EU Air Passengers’ Rights Past, Present, And Future: In an Uncertain World (Regulation (EC) 261/2004: Evaluation and Case Study)

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EU AIR PASSENGERS’ RIGHTS PAST, PRESENT, AND FUTURE: IN AN UNCERTAIN WORLD (REGULATION (EC) 261/2004: EVALUATION AND CASE STUDY)

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ABSTRACT

Passenger rights have continued to be strengthened following deregulation in the European Union (EU—previously the European Community) with common rules on compensation and assistance to passengers in the event of denied boarding, cancellation, and long flight delays. In January 2020, the European Commission (EC) stated that “these rights need to be better known and easier to understand and enforced.”¹ This article considers the emerging role of Claims Management Companies (CMCs) as a step to aid passengers in achieving redress against airlines, undertaking a case study of a CMC in Spain.

The research also addresses the complexities of airline passenger rights, for within a short period of time of the EC’s making this statement, COVID-19 struck Europe. The year 2020 will no doubt turn out to be one of the most complex and difficult years for aviation as airlines fight to stay afloat and face market and regulatory uncertainty, especially regarding potentially increased passenger rights. The article concludes by making recommendations for regulatory revisions in this uncertain period.

I. INTRODUCTION

The starting premise for this article is the following acknowledgment in terms of the successes and challenges of passenger rights in the EU: “The European Union is the only area in the world where citizens are protected by a full set of passenger rights. However, these rights need to be better known and easier to understand and enforced.”

In 2020, in the midst of a global pandemic, this statement is explored and re-examined in the context of developments and promoted regulatory revisions.

The financial performance of airlines is often challenged, as their performance is subject to global world affairs such as the rise of oil, political wars, terrorist attacks, and now COVID-19. Such uncertainties make forecasts and predictions challenging for both commercial aviation modellers and airline passengers. Inevitably, all challenges stand to affect profitability and ultimately the future of the airline. This, therefore, also stands to affect the available choices for customers and their rights.

The International Air Transport Association (IATA) bases its twenty-year Air Passenger Forecast prediction for passenger demand on “such factors as the emerging middle class in developing countries, diverging demographic outlooks, further liberalization of aviation markets, and climate change.” The apparent likelihood of an epidemic or health crisis therefore seems to have been, as anticipated, somewhat lower on its radar as a potential factor impacting passenger demand.

Increased competition through liberalization has been positive for passengers, helping drive down prices and increasing

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2 Id.
travel opportunities across the world. However, Newton’s Third Law, as applied to motion, states that for every action, there is an equal and opposite reaction. And arguably a negative effect of liberalization—as viewed from the passengers’ perspective (particularly with the entrance of low-cost carriers)—could be a reduction of airline services and other comforts. Invariably, there is a need to ensure passengers feel safeguarded in terms of services provided and received. Hence, the EU has implemented Regulation (EC) 261/2004, which sets out to aid passenger rights and entitlements.

Yet, conversely, airlines would identify that they face their own challenges, and such reductions are the consequence of competing to stay viable in a highly competitive market. From the airlines’ perspective, the increased competition (including from new players) has therefore resulted in financial challenges, with many airlines going bankrupt, consolidating, ceasing to trade, or some combination of all three. While passengers may need to be protected, airlines would also identify that, at times, Regulation (EC) 261/2004 has become an added burden and a burden that should not necessarily be borne by them.

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9 See Doganis, supra note 4, at 4–26, 258–91; Iatrou & Oretti, supra note 4, at iii–xiv, 1–22.

10 See Fox & Martín-Domingo, supra note 6; Steven Truxal, Air Carrier Liability and Air Passenger Rights: A Game of Tug of War?, 4 J. Int’l & Comp. L. 103, 115–18 (2017). See also concerns and discussions of the airlines after the Icelandic dust and volcanic disturbance Eyjafjallajökull, in April and May 2010. David Alexander, Volcanic Ash in the Atmosphere and Risks for Civil Aviation: A Study in European
In 2019–2020, the benefits of globalization—opening up the world through air travel—have also intensified the spread of COVID-19, and as a consequence, the future of many airlines now looks uncertain and certainly faces challenges like never before. These are unprecedented times, and there is little doubt that few people would have forecast the magnitudinal effect that one virus could have had across the globe. This subsequently will also stand to affect (would be) air passengers for some time to come.

