

Emirates' response to the proposed changes to clarify, simplify and strengthen the Air Passenger Protection Regulations

Emirates is grateful for the opportunity to provide comments to the Canadian Transportation Agency (“**CTA**”) regarding the Consultation Paper on Proposed changes to clarify, simplify and strengthen the Air Passenger Protection Regulations (“**APPR**”).

Emirates endorses the International Air Transport Association’s (“**IATA**”) response and highlights that the additional financial burdens imposed by the proposed changes to the APPR will be ultimately borne by the Canadian consumer. Emirates is concerned that the proposed changes to the APPR do not align with the primacy of safety in air travel and will result in higher costs for the airline and therefore the Canadian consumer.

In addition to the comments made by IATA, Emirates would highlight the below:

1. Exceptional circumstances

The CTA suggests that airlines: (a) should pay compensation to passengers for all flights disruptions unless they can prove the disruption was caused by exceptional circumstances; and (b) give the passengers a detailed explanation with documentary evidence that circumstances were exceptional.

Standard of proof

In Emirates' view, the APPR should maintain the standard exclusion of passenger compensation when there is a delay, cancellation or denial of boarding due to situations outside the carrier's control, or within its control but required for safety purposes.

While Emirates already provides a general explanation of the flight disruption when responding to APPR related complaints, having to prove the specific cause of every disruption (especially if passengers claims have to be processed in 30 days) would be time consuming and burdensome for airlines. In addition, in most cases, documents evidencing exceptional circumstances are technical (and sometimes also confidential) and would not be understood by the passengers unless a great level of detail was provided. The value of sharing such documentation should thus be reconsidered.

Criteria for events to be considered exceptional

Requiring an event that caused a disruption to be “not inherent to the normal exercise of the activities of the airline” on top of being outside the airline's control and unavoidable is likely to create very-high threshold for an event to be considered exceptional and lead to a non-uniform interpretation by courts.

It would even be arguable that certain circumstances listed as exceptional in the CTA's proposal are inherent to the normal exercise of the activities of the airline, such as airport operational issues or air traffic management decisions.

To avoid diverging interpretation, should the concept of exceptional circumstances be introduced in the APPR, it would be preferable to limit it to events outside the carrier's control which could not be avoided even if the airline took all reasonable measures to do so.

Proposed list of exceptional circumstances

If the concept of exceptional circumstances is introduced in the APPR, the list should be non-limitative and as comprehensive as possible to avoid courts deviating from that list. The CTA should also consider adding collisions with wildlife and lightning on the list.

Earlier flight disruptions

The CTA is suggesting a limit on the number of flights in a row that can be claimed as exceptional if such a disruption on one flight causes a chain reaction of delays or cancellations.

Emirates believes that there should be no limit regarding earlier flight disruptions and that what matters is the causal link between the extraordinary circumstance and the disruption, not the time in between. This is in line with case law of the Court of Justice of the European Union ("CJEU") on the matter (e.g. Case C-74/19, Transport Aéreos Portugueses SA, 11 June 2020, para. 54-55). An airline must be able to rely on exceptional circumstances affecting a previous flight which it operates with the same aircraft in order to be exempted from its obligation to compensate passengers in the event of long delay or cancellation of a flight.

2. Assistance

The proposition is for carriers to be required to provide passenger care for all flight disruptions, not just the ones within the carrier's control.

This would mimic the existing system under EU Regulation 261/2004, which creates an unreasonable financial burden for airlines. An example of this was the closure of the European airspace due to the eruption of the Icelandic volcano in 2010 (considered an extraordinary circumstance by the CJEU), which caused airlines to incur considerable costs in meeting their obligations of care over an extended period of time.

Should this be introduced in the APPR, certain financial caps or maximum time limits should also be introduced.

3. Delayed Baggage

The CTA should take into account the exclusivity of the Montreal Convention 1999 when considering the introduction of provisions governing delayed baggage in the APPR.

4. Refunds when Travel Advisories Issued

In Emirates' view, the CTA's proposal that airlines accept the financial risk if the Canadian Government releases a travel advisory recommending against 'non-essential' travel would make Canada an outlier in this regard and would result in airlines potentially introducing a 'risk

premium' on all Canadian consumers (as these costs will need to be absorbed). There are two specific issues associated with this proposal:

- (a) **Correctly insured party:** As you may be aware, airlines do not carry insurance to protect revenue in respect of such events. In fact, the proliferation of passenger travel insurance globally demonstrates that the passenger is the correct party to accept and insure this risk.
- (b) **Contradiction between protections and environmental waste:** This proposal would create a contradictory situation where passengers would be entitled to cancel their tickets at the last minute and receive a full refund (causing significant financial losses for the airlines) but airlines would be obliged to operate the resulting flight even if it were almost empty (as the travel advisory would not act as an exception for the airline in respect of compensation under the for the cancellation). This imbalance creates significant costs for the airlines and risks that operation of almost empty 'ghost flights'.

Travel advisories are subjective in nature and can potentially take into consideration factors that are not related to safety and security. In light of this, linking refund rights/obligations to such travel advisories creates significant levels of uncertainty for airlines, which will potentially introduce significant risk premiums into the Canadian aviation market (will likely take the form of increased fares for Canadian consumers).

If the CTA was to push ahead with this rule on travel advisories regardless of the additional costs that will be borne by the Canadian consumer, Emirates views that such rule:

- (a) Must be limited to "**avoid all travel**" as the standard for the category "avoid non-essential travel" is too low to trigger any refund rights.
- (b) Must only apply where the travel advisory was issued (or severity increased to "avoid all travel") **after** the passenger had booked their ticket.
- (c) Needs to be clear that the travel advisories must be at the **destination country only** and clearly exclude: **(i)** transit country/region advisories; and **(ii)** regional advisories in the destination country.

The inclusion of transit countries within this refund right does not take into consideration the significantly heightened security situation within transit airport and would disproportionately impact airlines with a hub and spoke model based outside of Canada.