

Regulation 261/2004

Current issues

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Amendments to Regulation 261/2004

- In force since **February 2005**
- Occurring issues in application
 - > case law
 - > (more) new issues arising > need for amendments
- **1st Proposal** for a revision (**2013**)
- **2nd Proposal** for a revision (**2020**)



1. Concept of
„extraordinary
circumstances”

What is an
„extraordinary
circumstance“?

- **Regulation 261/2004:** “circumstances which could not have been avoided even if all reasonable measures had been taken” +
- exemplary list in preamble (recital 14 and 15)

grey areas & case law

- **exploit of the concept**
- **meaning > case-law**
- **prerequisites** an occurrence has to fulfill (“two-limb test”):
 - 1. stem from events which are not inherit to normal exercise of the activity of the air carrier
 - 2. be beyond the air carrier’s actual control
- **case-by- case basis > uncertainty**

importance

- extraordinary circumstance as a reason for a carrier to exempt himself from the liability
 - to **pay compensation** (*if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken*)
 - NOT in the case of denied boarding
 - NOT in regard to the duty of care (incl. accommodation)

**New case law
on
Art. 5 subs. 3**

- **ECJ C 308/21** Sudden and unexpected failure of refuelling system at airport
- **ECJ C 659/21** Collision of catering vehicle with parked aircraft
- **ECJ C 287/20** Trade union lead pilot and crew strike
- **Czech courts** Operations minima in business jet operations

ECJ C 308/21

Case history for flights on 10 May 2017

- **Pax 1** purchased a ticket for flight operated by SATA International for a flight from Lisbon to Ponta Delgada Airport (Azores, Portugal). Pax arrived with a delay of five hours and 15 minutes.
- **Pax 2** booked a connecting flight with SATA International from Lisbon to Santa Maria (Azores, Portugal) via Ponta Delgada. Owing to the delay of the first flight from Lisbon Pax 2 missed flight to Santa Maria.
- **Pax 3** purchased a ticket for a flight operated by SATA International, from Pico (Azores, Portugal) to Lisbon. Since the flight was cancelled, Pax 3 was re-routed on a flight departing from Terceira (Azores, Portugal) for Lisbon where he arrived with a delay.

ECJ C 308/21

Answers from the ECJ:

- Since fuel is essential to the carriage of passengers by air, refuelling operations fall, in principle, within the scope of the normal exercise of an air carrier's activity. Thus a technical issue which arises during a refuelling operation performed in collaboration with the staff of the air carrier concerned can constitute an event inherent in the normal exercise of that activity
BUT
- Where that refuelling issue is the result of a **general failure in the refuelling system** managed by the airport, a distinction must be made to a technical problem, which by its nature is confined to a single aircraft
- Def. of "external" events stressed again.

ECJ C 659/21

Case history for 16 August 2018

- Pax made a reservation with Orbest for a flight departing from Lisbon, scheduled at 14.30, to Samana (Dominican Republic), with an expected arrival on the same day at 17.35 p.m.
- Due to a technical failure caused by the collision of a catering vehicle with the wheels of the aircraft that was to operate the flight and which was parked at the airport, the airport authorities considered that checks and repairs were necessary, which led to a delay and subsequent cancellation of the flight.
- As a result of this cancellation, the passengers were re-routed to the Dominican Republic on a flight operated by another air carrier the following day, 17 August 2018, at 16.00 with an arrival in Punta Cana, Dominican Republic, the same day. Pax travelled by coach from Punta Cana to Samana, which took approximately 4.5 hours, arriving in Samana at 2.00. on 18 August 2018.

ECJ C 659/21

Answers from the ECJ:

- In *Siewert* (C 394/14) the ECJ held that the impact of a moving airport boarding staircase hitting an aircraft cannot be classified as an extraordinary circumstance.
- Where a technical failure of an aircraft parked at the airport has its origin exclusively in the collision with a foreign object, that failure cannot be regarded as intrinsically linked to the operation of the aircraft (analogy to *Germanwings* C 501/17).
- Def. of “external” events stressed again.
- Technical failure of an aircraft caused by an act of a third party interfering in the aircrafts operation is beyond the control of the air carrier concerned, (analogy to *Airhelp* C 264/20).