The focus of this article is to consider passenger rights—yesterday, today, and in the future—from a European perspective. Hence, the article reflects on the evolution of the air traveler’s passenger rights, giving legislative consideration to Regulation (EC) 261/2004 on air passenger rights, specifically the means provided by the regulation to seek redress for infringements. Evaluations of Regulation (EC) 261/2004 over a period of time—particularly the enforcement process—are therefore discussed.  


Reference is particularly made to three commissioned EC reports:


The article commences by revisiting the European air sector liberalization process to consider the development of rights and protections afforded to passengers. The middle section demonstrates this through reference to a specific case study (never previously reported on) from Spain. This research thus contributes to the past literature with a more recent evaluation of the infringement mechanisms, principally the emerging role of CMCs as part of this analysis. This helps provide an understanding as to why the involvement of CMCs has become more prevalent. Passenger complaints are considered that were handled by a Spanish CMC from August 1, 2015 to July 31, 2017. This data is supplemented by Freedom of Information (FOI) data provided by the Spanish National Enforcement Body, Agencia Estatal de Seguridad Aerea (NEB-AESA).

Finally, the article looks to review passenger rights today (2020) in this uncertain COVID-19 period and in the near future, considering what it means to the passengers (and invariably to airlines). In this respect, it should also be kept in mind that, as of this date, Spain has been highly affected by both the number of COVID-19 cases and the related death toll. This has the potential to affect the appetite to travel in the future, including the proclivity to register a claim, let alone the availability of national and European airlines.

II. RESEARCH CONTEXTUALIZATION – SETTING THE SCENE

A. LIBERALIZATION IN EUROPE: HISTORICAL REFLECTION


14 Author Fox’s (designed) copyright as used in teaching materials 2011–2014 at Buckinghamshire New University, United Kingdom (U.K.) [hereinafter Fox
led to the creation of a single market for aviation in the 1990s that saw new airlines entering the market, some of them applying new business models (for instance, the low-cost carriers).\textsuperscript{15} The “Third Package,”\textsuperscript{16} enacted in 1992, remained applicable for fifteen years before being replaced by Regulation 1008/2008 on Common Rules for the Operation of Air Services in the Community (Air Services Regulation).\textsuperscript{17}

The Air Services Regulation added further simplicity and internal liberalization by setting out rules on:

(1) Market access;
(2) Public Service Obligations (PSOs);
(3) The granting of and oversight of operating licenses for Community (EU) carriers;
(4) Aircraft registration and leasing;
(5) Pricing; and
(6) Traffic distribution between airports.\textsuperscript{18}

The increase of competition among airlines resulted in lower fares for air passengers.\textsuperscript{19} However, in order to secure improved standards for passengers, in terms of services, the EU adopted Regulation (EC) 261/2004, introducing common rules on compensation and assistance to passengers in the event of denied boarding, cancellation, and long delay of flights.\textsuperscript{20}

\textsuperscript{15} Sarah Fox, Safety and Security: The Influence of 9/11 to the EU Framework for Air Carriers and Aircraft Operators, 45 RES. TRANSP. ECON. 24, 28–29 (2014).


\textsuperscript{17} Regulation 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, 2008 O.J. (L 293) 3, 3 (EC) [hereinafter Regulation 1008/2008].

\textsuperscript{18} Id.

\textsuperscript{19} María Belén Rey, Structural Changes in the Spanish Scheduled Flights Market as a Result of Air Transport Deregulation in Europe, 9 J. AIR TRANSP. MGMT. 196, 200 (2003).

