

NON PAPER

Proposed informal Guidelines on the application of some articles of (EC) Regulation 261/2004

These informal guidelines are aimed at helping the competent national enforcement bodies to fix a common application of (EC) Regulation 261/2004 under the very specific and exceptional circumstances directly linked to the eruption of the volcano in Iceland, in order to ensure harmonised enforcement of the Regulation. These Guidelines do not prejudice or amend in any way the official interpretation of the Regulation provided by the ECJ under its rulings or the guidelines agreed by NEB's and the Commission services in 2007 on a number of questions. These Guidelines do not set any precedent on the interpretation that NEB or the Commission services may hold outside the exceptional circumstances linked to the volcano situation.

The guiding principle for the common interpretation in relation to the volcano eruption is that, in principle, sanctions shall not be imposed on airlines where they can prove their best endeavours to comply with their obligations under the Regulation taking into consideration the particular circumstances linked to the ash cloud. However, NEBs shall apply sanctions if they consider that an airline has taken advantage of the volcano crisis to evade its obligations under the Regulation. Additionally, NEBs may still seek redress on behalf of individual passengers on a case-by-case basis in line with the common interpretation set out in these guidelines.

Article 3.6 (EC) Regulation 261/2004 and Package Travel Directive 90/314/EEC"

1. It is clear from article 3.6 and recital 16 of Regulation 261/2004 that the Regulation also applies to package tours, except where a package tour is cancelled for reasons other than cancellation of the flight, and that the rights granted under that regulation do not affect the rights granted under Directive 90/314. Consumers thus have, in principle, rights alternatively both vis-à-vis the package organizer and vis-à-vis the operating air carrier. Whether the package organizer or the operating air carrier ultimately has to bear the cost of their overlapping obligations is a matter not regulated in the Regulation and Directive, and will thus depend on the contractual provisions between organizers and carriers and the applicable national law.

Article 5.3 "Cancellation without compensation"

2. The Commission has stated from the beginning of the crisis that the cancellation of services due to volcanic ash should be considered an extraordinary circumstance in accordance with Article 5.3 and that consequently passengers have no right to compensation for flights cancelled as a direct result of that disruption.
3. **Definition of extraordinary circumstances linked to the volcano ash cloud:** without prejudice to the interpretation provided by the ECJ and the line taken by NEBs and the Commission since 2007 on the definition of extraordinary circumstance, given the very specific exceptional circumstances of the volcano situation -which have continued to randomly disrupt air traffic and may be regarded as "Force Majeure"- NEBs may, in evaluating a complaint on a case-by-case basis, give greater thought to accepting situations that they would not normally accept to constitute an extraordinary

circumstance (notably a cancellation due to shortage of cabin crew or a reactionary delay). However air carriers would have to clearly demonstrate a direct link between the cause – the volcano – and the effect: triggering the first delay or the cancellation for instance, or the longer duration of the flight that may have caused the cabin crew shortage.

Article 8 "Right to reimbursement or re-routing"

4. *Article 5.4 imposes on air carriers the burden of proof on whether and the point at which a passenger has been informed about the cancellation of their flight. Article 14.2 imposes on air carriers the obligation to provide passengers with written information on their specific rights in case of disruption of their journey. Article 8.1 imposes the obligation on air carriers to offer passengers a triple choice, between reimbursement of the ticket price, re-routing at the earliest opportunity or re-routing at passengers convenience, subject both to the availability of seats and under comparable transport conditions.*
5. In an interpretation strictly limited to the recent volcanic situation, NEBs may consider that sanctions are not justified, considering the criteria set out in Article 16 (3), in the following situations: **a)** the lack of an explicit offer of reimbursement or rerouting; **b)** the lack of provision of direct assistance and re-routing where passengers have made their own arrangements; **c)** the failure on the part of an air carrier to provide each individual passenger with written information per Article 14 (2).

