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Representation concerning

**New Refund Requirements for Disruptions Outside
the Control of the Airline**

Attention:

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A. Outline

My name is Christoph P. I'm a German attorney (mag.iur., Rechtsanwalt) currently located in Germany. I mostly consult companies on their international business ventures. I have had the chance to also lead several passenger protection related cases with a connection to the European Regulation (EC) No 261/2004 (in the following: "EU Regulation"). The latter also being the reason why I participated in the auditions in Ottawa during the introduction of the new Airline Passenger Protection Regulation (in the following: "APPR") on July 4th 2018 and provided feedback in writing into the bargain.

The Corona Virus pandemic has affected many industries. Among those the travel industry, namely the airlines, are the heaviest hit. Travel and visa bans, imposed testing necessities, tightened hygiene standards and procedures along with people's fears of contracting the virus caused the number of air passengers to dwindle. Flights are still cancelled on a large scale.

The economic effects leave marks on either side of the aviation value chain. Airlines have to face a massive reduction in revenue while struggling to tighten their expenses. Passengers have advanced their fares and are now missing out on family trips, vacations but also business appointments. The latter in a time when passengers, too, often face restricted income due to the effect on the economy as such.

Naturally, a pandemic is nothing that can be controlled by an airline, neither are any governmental measures to fight the disease.

Regarding the subject matter of the consultation, airline's and passenger's interests are opposing when it comes to refunds in the outlined situation as they are at different ends of

the value chain.

A new or amended regulation will only find wide acceptance if it balances these interests carefully.

One set of facts to be kept in mind is that, generally speaking, airlines have a stronger standing in comparison with a passenger. Not only do they have the bigger resources (finances, personal, equipment). Yet they also stand higher chances of resolving the situations potentially arising out of a disruption. Among which are being stranded in a foreign country with the return flight home being cancelled.

B. General Remarks

Imposing a duty for carriers to clearly and concisely inform passengers about their options is vital.

It is my experience with the application of the EU Regulation that more often than not do airlines try to hide the possibility that passengers have the full discretion regarding their choice of refund. Airlines tend to only offer the voucher option. This has increasingly happened during the COVID-19 pandemic. Even the German government tried to limit passengers to that option but the EU Commission didn't accept that.

Having seen a multitude of cancellation notices (also pre-pandemic) I can verify that mostly the cash refund and cancellation options are hidden in the last line or link in an e-mail (literally speaking).

It should in any way be insured that finding passengers themselves stranded always have the option to return to their point of origin.

C. Issues for Consultation

1. The entitlement to a refund will apply if the airline cannot complete the passenger's itinerary within a reasonable time. In the context of an event outside of an airline's control - such as a border closure, security incident, or volcanic eruption - what should be considered a "reasonable time" for completing a passenger's itinerary?

Recommendation

The completion of a passenger's itinerary is within a "reasonable time" when, in addition to the original schedule:

- it takes less than 2hrs for an itinerary distance of km 1,500 or less;
- it takes less than 3hrs for an itinerary distance between km 1,500 and 3,500;
- it takes less than 4hrs for an itinerary distance of km 3,500 and more.

Reasoning

When defining the term “reasonable time”, one has consider the situation the stakeholders will find themselves in.

Airline employees will be working at the airport informing passengers about a delay delay in the flight they were probably more or less only about to board. An airline will also try to organize alternatives.

Airlines will face far higher cost in comparison to the original ticket fare especially considering their revenue/profit-ratio when and if passengers decide to opt for the rebooking versus the refund.

Passengers on the other side will face delays which might trigger the cancellation of business appointments or vacation time. Also, up front expenses might have been made in vain or new expenses occur to get to the final destination. Moreover, passengers will be forced to wait at the airport, if not on the plane. This is a highly inconvenient situation. Airlines' duty to care under the current APPR does somewhat counterbalance this. However, food, drinks and means of communication (if provided) cannot make up for lost time and your hands bound by not being able to search for alternatives yourself.

So my conclusion is, that it is a good option for either party to the transportation contract, if passengers have and go for the refund instead of a rebooking. For the airlines this would mean, that they would "only" have to reimburse, what they had previously received by the passenger. The passenger would be able to make a choice depending on the very personal situation as to whether wait for a rebooking, make alternative arrangements themselves or cancel the trip altogether.

The EU Regulation employs a variety of criteria when establishing the consequences of a flight disruption. The two main criteria are the distance and the delay (either at departure or on arrival).