\textsuperscript{20} See generally Regulation (EC) 261/2004, supra note 8.
Table 1 – Summary of EU Deregulation Packages

From a wider perspective, an international treaty regime on air carrier liability had already been established by the Warsaw
Convention in 1929\textsuperscript{22} (and its amending instruments) and later advanced by the 1999 Montreal Convention.\textsuperscript{23} The premise of these conventions was that both national and regional legislation (where they exist) should be consistent and in accordance with international agreements.\textsuperscript{24}

### B. Literature Review

#### 1. Passenger Complaints: An Overview and the Current Regulation

As has been commented upon above, liberalization of the air transport industry resulted in a paradoxical situation: (1) there were new market entrants, particularly low-cost carriers, that resulted in an increased number of passengers traveling due to the availability of reduced fares; and (2) conversely, low-cost airlines also offered a lower standard of service (particularly when compared with the full-service airlines) from the perspective of baggage facilities and passenger comfort (e.g., a smaller seat space with reduced leg room and reduced or eliminated meal service).\textsuperscript{25}

While the probability of customers complaining about low fares is moderate-to-nonexistent, the potential for complaints relating to an unsatisfactory level of service should be viewed as significant and highly likely.\textsuperscript{26} The term “customer satisfaction” is recognized to cover a broad spectrum and is largely applied to a measurement (in many respects, subjective) that is used to


\textsuperscript{24} Fox, \textit{supra} note 15, at 29.


quantify the degree to which a customer is satisfied with a product, service, or their experience.\textsuperscript{27} As Wittman identified, “In service industries, customers can choose to register their dissatisfaction with the service they receive by making a complaint to the service provider.”\textsuperscript{28} Also, there is the option for customers to complain to an overarching regulatory agency in an attempt to highlight what the customer perceives as the service failings and inadequacies of an airline.\textsuperscript{29} This latter option is normally controlled by a legislative act as opposed to the terms and conditions of the airlines.\textsuperscript{30}

Regulation (EC) 261/2004 sets objectives in terms of standards and requirements for services and hence service-failings.\textsuperscript{31} In other words, Regulation (EC) 261/2004 lays down common rules on compensation and assistance to passengers in the event of specific circumstances where complaints could occur through poor or low service, namely (1) denied boarding; (2) cancellation; and (3) long delay of flights.\textsuperscript{32}

The aim could therefore be viewed as aiding to strengthen the customer experience by providing common standards and requirements for airlines to adhere to. And in this regard, Regulation (EC) 261/2004 makes no distinction in terms of the airline’s operating model or frequency of flights.\textsuperscript{33} This is an interesting factor in terms of variations of the services and standards of the two key players—full-service and low-cost carrier providers.

Through his research, Forbes found that the expectations of service quality were a significant predictor of complaint rates and that passengers are more likely to complain if actual service quality falls below their own expectations.\textsuperscript{34} However, this remains arguably subjective and relative to the individual. As Weber and Sparks identified, punctuality is a key area where complaints arise, along with scheduling, food quality, cost, fre-

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\textsuperscript{27} See Emrah Cengiz, \textit{Measuring Customer Satisfaction: Must or Not?}, 6 J. NAVAL SCI. & ENG’G 76, 79 (2010).

\textsuperscript{28} Wittman, \textit{supra} note 26, at 64.

\textsuperscript{29} Id.

\textsuperscript{30} Fox & Martín-Domingo, \textit{supra} note 6; Wittman, \textit{supra} note 26, at 64.


\textsuperscript{32} Id.

\textsuperscript{33} Id. art. 3 ¶ 5.

\textsuperscript{34} Silke J. Forbes, \textit{The Effect of Service Quality and Expectations on Customer Complaints}, 56 J. INDUS. ECON. 190, 190–91 (2008).
\end{flushleft}
quency, baggage delivery, cabin service, and membership of airline alliances.\textsuperscript{35}

Dresner and Xu,\textsuperscript{36} as well as Steven et al.,\textsuperscript{37} have suggested that the relationship between complaints and service quality is nonlinear, adding that there is a possible correlation to airline profitability—that is, an increase in complaints will more likely cause profitability to fall in the next period. Arguably, this is regardless of whether a complaint is made. In other words, this could be due to consumers choosing another airline due to their previous experience, resulting in reduced customer loyalty and trust of the brand (a point also referenced by Lin).\textsuperscript{38} Wittman has further identified that “past analyses of consumer complaints assume that complaints will rise as service quality worsens.”\textsuperscript{39} This also translates to the three defined areas specified within Regulation (EC) 261/2004—denied boarding, cancellation, and long delay.\textsuperscript{40} This said, the predisposition and hence propensity to complain has also been linked to differing cultural backgrounds.\textsuperscript{41} Several studies indicated a link between different cultures and their interpretations and perceptions of service quality.\textsuperscript{42} In other words, a passenger’s expectations are likely influenced by what the passenger is used to in terms of services or service delivery within their own country, including via different transportation means.