This above ad-hoc interpretation gives due consideration to the constraints affecting the industry during this difficult period. It should be expressly noted that it is without prejudice to application of these provisions in other circumstances. As part of any assessment NEBs may consider whether an air carrier has shown its intention to comply with the Regulation in so far as possible by trying to provide assistance and re-routing in as much as circumstances allowed them to do so. However, when a pattern of conduct showing a systematic breach of the Regulation is revealed, NEB's have to take appropriate action against air carrier concerned.

6. *Article 8.1 states, "Where reference is made to this Article, passengers **shall be offered the choice...**"* The costs linked to the assistance and the rerouting borne by the passenger in case of lack of direct assistance/rerouting must, in principle, be totally or partially reimbursed by the carrier. However where an air carrier can demonstrate that it has sought to contact a passenger and to provide the assistance required by Article 8, but a passenger has nonetheless made his own assistance and rerouting arrangements, then a NEB may conclude that the air carrier is not responsible for the additional costs the passenger may have incurred, and that reimbursement of the ticket price was implicitly the passenger's choice.
7. Since 2007 the Commission services have interpreted¹ two essential points that are worth remembering: a) the carrier must bear the cost of the transport to the final destination when the passenger is rerouted to a different airport; and b) the rerouting can be offered both by other means of transport or by another carrier.
8. In line with the recitals of the Regulation, the principle of proportionality and adequateness shall be applied. Rerouting, like assistance, must be compensated up to the limits of what is proportionate and reasonable in view of the specific circumstances of the case and the cost of alternative modes of transport. NEB may thus consider,

¹ p.25 and p.26 of the Questions & Answers document prepared by DG TREN

depending on the particular circumstances of the case, that the passenger is entitled to some of the expenses linked to the rerouting, but not to the total amount. This seems also to be in line with article 8.1 b) which mentions "comparable transport conditions". Points 12 and 13 below expand on how the right to be assisted and rerouted can be delimited by NEB. When passengers decide to be rerouted at an earlier date but in a class higher than that for which the initial ticket was purchased, the air carrier is entitled to ask the passenger to pay the difference of the price.

9. The principle of the "purpose of the travel" should be applied. This means that *when the outbound flight of a return trip has been cancelled owing to the volcano ashes, air carriers should refund both, **the outbound and the return flights** of the journey*. This should also apply to those cases where it is part of an air carrier's customer policy not to sell "return tickets" and thus, passengers have been obliged to buy **two "single way" tickets with the same carrier** to make their whole journey.
10. As a general principle, the choice offered to passengers under Article 8 is to be made once, when the passenger is informed about the cancellation of the flight. As soon as the passenger has chosen one of the three options under art. 8.1 a) b) and c), any obligation of the air carrier linked to any of the other two options ceases. In the specific volcano situation - where both, air carriers and passengers, were unable to correctly foresee how long the disruption would last - it could be exceptionally accepted that, after having opted for the right to be taken care of and to wait for re-routing, passengers **changed their minds and decided to ask for the reimbursement**. In these circumstances, a NEB should take into account the information and assistance provided to the passenger at the time of the incident: for example, if no information or assistance was provided, or if the only re-routing option was on the carrier's own services several weeks in the future. In such circumstances, the air carrier may have to provide both the reimbursement and a contribution to other costs – strictly on a case-by-case basis.
11. **When opting for 8.1.c), can passengers request a rerouting "at the passenger's convenience" at any moment of the year?** Article 8 must be read in the light of the spirit of the Regulation which is not to allow passengers to gain a profit from the air carrier, but to ensure that his/her transport contract can be fulfilled. If the passenger elects to be re-routed at a later date, the Regulation provides that this is to be at the passenger's convenience subject to availability. In the context of the volcanic ash situation NEBs are asked to investigate cases of dispute between the airline and a passenger where the airline seeks to limit the passenger's choice as to the date of travel on an availability of seat basis. In investigating complaints, where a passenger considers the date offered by the carrier is not one "at their convenience", NEBs are directed to take into consideration the purpose of the journey and the availability of seats on the part of the carrier. Airlines should not impose blanket time restrictions, such as re-booked flights must be within thirty days of the original date of travel.

