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Agenda Item 2: Examination of Key Issues and Related Regulatory Framework

Agenda Item 2.3: Consumer protection

EFFECTIVENESS OF CONSUMER PROTECTION REGULATIONS¹

(Presented by the Secretariat)

1. INTRODUCTION

1.1 This paper provides an overview of consumer protection initiatives taken in various regions and discusses their effectiveness.² The paper will be divided as follows: (i) introduction; (ii) overview of consumer protection rules; (iii) main areas of concern identified in relation to passenger satisfaction, including operational reasons for flight cancellations/delays and price transparency issues; (iv) effectiveness of consumer protection regulations; (v) costs of compliance with consumer protection regulations; (vi) protection against service failure; (vii) and need for regulatory convergence.

1.2 In accordance with recommendations of the eleventh meeting of the ICAO Air Transport Regulation Panel (ATRP/11, 4-8 June 2012) requesting that ICAO conduct a study on the effectiveness of consumer protection regulations in different regions, account has been taken of regulatory initiatives by as broad a sample of States or regions as possible. It should be noted, however, that most of the available analytical tools on the effectiveness and characteristics of consumer protection regulations come from European Union (EU) and United States (U.S.) sources. Those two geographic units have extensive passenger protection regulations and, as such, there are many sources of information, both public and private, providing detailed data and analysis on the impact of such regulations. In some cases, regulations impose an obligation to report and publicize consumer protection data which clearly facilitates analysis.

¹ This paper is intended to supplement ATConf/6 working paper on “*Consumer Protection and Definition of Passengers Rights in Different Contexts*” presented by the ICAO Secretariat (ATConf/6-WP/5).

² Recommendations 2.3.4.1 of the eleventh meeting of the ICAO Air Transport Regulation Panel (ATRP/11), held in Montréal from 4 to 8 June 2011, requested ICAO to study the effectiveness of regulatory interventions in different regions with respect to consumer protection.

2. OVERVIEW OF CONSUMER PROTECTION RULES

2.1 Previous ICAO work on consumer protection

2.1.1 ICAO's activities in the area of consumer protection include the adoption of Assembly resolutions (notably A37/20), of ATConf/5 recommendations and the development of guidance material, as described in ATConf/6-WP/5. The ICAO Secretariat has developed and maintains a summary of airline and governmental responses to consumer protection issues, available on ICAO's website.³

2.2 Warsaw and Montréal Conventions

2.2.1 The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 ("Warsaw Convention"), established the principle of the air carrier's liability for damage caused to passengers, baggage and goods, as well as for damage caused by delay. Over time, the Warsaw Convention had to be expanded and a number of amendments and additions were concluded (commonly referred to as Warsaw system of instruments). To modernize and consolidate the Warsaw Convention and related instruments, the Convention for the Unification of Certain Rules for International Carriage by Air, was adopted in Montreal on 28 May 1999 ("Montréal Convention").

2.2.2 The Montréal Convention expressly recognizes the "importance of ensuring the protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution."

2.2.3 Despite their broad scope, the Warsaw and Montréal Conventions do not expressly cover certain areas of the passenger-carrier relationship which have recently given rise to increased regulatory activity. Those areas include price transparency, assistance to passengers in cases of travel disruption, or protection against air carrier insolvency.

2.3 Canada

2.3.1 Canada has taken a specific approach to passenger protection rules insofar as there are no prescriptive rules applied. Instead, the Canadian Transportation Agency issues decisions addressing the rights of passengers. The Agency adopts a "circumstance-focused approach" which requires consideration of the particular circumstances surrounding a passenger. The Agency, in five related recent decisions⁴ stated that in some circumstances a delay or cancellation will defeat the purpose of the trip and that, in such cases, the passenger should have the right to choose between continued travel and a full refund. It appears from these decisions that the obligation of an air carrier is not absolute and that its responsibility applies only for delays within its control.

2.4 State of Israel

2.4.1 In August 2012, the State of Israel enacted an Airline Passenger Rights Law.⁵ The Law, which applies to scheduled airline flights as well as charter flights, provides for assistance (food, drink, phone access) in case of flight delays. An option is provided to the passenger to cancel the reservation and receive a refund if the duration of the delay is between 5 and 8 hours. For longer delays, compensation and accommodation are provided.

³ ICAO *Summary of Consumer Protection Rules*, http://www.icao.int/sustainability/pages/eap_ep_consumerinterests.aspx

⁴ Canadian Transportation Agency Decisions 248 to 252-C-A-2012, 28 June 2012.

⁵ Arutz Sheva, *Ben Gurion Passengers Get New "Bill of Rights"*, 16 August 2012.

