

AIR PASSENGER RIGHTS – EUROPEAN CASE LAW

On many occasions, the Court of Justice of the European Union (CJEU) has been requested by national courts to clarify certain provisions of Regulation 261/2004 on air passenger rights and of the Montreal Convention¹. Its interpretative judgments reflect the current state of EU law, which has to be enforced by national authorities.

Below, we provide a list and the references to the most important judgments with regard to air passenger rights.

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¹ The European Union is a contracting Party to this Convention and some of its provisions have been implemented in Union law by Regulation (EC) No 2027/97, as amended by Regulation (EC) No 889/2002. These rules are part of a set of measures aiming at protecting air passenger rights in the European Union along with Regulation (EC) No 261/2004.

DELAYS

Compensation for long delays

A long delay entitles passengers to the same compensation as in the case of a flight cancellation: the passenger is entitled to compensation if he reaches his/her final destination with a delay of three hours or more. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.

Joined Cases C-402/07 and C-432/07 Sturgeon:

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-402/07>

Compensation for missed connecting flights

The compensation for long delays is also due to passengers of directly connecting flights reaching their final destination with a delay of at least three hours. The delay to be taken into account is the delay at arrival, including in case of flight connections. It does not matter whether the delay occurred at the departure airport, at the connecting airport(s) or at any stage of the journey, only the delay at the final destination of the journey is relevant for the right to compensation.

Case C-11/11 Folkerts:

<http://curia.europa.eu/juris/liste.jsf?num=C-11/11&language=EN>

Compatibility of delay compensation with international law

In this judgment, the Court confirms the previous judgment (Sturgeon) with regard to delay compensation. In addition, the Court finds that the requirement to compensate passengers whose flights are delayed is compatible with the Montreal Convention. The Court finds that the loss of time inherent in a flight delay constitutes an inconvenience, rather than "damage", is not governed by the Montreal Convention. Consequently, the obligation to compensate passengers whose flights are delayed falls outside the scope of that convention and remains additional to the system for damages laid down by it.

Joined Cases C-581/10 and C-629/10 Nelson:

<http://curia.europa.eu/juris/liste.jsf?num=C-581/10>

DETERMINING THE AMOUNT OF THE COMPENSATION

With regard to the right to compensation, Regulation (EC) No 261/2004 makes no distinction as to whether the passengers concerned reach their final destination by means of a direct flight or an air journey with connecting flights. In both cases the passengers must be treated equally when calculating the amount of compensation. Consequently, when determining the amount of compensation in case of

a connecting flight, only the radial distance ('great circle' distance) that a direct flight would cover between the departure airport and the arrival airport should be taken into consideration.

C-559/16 Bossen:

<http://curia.europa.eu/juris/liste.jsf?num=C-559/16>

EXTRAORDINARY CIRCUMSTANCES

Compensation in case of technical defects

An airline can be exempted from paying compensation in case of a long delay or a cancellation if it can prove "extraordinary circumstances".

The Court has clarified further that a technical problem which comes to light during aircraft maintenance or is caused by failure to maintain an aircraft cannot be regarded as 'extraordinary circumstances'. The CJEU clarified that even a technical problem which has occurred unexpectedly, is not attributable to poor maintenance and is not detected during routine maintenance checks, does not fall within the definition of 'extraordinary circumstances' when it is inherent in the normal exercise of the activity of the air carrier. For instance, a breakdown which was caused by the premature malfunction of certain components of an aircraft may constitute an unexpected event. Nevertheless, such a breakdown remains intrinsically linked to the very complex operating system of the aircraft, which is operated by the air carrier in conditions, particularly meteorological conditions, which are often difficult or even extreme, it being understood moreover that no component of an aircraft lasts forever. Therefore, it must be held that unexpected event is inherent in the normal exercise of the air carrier's activity. However, a hidden manufacturing defect revealed by the manufacturer of the aircraft or by a competent authority, or damage to the aircraft caused by acts of sabotage or terrorism may constitute extraordinary circumstances.