Article 9 "Right to care"

12. It is worth reminding that when the passenger opts for reimbursement of the full cost of the ticket, the right to assistance ends. The same happens when the passenger agrees with the carrier a re-routing at a later date at the passenger's convenience (Art. 8.1c). The right to care subsists only as long as passengers have to wait for a rerouting against their will (art.8.1.b). Such a right exists irrespective of whether it is or not known or predictable when the rerouting will be possible, as stipulated in recital 13.

13. Article 9 does not leave room for an interpretation limiting the number of the hotel nights or meals and refreshments. The intention of the Regulation is that adequate care of the needs of passengers waiting for re-routing under Article 8(1)(b) is to be provided. This should be provided without imposing a disproportionate and unfair burden on the air carrier concerned. Accordingly, NEBs ought to take a qualitative approach and assess, on a case by case basis, what constitutes "adequate care" having due regard to the principle of proportionality.
14. When assessing whether the carrier's offer to compensate a passenger's expenses linked to assistance/rerouting may be considered as "adequate", NEB may take into account a set of criteria, amongst which: **a)** whether passengers were actually in need of assistance or not (depending on how far from their place of residence they were); **b)** the distance between the accommodation and the airport (in order to not to delay the rerouting as soon as it becomes possible); **c)** the availability, average conditions and prices practiced for rooms and hotels in the relevant area, region or State concerned; **d)** the treatment of other passengers in a comparable situation; **e)** balancing adequate assistance for the passenger with unnecessary expense for the airlines; **f)** average conditions and prices practiced in the place, region or State concerned. NEB may use public index available on average hotel costs to help their assessment of what can be considered as "adequate" cost of the accommodation ².
15. This would also mean that **g)** accommodation does not necessarily imply in all events the continuation of the stay of the passenger in the same hotel where he was previously lodged, **h)** nor the automatic right for the passengers to decide himself where and at what condition he is to be accommodated. In the case of passengers making their own alternative travel arrangements (by whatever mode) and subsequently seeking reimbursement from the carrier, NEBs should take account of efforts made by the carrier to finding alternative transportation, particularly where a carrier made no effort at all. In all circumstances relating to alternative travel and other assistance, NEBs may accept that air carriers reimburse passengers' expenses against receipts up to a certain "reasonable" level in line with the above mentioned criteria. In any event passengers who feel that they are entitled to have more of their expenses reimbursed retain the right to pursue the air carrier through a national Court procedure.

Article 14 "Obligation to inform passengers of their rights"

16. Besides the obligation to provide general information on air passenger rights, article 14.2 imposes on air carriers the obligation to provide individual passengers with "*a written notice setting out the rules for compensation and assistance in line with this Regulation*". Whenever an air carrier gives partial, misleading or wrong information to passengers on their rights in case of an incident, both individually or on a general basis through media statements or publications on their websites, this should be considered as an infringement of the Regulation.

Article 15 "Exclusion of waiver"

17. Article 15.1 states "*Obligations vis-à-vis passengers pursuant to this Regulation may not be limited or waived*". Whenever an air carrier issues a waiver, either via a general statement, a restrictive clause in the contract of carriage, or by way of a declaration which it requires passengers to sign at check-in prior to receiving their boarding card, they infringe the Regulation.

² i.e. <http://www.hotels.com/press/hotel-price-index.html>

18. Infringements to article 14 (information) and article 15 (exclusion of waiver) are the only two cases for which the Commission has asked NEB to take immediate action during the crisis. All air carriers have reacted to the NEB warning, by removing immediately the abusive waiver and the wrong information. Account should be taken of whether the air carriers have immediately respected the warning from the competent national authorities, in deciding whether action/penalty is necessary.
