Air Passenger Rights Revisited – European Commission publishes proposal for amendment of Regulation 261/2004

On 13 March 2013 the European Commission published its proposal for a Regulation to amend the ever-controversial Regulation 261/2004 on air passenger rights. The Commission’s proposal significantly amends and expands the EU’s existing air passenger rights framework. We examine some of the proposal’s key provisions below.

**Background**
Regulation (EC) 261/2004 (the Regulation) came into force on 17 February 2005, since which time it has been the subject of significant legal challenges and considerable debate, not least regarding compensation for flight delay and the proportionality of its care obligations. The European Commission’s proposal is a reaction to various factors, including perceived grey areas and gaps in the current Regulation, the non-uniform enforcement of its provisions across EU Member States and significant industry lobbying, particularly on the grounds of proportionality.

The proposal will be subject to the EU’s ordinary legislative procedure, with the European Parliament and European Council of Ministers still to consider and approve its provision (subject to any further amendments). That process is unlikely to be completed until the early part of 2015.

**The proposal – key provisions**

**Compensation for flight delay**
It comes as no surprise that the proposal includes an express right of compensation for flight delay, effectively codifying the general position adopted by the Court of Justice of the European Union (CJEU) in its controversial Sturgeon judgment and as subsequently confirmed late last year in its TUI judgment. The Sturgeon judgment interpreted the Regulation as including a right of compensation for flight delay where delay on arrival exceeds the original scheduled arrival time by 3 or more hours. Mercifully, the proposal adopts more sensible thresholds, being 5 hours for intra-EU flights and other flights of 3,500km or less, 9 hours for flights between 3,500 and 6,000km and 12 hours for flights of 6,000km or more.
Care – temporal and monetary limits
A further positive development is the application of temporal and monetary limits to the care obligations in the case of delays and cancellations arising out of ‘extraordinary circumstances’. In such circumstances the right to accommodation is limited to 3 nights at a maximum cost of 100 Euros per night (subject to limited exceptions). This is to be particularly welcomed following the significant care costs incurred by the industry during 2010’s volcanic ash cloud and the associated closure of European airspace, as well as the CJEU’s recent McDonagh v Ryanair judgment, which confirmed that the care obligations under the existing Regulation are not temporally or monetarily limited. However, under the proposal it remains the case that airlines are de facto insurers of last resort, albeit to a lesser extent, in circumstances which are wholly beyond their control.

Extraordinary circumstances
As expected, the proposal sets out a definition of ‘extraordinary circumstances’ which follows the CJEU’s Wallentin-Herman judgment, and provides a non-exhaustive list of ‘extraordinary circumstances’ in a new Annex. However, the proposal clarifies that in the case of delay or a change in schedule the defence may only be invoked “in so far as [the extraordinary circumstances] affect the flight concerned or the previous flight operated by the same aircraft.” This arguably ignores the commercial reality that the non-operation of a particular aircraft can have a legitimate knock-on effect on other flight operations. A clear example is the ongoing whole fleet grounding of Boeing 787 aircraft, which clearly arises out of ‘extraordinary circumstances’ and which is undoubtedly having an impact on the scheduling of non-787 aircraft. It seems inequitable that knock-on delays or cancellations would not benefit from the ‘extraordinary circumstances’ defence in such circumstances, particularly in the immediate aftermath of such a grounding.

Re-routing
A further disappointment comes in the form of the proposal’s re-routing obligations. In cases where the carrier is unable to re-route a passenger so that the passenger arrives at his/her final destination within 12 hours of the scheduled arrival time, the proposal entitles that passenger to re-routing by means of another air carrier or transport mode. The proposal states that the other transport provider “shall not charge the contracting carrier a price that goes beyond the average price paid by its own passengers for equivalent services in the last three months.” Jurisdictionally it is unclear how that requirement will be enforced, particularly against non-Community air carriers on flights departing from non-EU airports or where the transport provider concerned otherwise falls outside the scope of the Regulation. It is also unclear how this provision will be regulated in practice, how ‘equivalent services’ will be interpreted, or indeed how receptive other air carriers and transport providers will be to these requirements. That is particularly true in circumstances where they may wish to charge a premium for last-minute bookings, rather than applying a three month average.

Connecting flights
The proposal’s provisions regarding connecting flights are also a cause for concern. Where a passenger misses a connecting flight as a result of a delay or change of schedule to the preceding flight, the air carrier operating the onward connection will in many cases be responsible for any applicable care and re-routing obligations, with the first carrier responsible for any compensation under the Regulation. Whilst the proposal preserves the right for air carriers to apportion such costs between themselves on a contractual basis, the situation is nevertheless far from satisfactory.

Given that compensation is calculated by reference to the delay on arrival at the passenger’s final destination, one questions what impact the above measures will have on (inter alia) regional feeder services and interlining more generally. With the first carrier assuming liability for compensation of up to Euros 600 in circumstances where it has no involvement in the connecting long-haul service, there may be a gradual move away from global connectivity, which would be regrettable.

Partial ban on ‘no-show’ policies
The proposal also introduces a partial ban on airline ‘no-show’ policies, meaning that passengers may not be denied boarding on a return journey on the basis that they failed to use the outbound leg. Existing ‘no-show’ policies act, inter alia, as a disincentive to passengers booking cheap returns and foregoing the outward leg, which would otherwise leave empty seats on aircraft, constituting an inefficient use of capacity. The above ‘partial ban’ arguably extends the scope of the Regulation significantly beyond its original purpose and will undoubtedly have an impact on airlines’ sales practices, possibly to the detriment of passengers.
Conclusion
The proposal constitutes a few steps in the right direction, but arguably a few more in the wrong direction. The capping of care costs in the case of ‘extraordinary circumstances’ and applying more sensible temporal thresholds to compensation for flight delay are positive developments. However, a number of important questions remain unanswered, and the true proportionality of the proposal’s measures remains dubious. The practical application and enforcement of many of the proposal’s provisions, including as to re-routing and connecting flights, also remains unclear.

Perhaps most fundamentally, whilst entirely expected, the proposal’s inclusion of an express right of compensation for flight delay re-enforces the view at EU level (as expressed by the CJEU on a number of occasions) that such a right is compatible with the remedy for flight delay under the Montreal Convention 1999. In that regard the CJEU has repeatedly drawn a fundamentally incorrect distinction between the Convention and Regulation. Given the exclusivity of that Convention under English law (and that of various other jurisdictions), this position remains controversial, and in our view, incorrect.

For the moment at least, the commercial reality for carriers remains that the existing Regulation continues to apply, as does the succession of disappointing and at times legally questionable CJEU judgments that flow from it. In the interim, it is hoped that the ongoing legislative process will result in some further amendments to the proposal so as to arrive at a workable solution which properly balances the importance of passenger rights with commercial realities within the aviation industry.

Further information
If you would like further information on any issue raised in this update please contact:

Thomas van der Wijngaart
Associate
E: thomas.vanderwijngaart@clydeco.com

Alan Meneghetti
Partner
E: alan.meneghetti@clydeco.com

John Balfour
Consultant
E: john.balfour@clydeco.com

Peter Macara
Partner
E: peter.macara@clydeco.com

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR
T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111

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