2.5 Kingdom of Saudi Arabia

2.5.1 The General Authority of Civil Aviation (GACA) of the Kingdom of Saudi Arabia issued a Consumer Protection Regulation (the “GACA Regulation”) in August 2005.⁶ According to its Article 5 (Scope of Application), the GACA Regulation applies to “all domestic and international air carriage of persons, baggage or goods on flights arriving at the [Kingdom of Saudi Arabia] or departing therefrom.” Passengers are granted protections in cases of denied boarding due to overbooking, flight cancellations and delays, including assistance and compensation. Article 15 of the GACA Regulation promotes the “principle of utmost transparency in [...] advertisements on flight and services provided [...]”, notably by stating that the prices advertised should be considered as “total prices and [that] the air carrier shall not be entitled to add additional fees to such prices, unless such is included explicitly in advertising materials”.

2.6 U.S.

2.6.1 On 25 April 2011, a rule enhancing Airline Passengers Protection⁷ was issued by the U.S. Department of Transportation (DOT). This rule applies to: U.S. and foreign air carriers operating passenger service using aircraft of 30 seats or more; and to or from a U.S. airport. According to the *Manual on the Regulation of International Air Transport*,⁸ “passenger air service” is an air service performed primarily for the transport of passengers. Therefore, this rule does not apply to freight services.

2.6.2 Compensation of up to USD 1,300 is due in cases where the passenger is denied boarding due to oversold flights, depending on whether the carrier offers alternate transportation and based on the delay of arrival at final destination. In addition, with respect to domestic flights, a carrier is not permitted to allow an aircraft to remain on the tarmac for more than three hours before allowing passengers to deplane, subject to security or safety-related circumstances or if air traffic control advises that returning to the gate would significantly disrupt operations. With a view to ensuring price transparency, the price for an airline ticket must be the entire price to be paid. Although charges (e.g. government taxes) can be stated separately, they must be displayed so as to accurately reflect the total price to be paid by the passenger.

2.7 EU

2.7.1 In the EU, Regulation 261/204 was enacted in February 2004.⁹ The scope of application of the Regulation is set out in Article 3.

“Scope

1. This Regulation shall apply:

(a) to *passengers* departing from an airport located in the territory of a Member State to which the Treaty applies;

(b) to *passengers* departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier [emphasis added].”

⁶ Consumer Protection Regulation in the Civil Aviation Sector issued by the Board of Directors of the General Authority of Civil Aviation pursuant to the Board resolution No. (8-99) dated 1/8/1431h.

⁷ Rule “*Enhancing Airline Passenger Protections*” (76 Fed. Reg. 23, No 110).

⁸ ICAO *Manual on the Regulation of International Air Transport* (Doc 9626). See section 5.3-1.

⁹ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishes common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

2.7.2 The second paragraph of Article 3 describes the conditions for application of the Regulation:

“(a) passengers must have a confirmed reservation on the flight concerned and, except in the case of cancellation, must present themselves for check-in, as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorized travel agent, or, if no time is indicated, not later than 45 minutes before the published departure time; and

(b) have been transferred by an air carrier or tour operator from the flight for which they held a reservation to another flight, irrespective of the reason.”

2.7.3 The regulation does not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public. However, it applies to passengers having tickets issued under a frequent flyer programme or other commercial programme by an air carrier or tour operator. Regulation 261/2004 does not apply to other users of air transport, such as users of air freight services, or parties with whom air carriers have a contractual relationship, such as airports, air navigation services providers (ANSPs), or ground-handlers.

2.7.4 Regulation 261/2004 provides different protections to passengers. First, a right to care, or assistance: in case of flight delays and cancellations, the airline must minimize the discomfort to passenger (catering, hotels, communication means, etc.). Second, the Regulation gives passengers a right to compensation, in cases of flight cancellations and depending on flight distance, of up to EUR 600, unless the cancellation is caused by “extraordinary circumstances”. It should be noted that the exemption allowed for under “extraordinary circumstances” only applies to compensation obligations, and not to assistance.

2.8 Latin America

2.8.1 In November 2004, the Latin American Civil Aviation Commission (LACAC) recommended¹⁰ that Member States adopt a set of rules protecting passengers with confirmed reservations who have been denied boarding involuntarily. Among the protections provided by the recommended rules is the possibility to choose between substitute transportation and reimbursement. In addition, it is recommended that assistance be provided with respect to communications, refreshments/food, and accommodations for delays exceeding four hours.

3. PASSENGERS’ SATISFACTION: MAIN AREAS OF CONCERN

3.1 It is important to note that, in general, 1 to 2 per cent of flights are cancelled while 2 to 3 per cent are delayed by over 2 hours.