Case C-549/07 Wallentin-Hermann:

<http://curia.europa.eu/juris/liste.jsf?num=C-549/07>

Case C-257/14 van der Lans:

<http://curia.europa.eu/juris/liste.jsf?num=C-257/14>

The Court also clarifies that the collision of mobile boarding stairs with the aircraft cannot be considered as "extraordinary circumstances" which exempt the air carrier from the obligation of compensation. Mobile stairs or gangways can be regarded as indispensable to air passenger transport and, therefore, air carriers are regularly faced with situations arising from the use of such equipment. A collision between an aircraft and a set of mobile boarding stairs is, hence, an event inherent in the normal exercise of the activity of the air carrier. Nothing indicates that the damage to the aircraft is due to an act external to the normal services of an airport, such as an act of terrorism or sabotage, which would be considered as extraordinary circumstances. Therefore, there can be no exemption from the obligation of compensation in this case.

Case C-394/14 Siewert:

<http://curia.europa.eu/juris/documents.jsf?num=C-394/14>

Compensation in case of a bird strike

The Court concluded that a collision between an aircraft and a bird is an extraordinary circumstance which may exempt the air carrier from its obligation to pay compensation if a flight is delayed significantly. However, where an authorised expert finds after the collision that the aircraft concerned is airworthy, the carrier cannot justify the delay by invoking the need to carry out a second check.

The judgment has also confirmed that any delay caused by an extraordinary circumstance needs to be deducted from an overall delay in arrival in order to assess whether compensation must be paid.

Case C-315/15 Pešková and Peška:

<http://curia.europa.eu/juris/liste.jsf?num=C-315/15>

Compensation in case of a “wildcat strike” by airline staff

The Court has ruled that a ‘wildcat strike’ by flight staff following the surprise announcement of a restructuring does not constitute an ‘extraordinary circumstance’, and thus does not release the airline from its obligation to pay compensation in the event of cancellation or long delay of flight.

The Court notes that the Regulation lays down two cumulative conditions for an event to be classified as an ‘extraordinary circumstance’: (1) it must not, by its nature or origin, be inherent in the normal exercise of the activity of the airline, and (2) it must be beyond its actual control. The mere fact that a recital of the Regulation mentions that such circumstances may arise, in particular, in the event of a strike does not mean that a strike is necessarily and automatically a cause of exemption from the obligation to pay compensation. On the contrary, it is necessary to assess, on a case-by-case basis, whether the two conditions mentioned above are fulfilled.

C-195/17 Krüsemann and Others:

<http://curia.europa.eu/juris/liste.jsf?language=en&num=c-195/17>

Care in extraordinary circumstances

In the event of cancellation of a flight, the air carrier is obliged to provide care to passengers as well as to provide compensation. As regards the obligation to provide care, the air carrier must provide free of charge, in light of the waiting time, refreshments, meals and, where appropriate, hotel accommodation and transport between the airport and place of accommodation, as well as means of communication with third parties. The air carrier is obliged to fulfil that obligation even when the cancellation of the flight is caused by extraordinary circumstances, that is to say circumstances which could not have been avoided even if all reasonable measures had been taken. The air carrier is, however, exempt from its obligation to provide compensation if it is able to prove that the cancellation of the flight was caused by such circumstances.

Case C-12/11 McDonagh:

<http://curia.europa.eu/juris/documents.jsf?num=C-12/11>

"Reasonable measures" to be taken by the air carrier

Article 5(3) of Regulation 261/2004 must be interpreted as meaning that an air carrier, since it is obliged to implement all reasonable measures to avoid extraordinary circumstances, must reasonably, at the stage of organising the flight, take account of the risk of delay connected to the possible

occurrence of such circumstances. It must, consequently, provide for a certain reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end. However, the required reserve time should not result in the air carrier being led to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time.

Case C-294/10 Eglītis and Ratnieks:

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-294/10>

DENIED BOARDING

The concept of 'denied boarding' relates not only to cases of overbooking but also to those where boarding is denied on other grounds, such as operational reasons. Airlines cannot validly justify a denied boarding and be exempted from paying compensation to passengers by invoking extraordinary circumstances or by assuming that passengers would not arrive on time for their connecting flight.

Cases C-22/11 Finnair and C-321/11 Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor:

<http://curia.europa.eu/juris/documents.jsf?num=C-22/11>

<http://curia.europa.eu/juris/documents.jsf?num=C-321/11>

CANCELLATION

Flight that returns to the airport of departure

The concept of "cancellation" also covers the case in which the aircraft took off but, for whatever reason, was subsequently forced to return to the airport of departure where the passengers of the said aircraft were transferred to other flights.