\textsuperscript{39} Wittman, supra note 26, at 64.

\textsuperscript{40} Regulation (EC) 261/2004, supra note 8. As stated above, this regulation refers to: (1) denied boarding; (2) cancellation; and (3) long delay of flights. See further discussion infra Section II.B.2 (entitled Regulation (EC) 261/2004: Complaints and Handling).

\textsuperscript{41} See GEERT HOFPSTEDE, CULTURE’S CONSEQUENCES 10 (2d ed. 2001).

the transmission of COVID-19, there were fewer flights being offered with the grounding of many services.¹⁶⁸

British Airways (BA), part of the International Airlines Group (IAG) which encompasses Aer Lingus and the Spanish airlines, Iberia and Vueling, announced that it needed to take dramatic action in order to fight for the survival of the airline and, inevitably, the group.¹⁶⁹ “In a memo to staff on March 13, entitled ‘The Survival of British Airways,’ the carrier’s [Chief Executive], Alex Cruz, spoke of ‘a crisis of global proportions like no other we have known.’”¹⁷⁰ At the beginning of April, BA had agreed to a deal with unions leading to the furlough of more than 30,000 workers as the airline battles what is viewed as its worst ever crisis.¹⁷¹

At the beginning of this article, comments were made as to predictions for airlines’ financial performance and, inevitably, for growth. At the end of this article, a comment is being made as to the fact that it is forecast (and hoped) that “[m]ost of the industry should pull through if the [COVID-19] situation lasts one or two quarters. Any longer, and the future of air travel could be altered for good.”¹⁷² Hence, the simple truth is that the airline industry may not fully recover from the effects of the pandemic.

It is recognized that the coronavirus will drive a “European airline industry shakeout.”¹⁷³ The authors’ forecast of a challenging future for airlines was echoed by one of the most outspoken airline chief executives in Europe, Ryanair’s Chief Executive Michael O’Leary, who has acknowledged that “[i]t’s inevitable in the next couple of weeks we’ll see more failures”¹⁷⁴ of airlines. This will lead to consolidations with airlines taking routes from bankrupt competitors; this was recognized by Citi


¹⁷⁰ Coronavirus is Grounding the World’s Airlines, supra note 168.


¹⁷² Coronavirus is Grounding the World’s Airlines, supra note 168.


¹⁷⁴ Id. (quoting Michael O’Leary).
analyst Mark Manduca, who stated, “This virus will expedite the thesis of consolidation, possibly to extreme levels.”\textsuperscript{175} Aviation has always been subject to a Darwinian theory relating to survival of the fittest.\textsuperscript{176} Running alongside this has been the need to increase rights for the passenger.\textsuperscript{177}

There has always been the opportunity for customers to vent their annoyance at the airlines. As Nyer identified, there are positive benefits of complaining directly to the service provider, inasmuch as complaining directly provides a more positive attitude regarding future repurchasing intentions.\textsuperscript{178} The EC Interpretative Guidelines also direct a dissatisfied customer to the airline, indicating that the consumer should refer the matter to the NEB only where there is disagreement with the answer received from the airline or if a response has not been received from the airline.\textsuperscript{179} However, invariably, there are obvious barriers for doing so. These include perceived language barriers and potential cultural differences across the current twenty-seven EU states.\textsuperscript{180} This also extends to passengers from outside the EU, who still have redress through Regulation (EC) 261/2004.\textsuperscript{181} Individuals with collectivist tendencies may also be less likely to engage in registering any form of complaint.\textsuperscript{182}

That said, on other occasions, the complaint may be misguided in terms of believing a matter lies within the scope of the airline when, in fact, it lies outside of the airline’s control—such as flight delays caused directly by air traffic controllers. This could adversely affect the airline and its reputation. In 2009, Kim and Lee made reference to the fact that the EU’s expert group identified a $4.4 billion annual financial burden placed on both airlines and passengers because of air traffic control