It uses the distance between the place of origin and the final destination of the itinerary booked (calculated with the so-called great circle route method; see art. 7 para. 4 EU Regulation) on multiple occasions.

The first of them being to establish whether a delay triggers care obligations for carriers (see art. 6 para. 1 EU Regulation). In that instance the distance is combined with the length of the departure delay as determining benchmarks. Following are the (simplified) steps:

- distance km 1,500 or less and delay of 2hrs or more;
- distance between km 1,500 and 3,500 and delay of 3hrs or more;
- distance km 3,500 and more and delay of 4hrs or more.

The second occasion is the specification of the amount of compensation to be paid in case of a disruption (see art. 7 para. 1 EU Regulation). In art. 7 para. 2 EU Regulation the distance is combined with the arrival delay. The same distance ranges as mentioned above are applied.

As shown, the delay is combined with the distance in two instances. Yet also, a departure delay of five hours is the threshold for enabling the passenger to claim a refund (see art. 6 para. 1 lit. c) no. iii) EU Regulation).

For the Canadian purposes, the combined criteria of distance and departure delay are the most suitable. They acknowledge the difference it makes whether to transport passengers a shorter or longer distance (longer return or in-reach times for aircraft) from an airline's point of view. Yet also, the hardship passengers face is limited and reasonable in comparison with the overall flight distance (and, consequently, its duration).

The distances of the EU Regulation (km 1,500 and 3,500 or more) also work for Canada. Here are some sample distances, all measured from Toronto's Pearson:

distance YYZ-YUL: km 500;
distance YYZ-YYC: km 2,700;
distance YYZ-YVR: km 3,300;
distance YYZ-LAX: km 4,000;
distance YYZ-LHR: km 5,700.

This goes to show that all steps of distance are also useful for the Canadian Regulation.

One could also consider to include stopover(s) as an additional criterion. More often than not, does the delay on one leg trigger further delays down the itinerary as connecting flights are missed.

However, I do not recommend to do so. This would make the overall regulation too complicated. Especially passengers, who are not used to legal terms and operational questions as much as airlines would find it hard to understand when they would have the choice to a refund or not. Also, as stopovers become more and more effective, burdening the passenger with an additional hour or so in waiting time before being able to cancel would be unreasonable.

2. The entitlement to a refund could potentially apply not just in the context of a flight cancellation, but also a "lengthy delay." What should be considered a "lengthy delay" ?

Recommendation

A "lengthy delay" to enable the refund option for passengers should be given, when, for the completion of the itinerary and compared to the original schedule:

it takes 2hrs or more for an itinerary distance of km 1,500 or less;
it takes 3hrs or more for an itinerary distance between km 1,500 and 3,500;
it takes 4hrs or more for an itinerary distance of km 3,500 and more.

Reasoning

As argued under no. 1., using the combined distance and time criteria has the advantage

of offering the needed flexibility for the carrier yet also keeping the passenger's hardship in a reasonable frame.

Additionally, using the same benchmarks for both "reasonable time" and "lengthy delay" has the charm that the Canadian regulation remains concise and simple. Passengers are more likely to comprehend their rights and make use of them if not faced with a variety of legal terms that one has to think twice about before comprehending.

Using one set of criteria will also make it easier for carriers to comply. It will also help ground staff at the airports to explain the situation and its consequences.

One has to additionally keep in mind that a passenger in such a situation will generally not easily opt for the refund. The trip as such would have to be cancelled or replacement transport would have to be organized. Under the given scenario this would most certainly mean a far higher ticket price and a longer journey.

As also pointed out under no. 1., the EU Regulation considers a lengthy delay enabling the refund option instead of a rebooking to be given at a delay of five hours or more.

A flat-rate benchmark of five hours is unfair. Should, e.g., the original itinerary have had a duration of only one or two hours, then such a delay is harsh versus five hours delay when you were bound trans-Atlantic.

Therefore, I think that a "lengthy delay" defined as above balances either party's needs.

3. What should a refund cover? For example:

- The unused portion of the passenger's ticket;
- Any additional services the passenger purchased, but did not use (for example, seat selection or extra baggage);
- The full cost of the passenger's ticket, if their trip no longer serves a purpose because of the flight disruption.

Recommendation

A refund should cover the original ticket fare in full. This should apply when the trip no longer serves a purpose because of the flight disruption.

Also, any additional services purchased but not used yet should be refunded, too.

Reasoning

This is in line with the EU Regulation and also the court decisions based upon it.