¹⁰ Latin American Civil Aviation Commission, Recommendation A16-8, *Rights of the Users*, November 2004.

3.2 General satisfaction indicators — Europe

3.2.1 In the European region, passenger satisfaction varies depending on the criteria used. The results of a survey published in December 2009 at the request of the European Commission¹¹ are provided below, indicating itemized percentages of satisfied passengers who traveled by air:

Passenger satisfaction	Per cent
Punctuality	80%
Comfort	76%
Information in case of delays or cancellations	63%
Information in case of loss, damage or delay of luggage	46%
Compensation offered in case of service failures	37%

3.3 General satisfaction indicators — U.S.

3.3.1 In the U.S., passenger complaint categories can be listed in order of decreasing importance.

Rank	Complaint category	Number	Per cent
1	Flight problems (cancellations, delays, misconnections)	317	25.2%
2	Reservation/ticketing/boarding	176	14.0%
3	Baggage	174	13.8%
4	Customer service	164	13.0%
5	Fares	132	10.5%
6	Refunds	117	9.3%
7	Disability	68	5.4%
8	Other, frequent flyer	46	3.7%
9	Over sales	36	2.9%
10	Advertising	24	1.9%
11	Discrimination	5	0.4%
12	Animals	1	0.1%
		1,260	100%

(Source: Department of Transportation *Air Travel Consumer Report*, June 2012).

3.4 Passenger complaints

3.4.1 EU

a) In 2009, a total of 35,198 complaints were received.¹²

- 1) 41 per cent were due to cancellations;
- 2) 25 per cent were due to delays;
- 3) 24 per cent of all complaints were resolved;
- 4) in 3 per cent of the cases, sanctions were issued.

b) In the Federal Republic of Germany, draft legislation was adopted on 4 July 2012 regarding the introduction of conciliation bodies for airline passengers;¹³ the draft

¹¹ Special *Eurobarometer 319*, Summary, “*Air Passengers Rights*”, December 2009. Survey conducted by TNS Opinion & Social at the request of the Directorate General Energy and Transport.

¹² Commission Staff Working Paper, accompanying document for the Communication from the Commission to the European Parliament and the Council on the operation and the results of Regulation (EC) 261/2004, 11 April 2011.

¹³ Arnecke Siebold Rechtsanwälte, International Law Office, *Alternative Dispute Resolution for Passenger Claims*, 8 August 2012.

legislation needs to be approved by the Parliament. According to the draft legislation, claims can be brought by all passengers, except business travellers and passengers travelling on package tours, when the amount in dispute is between EUR 10 and EUR 5,000. Since the parties will not be bound by the mediator's suggestion, claims can be brought before civil courts. Airlines will be required to bear the cost of establishing and maintaining conciliation bodies. It is estimated that the average number of air passenger complaint cases in Germany is 6,500 per year.

3.4.2 U.S.

- a) In May 2012, the DOT handled 1,260 complaints (compared to 1,065 in May 2011).¹⁴ When looking at the complaint categories, an aggregate of 64 per cent of complaints are related to issues that occurred during the flight, including such areas as baggage, consumer service, disability, over sales, discrimination, animal-related incidents. The major single source of passenger complaint, with 25 per cent, stems from the category of "flight problems" which covers cancellations, delays, and misconnections.
- b) A total of 26 per cent of complaints are related to pre-flight issues. Those are areas touching on commercial or marketing matters, such as reservation/ticketing/boarding, fares, and advertising. Advertising only generates 1.9 per cent of complaints while refunds generate 9 per cent of complaints.
- c) The high level of satisfaction for punctuality (80 per cent) is remarkably consistent with the rate of on-time flights (around 83 per cent). The comfort is also generally satisfactory, with 76 per cent of satisfied respondents.

3.5 Causes of flight delays

3.5.1 A comprehensive study has been prepared for the European Commission¹⁵ examining how airlines have applied Regulation 261/2004. The analysis is based on data published by the French *Direction Générale de l'Aviation Civile* (DGAC), the Association of European Airlines (AEA) and the European Regional Airlines Association (ERAA). Based on graphical information presented in the study, estimates were derived on the causes of flight delays and are presented below.

AEA airlines	Per cent
Load and aircraft handling (flight operations)	20%
Maintenance/equipment failure	10%
Reactionary (late arrival)	40%
Airport/air traffic control (ATC)	25%
Weather	5%
ERAA airlines	Per cent
Flight operations	5%
Aircraft/technical	10%
Reactionary (late arrival)	50%
Other	10%
ATC	15%
Weather	5%
Passenger	5%

¹⁴ Department of Transportation *Air Travel Consumer Report*, June 2012.