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\item \textsuperscript{175} Id. (quoting Mark Manduca).
\item \textsuperscript{177} Prashanth U. Nyer, \textit{An Investigation into Whether Complaining Can Cause Increased Consumer Satisfaction}, 17 J. Consumer Mktg. 9, 15 (2000).
\item \textsuperscript{178} See Fox & Martín-Domingo, \textit{supra} note 6 (manuscript at 31); see also Press Release [IP/19/6814, \textit{supra} note 1].
\item \textsuperscript{179} Prashanth U. Nyer, \textit{An Investigation into Whether Complaining Can Cause Increased Consumer Satisfaction}, 17 J. Consumer Mktg. 9, 15 (2000).
\item \textsuperscript{179} See Kim & Lee, \textit{supra} note 95, at 350–51.
\item \textsuperscript{181} Regulation (EC) 261/2004, \textit{supra} note 8, art. 3.
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problems. While such issues may well be beyond the scope of the airline, on some occasions, it does mean that the airline is burdened with compensating the customer. It is unlikely that COVID-19 will be directly linked by the consumer to the direct failing of any airline; although, arguably aviation has helped intensify the effects of transmission across the globe.

This research has shown the development of mechanisms available to aid travelers in pursuing grievances and complaints against the airlines for a failure of service, including those within the remit and protection afforded through Regulation (EC) 261/2004. Invariably, consumers have chosen, particularly in some cultures, to revert to the use of CMCs, and at times, airlines have selected to pay a claim rather than to risk further financial penalties being awarded against them through the court system. It has also been shown that there remains a weakness in achieving compensation that has been sanctioned by an NEB—unless a court case is pursued.

The 2013 Proposal to Amend Regulation (EC) 261/2004 remains somewhat stalled, although the EU procedural steps show its progression as ongoing. That said, there have been no developments between 2014 and 2020, and the reference in development in 2020 refers specifically to the publication of the “Study on the Protection of EU Air Passenger Rights.” However, there must surely be less impetus now to see any legislative changes that could further weaken airlines and impede their recovery from the 2019–2020 pandemic. That said, this does not necessarily equate to strengthening passenger rights to the detriment of airlines; moreover, this should be seen as providing a balance by ensuring appropriate mechanisms are in place and that court redress is an exceptional measure rather than an accepted practice.

One way to achieve this would be to propose that NEB decisions should be binding on the airline, so as to free up court time and save costs. Arguably, the system could operate in a tri-
bunal-style manner, whereby the designated national experts in the field make the decision, as opposed to a judge who is not an expert on Regulation (EC) 261/2004 and is certainly inexpert when compared to the NEB (which is generally, in most states, the state Civil Aviation Authority). Court action is shown to push the average resolution time back significantly, which again causes not only delays but also anxieties. Resorting to courts making a decision also leads to less consistency across the EU. An NEB handling a large volume of claims is assumed to have good experience in this process and hence substantial knowledge of Regulation (EC) 261/2004. Therefore, NEB findings should be expected to have a good level of accuracy and aid consistency of interpreting Regulation (EC) 261/2004, thus providing fairness across the EU.

While Regulation (EC) 261/2004 is considered a pioneering regulation that aims to protect air passenger rights by ensuring high standards for service quality (particularly reliability), there is undoubtedly a need for revisions and refinement. The 2020 Steer Davies Gleave report revealed many of the same failings and difficulties as expressed in the earlier 2010 Steer Davies Gleave report. This earlier report advocated that the responsibility for making sure that passenger rights are respected should be borne by the NEBs.

With the reduction of the number of flights in 2020 (certainly within the first six months) into and out of the EU, it could be anticipated that the number of complaints by customers to NEBs will be significantly reduced. However, this may not be the case. The failure of Spanish airlines Air Comet and Spanair demonstrated, only too clearly, that without direct recourse to the service provider (i.e., the airline), customers selected to register any negative consequence directly with an enforcement body. However, in such cases it is unlikely that all customers would be compensated when the airline has ceased to trade.

