that airline should be automatically obliged to readily make refunds to the same source of payment.

ECTAA strongly calls for an amendment to article 8 as follows:

Right to reimbursement or re-routing

1. Where reference is made to this Article, passengers shall be offered the choice between:

(a) - reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant,

- a return flight to the first point of departure, at the earliest opportunity;

(b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or

(c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.

(new) 1a The right to refund under paragraph 1(a) also applies to tickets that have been bought through a tour operator or intermediary. Airlines must process ticket refunds in the same way as the payment of the ticket was done.

Article 8.2 – Equal right of refund for all passengers

Certain airlines have sought to invoke Article 8.2 as a basis for not refunding passengers, whose flight formed part of a package ('package passengers'), where the airline has cancelled the flight. This has particularly been the case during the pandemic.

Article 8.2 specifies that the right to refund in case of cancellation 'shall also apply to passengers whose flights form part of a package, except for the right to reimbursement where such right arises under Directive 90/314/EEC.'

Recital 16 of Regulation 261/04 states that 'in cases where a package tour is cancelled for reasons other than the flight being cancelled, this Regulation should not apply'. This is accepted as being fair and equitable.

Where a package tour is cancelled as a consequence of the flight being cancelled, the inference of Recital 16 is that Regulation 261/04 should apply.

Article 8.2 has served to undermine this corollary, with the unintended consequence of airlines potentially being indirectly subsidised by tour organisers and even Member States. Indeed, some airlines have cited the ruling of the CJEU 'the Aegean Airlines Case' [C-163/18] in support of their refusal to refund package passengers. In the Aegean Airlines case, Article 8.2 foreclosed the possibility of the CJEU issuing a direction to Aegean Airlines to reimburse the passengers, even though Aegean Airlines had cancelled the flight. Aegean Airlines retained the passengers' monies with the passengers having no option but to seek recourse against the government of the Netherlands (as the organiser went bankrupt and the insolvency arrangements were insufficient to refund the passenger). This amounts in essence to Aegean Airlines receiving a state subvention from a Member State.

Had it transpired in the Aegean Airlines case, that the tour organiser's insolvency arrangements were sufficient to cover the passengers' monies, the passengers would have been reimbursed from the tour organiser's insolvency protection arrangements. Aegean Airlines would have retained the passenger's monies, receiving a subvention, in this instance, from the tour organiser's insolvency arrangements.

Article 8.2 serves to create an unlevel playing field, with tour organisers, tour organiser's insolvency protection schemes and where such schemes are insufficient, national governments being exposed to having to refund 'package passengers' for flights, that airlines have cancelled, with the airlines ultimately receiving an advantage in retaining package passengers' monies.

ECTAA strongly objects that tour operators should be required to refund package travel passengers, where the flight has been cancelled by the airline.

ECTAA thus calls for the deletion of Article 8.2.:

~~Paragraph 1(a) shall also apply to passengers whose flights form part of a package, except for the right to reimbursement where such right arises under Directive 90/314/EEC.~~

Article 9 – Right to care – exemption

ECTAA supports the capping of airlines' obligations to provide care in exceptional circumstances. The impact assessment study indicated that the cost of complying with the Regulation under 261/2004 can quickly take disproportionate dimensions when an event takes place that causes mass disruption, such as the ash cloud crisis in 2010 or the pandemic that led to mass cancellation of flights.

However, ECTAA does not see why the obligation to offer accommodation shall not apply where the flight concerned is of 250 km or less and scheduled to be operated by an aircraft with a maximum capacity of 80 seats or less. The passengers still suffer the same inconvenience regardless of the flight distance and aircraft type.

ECTAA suggest deleting paragraph 5 in Article 9 of the Commission proposal:

~~5. The obligation to offer accommodation under paragraph 1(b) shall not apply where the flight concerned is of 250 km or less and scheduled to be operated by an aircraft with a maximum capacity of 80 seats or less, except where the flight is a connecting flight. If the operating air carrier chooses to apply this exemption, it shall nevertheless provide the passengers with information about available accommodation.~~

Article 13 – Right to redress – reciprocal right

Article 13 of Reg 261/04 specifies that 'In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.'