¹⁵ Steer Davies Gleave, *Evaluation of Regulation 261/2004, Final Report*, February 2010.

French DGCA	Per cent
Airline (flight operations)	25%
Reactionary and miscellaneous	40%
Airports and security	10%
Air traffic management	10%
Weather	5%
Passenger	10%

3.5.2 According to a regular survey published by the DOT,¹⁶ 83.4 per cent of flights were on time in May 2012 and 0.6 per cent were cancelled. The report also provides a breakdown of the causes of delay.

Cause of delay	Per cent
On time	83.4%
Cancelled	0.9%
Diverted	0.2%
Airline	4.6%
Weather	0.6%
National aviation system	4.8%
Security	0.0%
Late arrival	5.6%
Total	100.0%

3.5.3 According to a European Commission working paper published in April 2011 on the operation of Regulation 261/2004,¹⁷ about half of the cancellations in 2010 were due to the volcanic ash crisis which took place in April of the same year. This illustrates the high impact of circumstantial or cyclical disruptions on overall airline timeliness.

3.6 Flight cancellations in cases of strike

3.6.1 In March 2012, the French Parliament passed a new law on the organization of services and information to passengers in companies involved in the carriage of passengers by air.¹⁸ This law imposes on employees of airlines an obligation to declare their intention to initiate strike action at least 48 hours before the commencement of any disruption. Airlines must also inform passengers at least 24 hours before the commencement of disruptions caused by planned industrial action.

3.6.2 This statute has been submitted to France’s Constitutional Court, particularly with respect to the requirement for employees to inform their employer of their intention to initiate strike action 48 hours in advance, and was upheld, on the grounds that this requirement is proportionate from a constitutional viewpoint, considering passengers’ right to travel.

3.6.3 A decision by the Federal Republic of Germany’s Federal Court of Justice¹⁹ confirmed that strikes should be considered as constituting “exceptional circumstances.” Consequently, passengers may not claim for compensation provided by Regulation 261/2004 in cases of strikes.

3.7 Price transparency — U.S.

¹⁶ U.S. Department of Transportation *Air Travel Consumer Report*, June 2012.

¹⁷ Commission Staff Working Paper, accompanying document for the Communication from the Commission to the European Parliament and the Council on the operation and the results of Regulation (EC) 261/2004, 11 April 2011.

¹⁸ *Loi n°2012-375 du 19 mars 2012 relative à l’organisation du service et à l’information des passagers dans les entreprises de transport aérien.*

¹⁹ Tapan Sharma, *The Wall Street Journal*, *Court Ruling Could Help Lufthansa in Event of Strike Action*, 22 August 2012.

3.7.1 DOT rules require that the total price, including taxes, appear as the most prominent figure displayed on print advertisements and websites. Under the so-called “Airfare Advertising Rule,” airlines remain free to provide an itemized breakdown, displaying to the customer the amount of the base fare, taxes and other charges, but they may not display such price components “prominently” or in the same or larger size as the total price. To ensure that consumers clearly understand the final price to be paid, the total cost must be the most prominent figure.²⁰

3.8 Price transparency — EU

3.8.1 Regulation 1008/2008²¹ on air services in the EU requires that the published price for the service shall include the fare and all applicable taxes, charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition, details must be given of the different components of the price (fares, taxes, airport charges and other costs).

3.8.2 The Consumer Rights Directive 2011/83/EU²² aims at increasing transparency for passengers, especially when purchasing tickets online. The Directive explicitly bans pre-ticked boxes, internet cost traps and any additional charges which passengers were not duly informed of in advance. Additionally, it prohibits traders from charging fees for the use of means of payment (e.g. credit cards) that exceed the cost borne by the trader for the use of these means.

4. EFFECTIVENESS OF CONSUMER PROTECTION REGULATIONS

4.1 U.S.

4.1.1 It has been argued that, while the so-called “DOT Tarmac Delay Rule” has nearly eliminated tarmac delays of 3 hours or more, the enactment of this rule has coincided with a greater likelihood of flight cancellations.²³ Available data tends to support the view that this rule did not have such counter-productive effects. Judging from official figures based on information from the largest U.S. airlines,²⁴ on-time arrivals have increased from 73.4 per cent in 2007 to 83.4 per cent in 2012. In the same interval, cancellations have decreased from 2.16 per cent to 0.9 per cent.

4.1.2 The same positive trend can be observed for mishandled baggage reports, which have decreased from 7.05 per cent to 2.77 per cent. In the month of June 2012, no domestic flights with tarmac delays over 3 hours were recorded, and there was just one international flight with a tarmac delay of more than four hours.²⁵

4.2 EU

4.2.1 According to data on ERA airlines, in 2005, the year of implementation of Regulation 261/2004, 22 airlines were responsible for 46 per cent of primary delays, excluding reactionary ones. According to the French DGAC, airlines are responsible for 36 to 44 per cent of primary delays.