It also provides a viable solution for the Canadian airspace. It is a good balance of the interests involved. If, e.g., a passenger has made a three point round trip for a vacation and is about to board the last leg which faces the disruption, then it would surely harm less if vacation days had already been spent at the previous stopovers compared with a

multiple leg flight on which the disruption appears on the second or third leg and the passenger never reaching the final destination.

4. How should airlines be required to refund passengers? For example:

- Using the same method used to buy the ticket;
- In monetary form (for example cash, cheque, or a bank account deposit);
- Passenger's choice of money or other forms offered by the airline (such as vouchers or rebates).

Recommendation

I can see either the monetary form at the passenger's discretion or a refund using the same method as for the ticket purchase working. The possibility of a voucher or airline credits should be included as a choice for the passenger.

Reasoning

The most pragmatic way to refund surely is to use the same method as for the purchase of the ticket. The airline has the necessary data.

Additionally, the passenger could also have a choice of another monetary form. I would not leave this to the carrier's discretion as some payment methods may not be suitable for all passengers, e.g. payment by cheque is by far less usual in Europe than in Canada. Given such a payment, international travellers would be disadvantaged.

However, I would recommend to also include the choice for the passenger to receive a voucher. I think this option would reduce the impact a refund would have on the airline. As this also meets the passenger's needs, then it shouldn't be excluded from the get-go.

The EU Regulation offers the same choice of monetary payments(see art. 8 para. (1) lit. a); art. 7 para. (3)). A voucher can only be issued if the passenger has agreed so in writing. I am not sure, whether this formality is always needed. However, the airlines need to be obliged to fully inform the passenger of their choice. Also, they should be obliged to provide proof, that they did so.

5. How much time should airlines have to provide refunds to passengers under the new requirements?

Recommendation

The refund obligation should be met within 7 days from the day of the passenger's choice.

In case of large-scale events, airlines should have the opportunity to opt for an extension of up to three months (see under no. 6 a) for details to "large-scale events").

Reasoning

This might appear to be a sharp deadline. However it is my experience, that airlines do manage to meet that deadline. That is, naturally, if they are willing to do so. It might need some preparation and the set up of a bookkeeping system that is connected to the booking system. I don't think it is hard to achieve.

Also, I have personally heard of passengers stranded abroad who tried to get back to Canada. They'd booked several flights back home only to find them cancelled (sometimes within hours). A tight deadline might at least provide some deterrence to such cash collection.

Under the EU Regulation (see art. 8 para. (1) lit. a)), airlines have a deadline of seven days, too.

The question, if airlines could face bankruptcy due to a large amount of refunds is surely to be considered. However, an airline does have the opportunity to make balance sheet provisions for those cases. Foreseeing risks associated with your business and taking precautions is the task of any prudent business.

Naturally, this can never cover all possible catastrophic events, such as the current pandemic. However, it is my perception, that the vast majority of airlines - though suffering badly - have not faced bankruptcy yet. Also, it would soften the impact enormously.

It is therefore my conclusion, that airlines should make financial provisions to balance such situations. The risk of large-scale refunds comes with the business so a prudent business should be prepared. These provisions could be made by setting back cash. This might be in the equivalent of a certain percentage of the value of their total bookings for a certain period of time. E.g. if an airline has bookings in the total value of C\$1 million for the next three months, then it should be obliged to have a provision of C\$200,000 in cash as a reserve.

I also understand, that setting cash aside as a provision means that this money is not available for the cash flow. However having this provision on the balance sheet actually increases the company capital and the value. It would also make it easier to get loans or credit lines to finance any large-scale refunds.

Those airlines that had a cash reserve fared significantly better during the pandemic than those that did not. Ryanair serves as an example for the former although the cash buffer didn't help its willingness to pay refunds.

6.

a) Should there be greater flexibility in the requirements for certain types of airlines, or in certain situations? For example:

- Based on airline size (smaller airlines may be, for example, less able to recover quickly after an event outside their control);
- If an airline provides essential services (for example, to remote, regional or northern communities);

- If the event is large-scale (as opposed to an isolated event like a collision with wildlife);
- If the event could threaten an airline's financial viability (for example, one that results in operations being shut down for months).

Recommendation

Only the “large-scale event” would be a good and objective criterion to provide greater flexibility. Such an event should be given when at least 70% of all flights covered by the Canadian Regulation (for a given period) are disrupted or cancelled.

Reasoning

The supposed definition of “large-scale event” offer a clear and concise benchmark. It is simple to understand and easy to measure (as opposed to the “financial viability” of an airline; which would lead to discussions about positions on an airline's balance sheet).

