

# FLYING TO EUROPE...AN EXPENSIVE ADVENTURE FOR AIRLINES?

## RECENT DEVELOPMENTS IN PASSENGER RIGHTS UNDER EU REGULATION (EC) NO 261/2004

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Imagine you're coming to the end of your summer vacation in Europe, you're doing some last minute duty-free shopping at the airport, and then you're told your flight is going to be delayed by at least a few hours. Don't worry, keep shopping – you're probably entitled to a € 600 cash payment, courtesy of the European Court of Justice and its apparent willingness to go to any interpretive lengths to award passengers monetary compensation under EU Regulation (EC) No 261/2004 (**Regulation**).

The Regulation came into effect in 2005 for the purpose of establishing common rules on compensation and assistance to passengers in the event of cancelled flights, long delays or denied boarding (e.g. due to overbooking). The Regulation applies to all flights within or departing from the EU/EEA and Swiss region, including flights to the U.S. operated by U.S.-based carriers. It also applies to flights departing the U.S. to Europe where the carrier is an EU-based airline.

### COMPENSATION FOR CANCELLED FLIGHTS AND LONG DELAYS

When a flight is cancelled, Article 5 gives passengers a right to re-imbusement or re-routing, and a *right to care* (meals and refreshments, telephone calls, and if necessary accommodation and transfers). It also gives passengers an express right to monetary compensation if the airline cannot re-route the passengers allowing them to stick fairly closely to their original timing. For example, for a cancellation with less than a week's notice, the airline has to be able to re-route the passenger onto a flight allowing them to depart no more than one hour before and arrive no later than two hours after their scheduled flight. The

amount of compensation is divided into three categories: € 250, € 400 or € 600, depending on the distance of the flight and whether the flight is within the EU. Any flight from the EU to the U.S. would attract € 600 as the flight distance would exceed the applicable threshold of 3,500 km.



Where a flight is delayed, the passengers' rights are regulated by Article 6. It only gives passengers a right to re-imbusement or re-routing, and the *right to care*. There is no right to monetary compensation.

So what happens where there is a really long delay of, say, 25 hours? Well, the passengers obviously argue, "It's not really a delay, it's a cancellation, so we have a right

to monetary compensation." And airlines obviously argue, "25 hours is still a delay, so no compensation is payable. Passengers are only entitled to a *right to care*" (i.e. pizza and coke while they're waiting).

This is exactly what happened in the controversial case of *Sturgeon*,<sup>1</sup> where the European Court of Justice (ECJ) was asked to consider whether a delay in that case of more than 25 hours was a cancellation under Article 5 or a delay under Article 6. The Court held that a delay can never evolve into a cancellation, no matter how long it is. It also acknowledged that the Regulation only gives a right to compensation for cancellations.

But the Court ultimately concluded that the word "cancellation" in Article 5 must be given a broad interpretation which includes **delays** where the passenger arrives at its final destination three hours or more after the scheduled arrival time. At this point, anyone who has read the Regulation stops and asks themselves, "What have I missed?"

It turns out the Court had been crunching numbers. It calculated that under Article 5 the airline has to pay compensation if it cancels a flight but cannot re-route passengers allowing them to lose no more than a total of three hours (i.e. one hour before scheduled departure plus two hours after scheduled arrival). The Court held that the objective of the Regulation is to provide passengers with standardised compensation for their inconvenience and that passengers whose flights are cancelled or delayed suffer similar damage (i.e. a loss of time). It would therefore be an infringement of the principle of equal treatment to treat them differently. Accordingly, the word "cancellation" in Article 5 must be interpreted as including **delays** of more than three hours on arrival.

The decision was controversial, mostly because the Court blatantly disregarded the wording of the Regulation and the obvious intention of the legislature to treat delay and cancellation differently. If the Court considered the Regulation to be inconsistent with the principle of equal treatment, then it should have declared the Regulation invalid instead of re-writing it. But despite the Court's misconceived approach, the decision was subsequently affirmed.<sup>2</sup> And philosophically speaking, the Court has a point: the loss of time and inconvenience is the same or similar enough, irrespective of whether a flight is cancelled or delayed. Accordingly, the EU Parliament is currently amending the Regulation so that the right to compensation expressly extends to long delays.