Case C-83/10 Sousa Rodríguez:

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-83/10>

OPERATING AIR CARRIER

The Court has ruled that the air company which must pay the compensation owed to passengers under Regulation 261/2004 is the air company which decided to perform the flight, and not the air company which leased out the aircraft and its crew.

The Court thus clarified that in the case of a so-called "wet lease" (one airline, the lessor, provides an aircraft plus crew to another airline, the lessee), the lessor cannot be regarded as the operating air carrier for the purposes of the Regulation.

Case C-532/17 Wirth:

<http://curia.europa.eu/juris/liste.jsf?num=C-532/17>

TIME OF ARRIVAL

The CJEU concludes that the ‘arrival time’, which is used to determine the length of the delay to which passengers on a flight have been subject, corresponds to the time at which at least one of the doors of the aircraft is opened, the assumption being that, at that moment, the passengers are permitted to leave the aircraft.

Case C-452/13 Germanwings:

<http://curia.europa.eu/juris/liste.jsf?num=C-452/13>

THE SCOPE OF THE REGULATION

The Court stated that a return flight is a separate flight from the outbound flight. In case the return flight does not originate in the EU and is not operated by an EU carrier, it is not subject to the Regulation.

Case C-173/07 Emirates Airlines:

<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-173/07&td=ALL>

The Court confirmed that the right to compensation for long delays of flights applies to connecting flights to third States with stopovers outside the EU. Moreover, a change of aircraft during the stopover does not alter the fact that two or more flights booked as a single unit must be considered a single connecting flight.

C-537/17 Wegener v. Royal Air Maroc:

<http://curia.europa.eu/juris/liste.jsf?num=C-537/17>

ENFORCEMENT

National enforcement bodies’ competences

Under the Regulation, national enforcement bodies carry out general monitoring activities in order to guarantee air passengers’ rights but are not required to act on individual complaints. Hence, a national enforcement body is not required to take enforcement action against air carriers with a view to compelling them to pay the compensation provided for in the Regulation in individual cases. Its sanctioning role as referred to in Article 16(3) of the Regulation consists of measures to be adopted in response to the infringements which the body identifies in the course of its general monitoring activities provided for in Article 16(1). However, the Court observes that, in view of the objectives of the regulation and the discretion enjoyed by Member States in the allocation of the powers with which they intend to endow the bodies in question, it is open to Member States, in order to remedy inadequate protection for air passengers, to empower that body to adopt measures in response to individual complaints.

Joined Cases C-145/15 and C-146/15 Ruijsenaars and Jansen.:

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-145/15>

Time limits for bringing action under Regulation 261/2004

The time-limits for bringing actions for compensation for flight cancellation under Union law are determined in accordance with the rules of each Member State on the limitation of actions (the provisions of the Warsaw and Montreal Conventions are not relevant, because the compensation measure laid down by Regulation 261/2004 falls outside their scope, and remaining additional to the system for damages laid down by them).

Case C-139/11 Cuadrench Moré:

<http://curia.europa.eu/juris/documents.jsf?num=C-139/11>

Jurisdiction under which action can be brought under Regulation 261/2004

For flights from one Member State to another Member State, carried out on the basis of a contract with a single air carrier, which is the operating carrier, a claim for compensation under the Regulation can be brought, at the applicant's choice, to the national court which has territorial jurisdiction either over the place of departure or place of arrival, as stated in the contract of carriage (in application of Council Regulation (EC) No 44/2001 ('Brussels I')). Under Article 2(1) of Brussels I passengers also retain the option of bringing the matter before the courts of the defendant's (air carrier's) domicile.

Case C-204/08 Rehder:

<http://curia.europa.eu/juris/documents.jsf?num=C-204/08>

An airline which operated only the first leg of a connecting flight in one Member State can be sued before the courts of the final destination in another Member State for compensation for delays. That is the case where two flights operated by two different air carriers were part of a single booking for the entire journey and the long delay on the arrival at the final destination is based on an irregularity which took place on the first of those flights.

Joined Cases C-274/16, C-447/16 and C-448/16 flightright:

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-274/16>