Consistent with Recital 16, Article 13 provides for a mutual right of redress as between airlines, tour organisers and other third parties, where expenses have been incurred or losses suffered by one party as a consequence of the actions of the other. **The need for a reciprocal right of redress is evident.**

However, the reciprocity in Article 13 was removed in the Commission's proposal to amend Regulation 261/04. **ECTAA strongly opposes the Commission proposal to abolish the reciprocal right of redress of tour organisers and other third parties, where expenses have been incurred or losses suffered as a consequence of the actions of the airline.**

ECTAA strongly calls for Article 13 to be retained in its current wording.

Article 14 - Notification of operational disruptions – customer contact details

In the interest of the mutual customers, travel companies agree that customers should always be informed about operational disruptions that have an impact on their journey. Most travel companies have systems and processes in place to provide customers with all relevant information that transport companies share with them. It is thus **fundamental that all information by transport companies are shared with the travel company that made the booking.**

If travel companies do not have the **possibility to share operational disruption information**, then they should have the possibility to either (i) disclose the customer contact details to the carrier, so that the carrier can inform the customer directly or (ii) inform the customer where operational disruption information is available (from carriers' website, app, etc.).

Articles 6 (1) a & f of the GDPR describe clearly that processing of personal data is lawful without consent, where this is necessary for the performance of a contract and where processing is necessary for the purposes of a legitimate interest. As such, **no consent from the customer is needed to disclose customer contact information to the carrier when there is a legitimate interest for the fulfilment of the contract, e.g. for operational disruptions.** Travel companies should be free to make individual assessments whether the GDPR's criteria have been satisfied. Therefore direct customer contact details which are shared with transport companies, must only be used for operational disruptions! The misuse for marketing purposes of customer contact information provided for operational disruptions damages trust of customers and creates reluctance of travel companies to share customer contact information with transport companies. We propose a revised wording of Article 14 in the proposal presented by the Commission in 2013 – see below.

It must be **enforced with sanctions that customer contact details only provided for operational disruptions** must not be used for other purposes like upselling, customer surveys etc. Sanctions are necessary, as there are proven cases of abuse. Today airlines already require travel agents to provide customer contact details to allow them to share operational disruption information. There are many cases where commercial offers were sent to customers that have nothing to do with operational disruptions.

ECTAA amendment suggestion to Article 14 of the Commission proposal (text in bold new):

6. Where the passenger does not acquire a ticket directly from the operating air carrier, but via an intermediary established within the Union, this intermediary shall provide the passenger's contact details to the air carrier, ~~on condition that the passenger has given his explicit and written authorisation. This authorisation may only be given on an "opt-in" basis.~~ The air carrier may use these contact details exclusively for the purpose of fulfilling the information obligation under this Article and not for marketing purposes.

*An ~~intermediary~~ **organiser or ticket seller** shall be exempted from paragraph 6 if it can prove the existence of an alternative system that ensures that the passenger is informed without the transmission of the relevant customer contact details **to the airline. In such a case, the airline shall fulfil its information obligations under this Article towards the organiser or ticket seller who shall ensure the correct and timely transmission of the information to the passenger and, therefore, in such cases contact details transmitted to the airline shall be those of the organiser or ticket seller.***



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ECTAA position on the review of Regulation No 2027/97

Article 6d - Transparency of baggage allowances

Airlines have put in place a plethora of different baggage policies. As maximum baggage allowances, allowed number of items and dimensions, as well as possible extra charges differ by airlines, passengers are not able to compare airlines' offers in a transparent manner. The problem is further complicated by some airlines' distribution practices, whereby baggage fees are charged only for passengers that do not hold a frequent flyer card, or where passengers are not able to pay for the baggage fee through their travel agent.

To further increase transparency in baggage fees, ECTAA proposes to introduce the following amendments in the 1st paragraph of Article 6 (d), creating a level playing field for all passengers using different distribution channels to book their flights and baggage allocations (changes in bold):

ECTAA would make the following amendment suggestion to Article 6d:

1. Whilst air carriers have full commercial freedom to establish the conditions under which they permit baggage to be carried, they shall clearly indicate, at booking and at the check-in desks (including at self-service check-in machines), the maximum baggage allowance passengers are permitted to carry within the cabin and hold of the aircraft on each of the flights included within a passenger's reservation, including any restrictions on the number of items that would be applied within a given maximum baggage allowance. **Air carriers shall make such information available through all their distribution channels.** Where additional charges are applied for the carriage of baggage air carriers shall clearly indicate details of those charges at booking and on request at the airport, **and make those charges available through any of its distribution channels.**