²⁰ Petitions by Spirit Airlines Inc. et al. & Southwest Airlines Co., U.S. Court of Appeals for the District of Columbia Circuit, No. 11-1219.

²¹ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community.

²² Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

²³ U.S. Government Accountability Office (GAO), *Highlights, Airline Passenger Protections*, September 2011.

²⁴ Department of Transportation *Air Travel Consumer Report*, June 2012.

²⁵ Department of Transportation *Air Travel Consumer Report*, June 2012.

4.2.2 There is no evidence that, following the introduction of Regulation 261/2004, the proportion of delays for which airlines are responsible has changed from its historical average of 40 per cent. Furthermore, information available as of today suggests that Regulation 261/2004 has had a limited impact on the occurrence of long delays, or on the number of cancellations. Conclusive evidence for carriers reclassifying cancellations as long delays to avoid the application of the Regulation²⁶ does not appear to exist.

4.3 **An interesting paradox: delays are down, but complaints are on the rise**

4.3.1 Contrary to expectation, and surprising to note is the fact is that, even when delays decrease, satisfaction does not necessarily increase. While the largest U.S. airlines set a record for on-time performance during the first half of 2012, during the same period passenger complaints regarding airline service increased 24 per cent as compared to the previous year.²⁷

4.3.2 In light of this apparent contradiction, care should be taken not to attempt to pursue an elusive objective of *absolute* passenger satisfaction, which may well be unachievable. No matter how timely, cheap, comfortable, safe and secure the flight is, there will probably always remain irrational factors for passengers' dissatisfaction.

4.3.3 Increased passenger satisfaction may be achieved by enhancing consumer education, as further explained in the conclusion to this paper. Broad and high-level agreement on a set of simple criteria characterizing what constitutes a normal flight may also contribute to raising public awareness on simple truths, such as the correlation between price and service. It may contribute to limiting unreasonable expectations and ultimately increase satisfaction.

5. **COSTS OF COMPLIANCE WITH CONSUMER PROTECTION REGULATIONS**

5.1 According to a survey on the costs incurred by carriers associated with compliance of Regulation 261/2004,²⁸ such costs were in the range of 0.1 per cent to 0.5 per cent of airline revenue.

5.2 The events of 2010, most notably the volcano ash crisis and the severe weather disruptions in Europe, are examples of occurrences likely to trigger ripple effects across the air transport system. These events highlight the need to consider the air transport value chain as a whole. In cases where the responsibility for the delay rests with third parties such as airports, air navigation services providers, ground-handlers, and tour operators, air carriers can seek compensation. Article 13 of Regulation 261/2004 explicitly mentions the right of the carrier to seek redress from third parties:

a) **Right of redress**

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

²⁶ Steer Davies Gleave, *Evaluation of Regulation 261/2004*, Final Report, February 2010, at p. 17.

²⁷ Christine Boynton, *Delays Down, Complaints on the Rise*, ATWOnline, 9 August 2012.

²⁸ Steer Davies Gleave, *Evaluation of Regulation 261/2004*, Final Report, February 2010, at p. 29.

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.

5.3 During the December 2010 disruption, European airlines had to cancel a significant number of flights because airlines could not de-ice aircraft as a result of the ground-handlers shortage of de-icing fluid. In such cases, when a carrier cannot invoke extraordinary circumstances, it is liable to pay compensation to passengers. Carriers whose aircraft had been grounded due to the ground-handling companies' failure to de-ice airplanes may consider seeking compensation from such companies in order to recover the cost of compensatory claims from passengers, as well as for loss of profit.²⁹

5.4 In economic terms, it appears that the most burdensome set of obligations for airlines is the duty of assistance, particularly in cases where assistance is in the form of hotel accommodations.

5.5 The question has been raised as to whether the principle of shared responsibility, or "Burden Sharing," should be explored. Considering the significant differences in the levels of profitability among various components of the air transport value chain, the argument was made that, in cases where compensation must be paid for reasons unrelated to airline performance, whole or part of the financial burden for the passenger compensation should be reimbursed to the airline by the responsible third party.

6. PROTECTION AGAINST SERVICE FAILURE

6.1 EU

6.1.1 According to a study prepared for the European Commission,³⁰ between 2000 and 2010, 96 airline insolvencies were identified in Europe, impacting an estimated 1.4 to 2.2 million passengers. Among these passengers, 12 per cent were stranded away from home. Stranded passengers appear to incur the highest costs (of over EUR 796 on average). The costs vary according to the distance travelled:

- a) for scheduled long-haul carriers, the average stranded passenger incurred costs of EUR 1,109;
- b) for short-haul low-cost carriers, the cost was EUR 335.