### EXCEPTION FOR 'EXTRAORDINARY CIRCUMSTANCES'

Airlines are exempt from paying compensation where they can prove that the cancellation [or long delay] was caused by "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken." The term "extraordinary circumstances" is not defined in the Regulation, but the introductory recitals give some examples of what it's getting at: political instability, meteorological conditions, security risks, unexpected flight safety shortcomings, strikes and air traffic management decisions. These are the obvious ones.

The real uncertainty surrounds delays or cancellations caused by technical problems with the aircraft. The ECJ in *Wallentin-Herrman* (C-549/07) held that given the sophisticated nature of airplanes, resolving technical problems must be considered a normal part of an airline's activities. Accordingly, technical problems are not covered by the extraordinary circumstances exception unless the "problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control," such as hidden manufacturing defects.<sup>3</sup> Technical problems arising from bird strikes or severe turbulence are also commonly accepted as extraordinary circumstances.

It is unclear how far an airline has to go to prove that the extraordinary circumstances could not have been avoided even if

all reasonable measures had been taken. In *Wallentin-Herrmann* the ECJ initially explained that an airline must establish that the extraordinary circumstances "could not on any view have been avoided by measures appropriate to the situation, that is to say by measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned."<sup>4</sup> That interpretation is rational and justified by the wording of the Regulation. But then in a schizophrenic about-face, the Court stated in the very next paragraph that an airline "must establish that, even if it had deployed all its resources in terms of staff or equipment and financial means at its disposal, it would clearly not have been able – unless it had made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time – to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight." This latter approach is neither supported by the drafting nor a sensible interpretation of the provision.

A more worrying trend is developing in Germany, which has seen courts (even at the highest level) focusing on what the airline did after the event to reduce the consequential delay or impact of the cancellation. This approach requires the airline to provide detailed evidence on subsequent operational decisions, including where its spare aircraft and standby crew were etc.

Proving extraordinary circumstances can be difficult and expensive. For a claim of € 600 by one passenger, it hardly seems worth it. But if you're flying a Boeing 747-400 with 374 passenger seats, claims for compensation alone could add up to € 224,400 for one flight. That's worth a fight.

### RIGHT TO CARE, EVEN WHERE EXTRAORDINARY CIRCUMSTANCES EXIST

What happens if most of the airspace in Europe is closed due to a nasty, unpredictable volcano in Iceland, as happened in April 2010? They're extraordinary circumstances beyond the airline's control, so the airlines are exempt from having to pay compensation. But the passenger's *right to care* is not affected, so the airlines still have to provide, for example, accommodation, meals

and refreshments. Under the current Regulation, the *right to care* is unlimited in time, so during the volcanic ash incident in 2010 some airlines were forced at their own expense to baby sit passengers for up to a week.

### AMENDMENTS TO THE CURRENT REGULATION

The ECJ's ruling that the compensation provisions under the Regulation also extend to passengers who are delayed by more than three hours has led to a huge increase in complaints to airlines. It has also seen the popping-up of claim firms trying to cash in on the current mess. To help reduce the number of cases before the courts, Germany has just introduced an alternative dispute resolution process, which if invoked by passengers is compulsory for airlines.

The current situation is unsatisfactory. Despite the nature of the Regulation being consumer protection legislation, the ECJ's rulings have gone further than was intended. An amendment bill has been introduced to the EU Parliament in an attempt to strike a better balance. There is heated debate among the various stakeholders, so it remains to be seen what the final amendments will be. They are expected to be approved in the middle of 2014, so watch this space...



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1 Joined cases (C-407/07) *Sturgeon & Oths v Flugdienst GmbH* and (C-432/07) *Böck & Oths v Air France SA* (Fourth Chamber, 19/11/09).

2 Joined cases (C-407/07) *Tui Travel & Oths v Civil Aviation Authority* and (C-581/10) *Nelsen & Oths v Deutsche Lufthansa AG* (Grand Chamber, 23/10/12).

3 *Wallentin-Herrmann v Alitalia – Linee Aeree Italiane SpA* (C-549/07), 22/12/08, [34].

4 *Wallentin-Herrmann*, [40].