In 2020, more than ever, there is a need to also review whether all responsibility under Regulation (EC) 261/2004 should actually lie with the airline. There is little doubt that the regulation remains, in part, unclear in terms of entitlements. This situation has invariably created the space and opportunity

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187 See Press Release IP/19/6814, supra note 1.
for CMCs to come into the process, supporting passengers during
the claim process and translating Regulation (EC) 261/2004 into a more workable mechanism for the consumer. This may
be due to the comfort of using a mechanism not directly linked
to the airline or to a state body. This said, at times, there has
been criticism levied against these types of CMCs, who are said
to take too high a percentage for their services when the claim-
ant should be able to make their claim via the airline freely. The data used for this study was provided from one of those
claim companies operating in Spain—a company that would
stress that it aided travelers in determining their entitlement
and facilitating what is a lengthy process on occasion.

While Regulation (EC) 261/2004 included the creation of
NEBs, NEBs’ effectiveness and consistency have been ques-
tioned. This has led to two opposite ends of the spectrum per-
haps developing: the CMC and the need to use arbitration
services. This research has observed, in general, a good func-
tioning of the Spanish NEB supporting the claims process.

One mechanism to aid transparency and ensure passenger
rights, afforded under Regulation (EC) 261/2004 or adjacent to
it, could be requiring the NEBs to publish periodic statistics on
the number of claims filed (including against each airline) with
the EC and translating this across all EU states to show consist-
cy of practices and procedures. A good practice to consider,
in this respect, is the practice implemented in the United States,
where airlines are required to report their statistics to the US-
DOT, which collects and processes the information. Such sta-
tistics and data are also reported on the Aviation Consumer
Protection website. This said, there is also a need for more
transparency and accountability at airports and by the air traffic
controllers, to provide a better understanding as to why such
delays occur in the first instance and who is liable for such
delays.

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190 See Civil Aviation Authority, supra note 92, at 7.
191 Anna Tims, Beware Firms Trying to Take a Cut of Your Flight Delay Claim . . .
You Can Do It for Free, GUARDIAN (Oct. 28, 2018), https://www.theguardian.com/
192 FOI Data, supra note 84.
193 See, e.g., Fox & Martin-Domingo, supra note 6.
194 See Airline Service Quality Performance Reports, 14 C.F.R. §§ 234.1–234.12
195 Air Travel Consumer Reports, supra note 86.
In terms of the case study used in this article, it is acknowledged that there were some limitations, as one single state (Spain) does not provide an adequate understanding of the whole of the EU in terms of the use of CMCs. The results and use of such services may not be consistent across all of the EU. Furthermore, the nationality or the place of residence of the parties utilizing this service was not known and cannot be assumed to be only Spanish nationals. Future research could perhaps be aimed at analyzing more data from other states in terms of the use of CMCs and whether there is a need for CMCs to be an added and a stated resource referred to within Regulation (EC) 261/2004.

In conclusion, deregulation invariably aided to strengthen the air transport European market, giving airlines more opportunities across the EU. One of the aims of Regulation (EC) 261/2004 was to try to secure high levels of customer service after deregulation. Further, as we come out of 2020, we cannot yet predict what the global or European sector will look like or, indeed, whether legislative and other policy changes will need to be applied in order to allow the industry to recover and not to be disadvantaged by new practices which have arisen to protect the aviation passenger (e.g., CMCs).

Currently, it is reported that airlines “are desperate to avoid having to immediately refund huge numbers of customers” in the midst of this pandemic. In the U.K., airline bodies have written to the government asking them to “allow carriers to issue vouchers instead of refunds,” identifying that “[i]f refunds have to be given [airlines] want to wait until the coronavirus crisis is over and flight levels are back to normal.” However, in the short term, at least, a new normal will have to be established. And it may be that a different tolerance level will have to be applied to perceived failures of service delivery, including those stipulated by Regulation (EC) 261/2004. However frustrating these perceived failures of service delivery, the consumers may also be equally grateful to the airlines to have any services restored that allow them to access friends and different countries of the world.

COVID-19 will inevitably cause a reduction of services (certainly in terms of volume) for some years to come, including

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196 See Press Release IP/19/6814, supra note 1.
197 Baker, supra note 154.
198 Id.
leading to the loss of some airlines. And while revisions of the Regulation (EC) 261/2004 have been proposed for some time, there is perhaps a more pressing need to revisit this given the current challenging and changing landscape both airlines and passengers now face.