6.1.2 The protection available to passengers depends on whether the air ticket was purchased in the framework of a package travel, or on a stand-alone basis.

6.1.3 The Package Travel Directive³¹ provides protection by having the organizers or retailers refund money paid. Under the Directive, passengers who purchase a package tour are protected from events that would lead to a failure to deliver the service, including insolvency of airlines. As a result of the growing popularity of direct bookings made separately for each element of a trip, and "dynamic packages," where passengers put together the different components of a package themselves, the proportion of passengers protected by the Package Travel Directive is declining.³²

6.1.4 Several means of protection may still be available in cases where the passenger purchased a ticket on a stand-alone basis.

²⁹ Arnecke Siebold Rechtsanwälte, International Law Office, *Running Out of De-Ice: Damages for Non-Performance*, 9 February 2011.

³⁰ Steer Davies Gleave, *Impact Assessment of Passenger Protection in the Event of Airline Insolvency*, Final Report, March 2010.

³¹ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

³² Steer Davies Gleave, *Impact Assessment of Passenger Protection in the Event of Airline Insolvency*, Final Report, March 2010, at p. 7.

6.1.5 First, if the purchase was paid with a credit card, and the airline subsequently becomes insolvent and can no longer deliver the agreed service, the passenger may be in a position to claim for a refund from his or her bank.

6.1.6 Second, when the purchase was made via an International Air Transport Association (IATA) travel agent and the payment has not yet been processed, the interlining system may provide protection. Under the IATA interlining system, travel agents are able to issue tickets involving more than one airline. These tickets contain several coupons (one for each segment). These multi-coupon tickets are issued by one airline on behalf of the other airlines participating in the journey. The issuing airline receives the money from the travel agent and retains it until the passenger flies. The carrying airline then bills the issuing carrier through the IATA Clearing House. Should the carrying carrier become insolvent, the issuing airline will be able to reimburse the purchaser. If the issuing airline becomes insolvent, the carrying airline should still accept to transport the passenger and attempt to collect payment from the IATA Clearing House.³³

6.1.7 Other mechanisms may be available on a national basis. For instance, in the Kingdom of Denmark, the *Rejsegarantifonden* is a fund which provides protection under the Package Travel Directive. The mechanism was extended on 1 January 2010 to offer passengers the benefit of this protection on all flights from Denmark on carriers established in Denmark. In the Kingdom of Belgium, a Decree came into force in 2007 which implemented an extended definition of “tour operator” to include any company having at least one sales outlet in Belgium which sells tickets to passengers. As a result, airlines must hold insurance guarantee against insolvency.³⁴

6.1.8 General bankruptcy laws may also provide some level of limited redress in the event of air carrier insolvency. Depending on the jurisdiction, national laws usually provide that a creditor (in this case, the passenger who has paid for a ticket with the bankrupted airline) must file a claim with a designated authority in order to obtain payment. The actual protection offered by such general mechanism is often not satisfactory, since unsecured creditors are paid from the remaining proceeds of liquidation proceedings once all secured creditors have been paid. In the context of heavily-leveraged airlines, secured creditors likely include aircraft lessors, financial institutions, aircraft manufacturers, labor, in addition to tax authorities, and insolvency procedure officials such as trustees. The likelihood that any monies remain for passengers after secured creditors have been paid is therefore low.

7. THE NEED FOR REGULATORY CONVERGENCE

7.1 The need for uniform interpretation

7.1.1 Different levels of interest and responses to consumer protection issues have resulted in the emergence of regimes with similar aims and objectives on passenger rights but with different approaches in the different regions, as illustrated in ICAO’s online Summary of Consumer Protection Rules.³⁵ A potential consequence of this patchwork of emerging regimes is that carriers with broader networks, especially the ones involved in major markets, could face numerous and sometimes conflicting regulatory and contractual requirements. Several undesirable consequences are likely to result. A fragmented system of consumer protection regimes may make it costlier for airlines to apply consistent

³³ *Questionnaire on the Package Travel Directive* (PTD). Additional information submitted by the International Air Transport Association (IATA); www.ec.europa.eu/consumers/rights/.../IATA_Questionnaire_annex_en.pdf

³⁴ Steer Davies Gleave, *Impact Assessment of Passenger Protection in the Event of Airline Insolvency*, Final Report, March 2010, at p. 8.