The airline size should not be a criterion for higher flexibility. A small carrier will also face a smaller amount of refunds. Considering that the airline had been operating sustainably prior to the disruptive event, it should be not harder for a smaller carrier versus a bigger one to refund.

An airline providing essential services is not a criterion that ought to be applied for flexibility purposes.

I understand the thought behind that criterion. However, I think that passengers using airlines providing essential services will be far more dependent on finding alternatives to that service. Thus, getting their money back is more essential to them.

Also, if people see that their request for refund would threaten such an airline's operations and also consider the essential nature of its services, passengers might by themselves already be more inclined to not demand a refund, at least yet.

I also believe, that if an airline provides essential services to certain regions, then the interest in keeping its operations going goes beyond the question of the individual passenger and a refund. Therefore it is more likely supposed to be answered by the authorities or the government as such. This should not be decided or regulated on the backs of the passengers.

Using an airline's financial viability as a criterion is neither fair, balanced nor manageable.

First of all it is too hard to define and, subsequently, to measure when that threat to an airline's financial viability occurs. I refer to my reply to no. 5. Additionally, it is nearly impossible to make a prediction, until when the operations would be shut down. The current situation provides a very striking example for that. Only a year ago, even after the pandemic had occurred, people expected operations to be back to normal within the year. Right now everybody is predicting that this might take another two years.

Two years in which passengers wouldn't get their money.? Even further, the outstanding refunds would have to be reflected in the airline's balance sheet. That would not help an airline's financial position at all.

Also, denying the passengers their refund would basically make them creditors to the airline. Forced creditors. This is for once unfair as passengers would not have any choice at all whether they want to assume that position or not. It is even more unfair as, opposed to any other creditor of a company, passengers would not have a say at all in the operations or what would actually happen with their money.

Inserting a clause that would enable airlines to deny a refund in case of a potential bankruptcy is hardly manageable by the parties involved. Verifying whether an airline faces immediate bankruptcy would oblige the applicant of the rule to check the balance sheet of the airline and consider further economic and financial data of the company. This could hardly be an easy task. So inserting such a clause wouldn't help anybody.

Further, if an airline actually goes bankrupt, then passengers would be treated as general creditors in any way. As they would mainly be small amount creditors they would not be the first ones to be served. So I think it would be even more unfair, if they would be the first ones to be asked to avoid a bankruptcy.

- b) If so, in what areas should flexibility be given? For example, should there be a different:
- definition of "lengthy delay";
 - deadline to provide a refund to passengers.

Recommendation

Using the "large-scale event" provides the flexibility needed. In which case an extension of the payment period to three months should be possible.

Reasoning

As outlined under lit. a), the term "large-scale event" (using the suggested percentage of flights) is a viable criterion for more flexibility. In which case I think that extending the deadline to refund might be a good option. I hold the opinion that going beyond the seven day period and up to a period of three months is sufficient. A full calendar quarter would provide airlines with enough flexibility to adjust to the situation.

They may also use this period of time to contact passengers who are basically entitled to a refund and either negotiate or make them additional or different offers to incline them to leave their money longer with the airline.

7. Events since March have shown that some situations caused by a pandemic are outside of airlines' control, while others may be within airlines' control. An airline's business decision to consolidate flights during a pandemic could sometimes be considered within its control, while government travel restrictions, employee quarantine or self-isolation, and

additional hygiene procedures are examples of pandemic-related situations the CTA considers outside airlines' control. Are there other, specific pandemic-related situations that you think should be considered either within or outside airlines' control?

Recommendation

None.

Reasoning

Many situations came to my mind when reading this question. Among them were widespread staff infections within the airline, at traffic control or at an airport. But I also thought about short-term administrative decisions imposing new rules for air transport during a pandemic (hygiene, staffing, testing etc.) yet also on/off travel bans.

I actually believe that the variety of these situations is too big to imagine them all in advance. This would make it nearly impossible to fit them into a regulation that is still understandable. I think that applying common sense and prudent business operations and providing for some scenarios by the airlines should suffice. All else should be dealt with once a certain scenario appeared.

8. The CTA will consider the legal frameworks in the European Union (EU) and the United States (US) in developing the new regulation on refunds. What particular aspects of these frameworks should the CTA consider?

Recommendation

See above.

Reasoning

I have already outlined where and why I'd make use of mechanisms of the EU Regulation.

Please find attached the EU Commission's guidelines for the application of the EU Regulation during the pandemic.

Thank you for your time. Please do not hesitate to contact me for further questions or clarification.

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