³⁵ ICAO *Summary of Consumer Protection Rules*. See note 3.

internal training and to maintain adequate communication. Fragmentation may also affect common or compatible industry systems and standards as well as the multilateral interline system.³⁶

7.1.2 The negative impact of divergence in the regulatory frameworks between different States, as well as the benefits of convergence, are well summarized in the text of a Communication from the European Commission³⁷:

“These divergences in national legal frameworks, administrative systems and judicial procedures increase costs and legal uncertainty for both the aviation industry, which is heavily reliant on cross-border traffic for business, and passengers. Working with Member States to detect and overcome obstacles in national law hampering proper application of the Regulation – including, if necessary, the opening of infringement procedures – will improve enforcement at EU level.”

7.2 The risks of extra-territorial application

7.2.1 Although existing regulatory measures are applied internationally on the country-of-origin basis, a State may wish to apply them irrespective of the origin or destination of the flights operated by its national carrier(s), or to further extend the scope of application to foreign carriers operating in its territory.

7.2.2 An example can be found in Regulation 261/2004, which applies:

- a) to passengers departing from an *airport located in the territory of a Member State* to which the Treaty applies;
- b) to passengers departing from an *airport located in a third country* to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier [emphasis added].

7.2.3 As previously mentioned, the DOT rule enhancing Airline Passengers Protection applies to U.S. and foreign air carriers that operate passenger service, *to or from* a U.S. airport [emphasis added].

7.2.4 A scenario of possible overlap between these two rules could be the following: a flight from New York (U.S.) to Paris (France) operated by an EU carrier. Let us assume that a passenger is denied boarding and arrives late at destination. The passenger may be able to request assistance under Regulation 261/2004 and could also invoke the DOT rules to claim denied boarding compensation. Article 3.1(b) of Regulation 261/2004 provides that compensation may be claimed by the passengers “unless they received benefits or compensation and were given assistance in that third country.” Despite this exclusionary language, in practice a passenger could be tempted to resort to the regulation which is more favorable. This possibility would be conducive to additional uncertainty for operators and may generate litigation.

7.3 The concept of “Extraordinary Circumstances”

³⁶ ICAO *Manual on the Regulation of International Air Transport* (Doc 9626). See section 4.9-1

³⁷ *Communication from the Commission to the European Parliament and the Council on the application of Regulation 261/2004* [SEC(2011) 428 final].

7.3.1 The *Wallentin-Hermann* Case

7.3.1.1 In the case of Friederike Wallentin-Hermann,³⁸ the European Court of Justice clarified the concept of “extraordinary circumstances”, under which according to Article 5.3 of Regulation 261/2004, a carrier is not be obliged to pay compensation. Recital 14 of this regulation provides that such extraordinary circumstances may, in particular, occur in cases of “political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.”

7.3.1.2 In the case at hand, delayed passengers were claiming for compensation and the airline invoked the extraordinary circumstances exception. On the night before the flight, during a routine inspection of the aircraft, a defect was found on a turbine, preventing the use of this aircraft. The flight was cancelled and the passengers, re-routed by the airline, arrived at destination around 4 hours and 40 minutes after the scheduled arrival time. The Court ruled that such a problem did not fall under the meaning of “extraordinary circumstances”, unless the problem stems from events which, by nature or origin, are not inherent in the normal exercise of the activity of the air carrier.”

7.3.2 The *Sturgeon* Case

7.3.2.1 In this case,³⁹ the European Court of Justice ruled that passengers whose flights are delayed may be treated as passengers whose flights are cancelled when they arrive at a destination 3 hours or more after the scheduled arrival time. As a result, passengers can claim for compensation provided by Article 7 of Regulation 261/2004.

7.3.3 The *Elvind F. Kramme* Case

7.3.3.1 In his opinion delivered on 27 September 2007,⁴⁰ the Advocate General considered that extraordinary circumstances include “technical problems which are neither of a kind typically occurring from time to time on all aircraft and/or a particular aircraft type nor of a kind known to have affected the aircraft in question before.”

7.3.3.2 It is informative to look at the underlying circumstances of the case before the European Court. Before the flight in question, the aircraft underwent a B-check, which is carried out after every 275 hours of flying time. On the day before the cancelled flight, the pilot heard unusual noises coming from the nose of the aircraft. Since no other aircraft was available, the flight was cancelled.

7.3.3.3 In its opinion, the Advocate General delves on the nature of the problem encountered and indicates “regular air travelers know technical problems with aircraft are not infrequent [...] the occurrence of such problems *in general* cannot be considered extraordinary.”

7.3.4 The *Denise McDonagh* Case

7.3.4.1 In this case⁴¹ the Court ruled that circumstances such as the closure of part of the European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute ‘extraordinary circumstances’ within the meaning of [Regulation 261/2004] which do not release air carriers from their obligation laid down in Articles 5(1)(b) and 9 of the regulation to provide care.

³⁸ Judgement of the European Court of Justice, 22 Dec. 2008 (C-549/07).

³⁹ Judgement of the European Court of Justice, 19 Nov. 2009 (C-402/07 and C-432/07).

⁴⁰ Opinion of Advocate General in the case of Elvind F. Kramme, 27 September 2007 (C-396/06).

⁴¹ Judgement of the European Court of Justice, 31 Jan. 2013 (C-12/11).

7.3.4.2 The above cases illustrate the challenges associated with the interpretation of the notion of “extraordinary circumstances”, as well as the need for drafting clarity and contractual predictability. It should be noted that in 2011, the European Commission decided to launch a public consultation on the possible revision of Regulation 261/2004.

8. CONCLUSION

8.1 It is difficult to draw a general worldwide conclusion on the effect of consumer protection regulations on the quality of air transport services, including timeliness. The consumer protection regimes implemented in different regions are strongly influenced by the specific features of the region or State concerned, whether they are of a regulatory, commercial or operational nature. As already mentioned, most of the readily available analysis focuses on passenger protection regulations issued in the EU and the U.S. Based on the information available, it is possible to make the following findings:

- a) in the U.S., a general decrease in the frequency of delays and cancellations can be observed over the past five years. Recent figures tend to show record low levels of delays and cancellations. The question of whether the noted decrease is directly influenced by the introduction of regulations or not remains unanswered. Further study would be beneficial to ascertain the exact causality between regulatory activity and level of service. Additional research would also be needed to evaluate in more detail the advantages of consumer protection regulations over other initiatives such as airline voluntary commitments;
- b) the figures from the EU do not yet show any significant impact of the adoption of Regulation 261/2004 on the frequency of delays or cancellations; and
- c) there is no evidence indicating that airlines have reclassified long delays as cancellations.

8.2 As explained previously, there seems to be an element of passenger dissatisfaction, since irrational factors are involved, including possibly a certain nostalgia of times when the state of the air transport industry allowed for the widespread provision of a level of service nowadays equivalent to business class standards. It should be borne in mind that the cost of air travel has dramatically decreased during the past half-century. It takes 1.7 weeks of the average Australian wage to pay for the lowest Sydney-London return airfare. In 1945, it took 130 weeks.⁴²

8.3 Certain States have undertaken to address consumer protection issues through proactive education of passengers. One example is the Civil Aviation Authority of Singapore, which has been working with the Consumers Association of Singapore (CASE) to educate consumers on the key aspects of air travel, including what to look for when purchasing air tickets and the avenues of recourse in the event of airline service lapses. Consumers increasingly recognize that Singapore’s air travel market presents a wide range of choices with different fares, services standards and contractual obligations during service outage. The gap between consumers’ expectations and low-cost carrier service levels seem to have narrowed, as consumers became more familiar with the product and as carriers respond dynamically to their customers’ needs in a competitive market. A decline has been observed in the number of complaints against the largest carriers.⁴³

⁴² Air Transport Action Group, *Aviation: Benefits Beyond Borders*, March 2012.

⁴³ Working paper presented by Singapore at the 49th Conference of Directors General of Civil Aviation (DGCA), Asia and Pacific Regions, New Delhi, India, 8 to 12 October 2012.

8.4 The proactive implementation of a global framework to manage consumer protection issues, whether through the development of guiding principles or under the form of a multilateral arrangement, would be in line with the need for regulators to focus on passenger satisfaction, as recently expressed at the ICAO High-Level Security Conference on Aviation Security (HLCAS, 12-14 September 2012). During this event, a State presented a working paper⁴⁴ which stated that:

“passenger satisfaction must be the basis of any public policy in civil aviation matters, particularly regarding security. This priority, which is in no way incompatible with the need for security, is split between two complementary objectives: facilitation and quality of service; and that of costs control. The criterion of passenger satisfaction is thus a powerful lever to ensure the sustainability of security systems, requiring in particular a holistic approach focused on efficiency.”

8.5 Initiatives have already been inaugurated that aim at providing regulatory convergence in the area of consumer protection: i.e., the *United Nations Guidelines for Consumer Protection* (as expanded in 1999). The substance and format of these guidelines can serve as useful examples in the future development by ICAO of a set of uniform guidelines for consumer protection in air transport. Such future guidelines should be consistent with existing legal instruments such as the Warsaw system of instruments and the Montréal Convention.

— END —

⁴⁴ Working Paper presented at the High-Level Conference on Aviation Security (HLCAS), *Refocusing Security Policies on the Passenger* (HLCAS-WP/28).