ECJ C 287/20

Case history for 28 September 2018:

- Pax booked a flight from Verona (Italy) to Hamburg (Germany) with Ryanair. Ryanair cancelled the flight and informed pax thereof on the scheduled day of departure.
- The cancellation was due to a strike following the failure of negotiations between the air carrier and representatives of its flight staff, namely cabin crew and pilots.
- Local court presented case to ECJ asking if there is a different approach to a “wild strike” (as in *Krüsemann/Tuifly*, C 195/17 etc.) when there was a union lead strike after negotiations were conducted with employee’s representatives before the strike.

ECJ C 287/20

Answers from the ECJ (1):

- A strike is manifestation of collective bargaining and is to be regarded as part of normal exercise of activity of the employer irrespective of the specific features of the labour market or the applicable law implementing Art 28 of Charter of Fundamental Rights of EU (*Airhelp* C 28/20; *Eurowings* C 613/20)
- Measures relating to the working and pay conditions of the employees of an operating carrier fall within the normal management of the entity; there is no exception to an airline.
- Strike is controllable for air carrier and must be regarded as foreseeable fact if it has been announced.

ECJ C 287/20

Answers from the ECJ (2):

- “Strike” in recital 14 refers to strikes outside the activity of the air carrier.
- The fact that an operating carrier might be liable under Art. 5 and 7 of Reg. 261 does not oblige air carrier to agree to all striker’s demands. Thus the company is not deprived of its right to freedom of association which is protected under EU law.
- For Art. 5 subs.3 it is irrelevant if strike is lawful under the relevant national legislation.

Czech case law

(Municipal Court in Prague, No.
39Co59/2021)

Case History:

- Charter flight from Sliač (Slovakia) to St. Moritz (CH)
- Learjet 60XR specifically requested
- Engadin Airport
 - category “C” (the most complex)
 - sunny, absolute windless, temperature 3 C
- Aircraft not compliant with operational minima (60% RWY vs. maximum weight vs. temperature vs. wind)
- Alternative road transport to Zurich in the contract
- PAX ordered Citation CJ3 and departed later that day
- 261 Regulation claim for cancellation and MC claim for damages

Czech case law

(Municipal Court in Prague, No.
39Co59/2021)

Answers from the Court:

- 261 Regulation applies to private jet charters
- Flight cancelled if there is a deviation from the flight schedule (alternative routing not taken into account)
- Main argument: failure to submit a flight plan
- Non-compliance with operational minima not considered as extraordinary circumstance

what next?

Proposal 1 (2013)

- **definition:** “extraordinary circumstances» means circumstances 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. For the purposes of this Regulation, extraordinary circumstances shall include the circumstances set out in the Annex”
- Annex non-exhaustive list of (7) circumstances considered as extraordinary circumstances for the purposes of this Regulation

Proposal 2 (2020)

- definition: “extraordinary circumstances» means circumstances which are beyond its actual control. For the purposes of this Regulation, extraordinary circumstances are listed in Annex 1”
- Annex **exhaustive list of (11) circumstances considered as extraordinary**
- **introducing “unexpected flight safety shortcomings”**

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2. Combined flights and booking with several flight legs

Concept of a „flight“

- **no definition in Regulation 261/2004**
- *consisting essentially of an air transport operation, as a ‘unit’ of such transport, performed by an air carrier which fixes its itinerary. (case C-173/07 Emirates Airlines)*
- *the fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that (art. 3 (1a)) provision (case C-173/07 Emirates Airlines)*
- **single-operation approach**

Single booking

- BUT **directly connecting flights** done under single booking represent a single operation - extending the application of the Regulation further than originally intended?

importance

- right to compensation
- various flight (and booking) possibilities
- relations: operating air carrier - contractual air carrier - tour operator
- non-consistent approach from the CJEU - case law: Emirates (C-173/07), Wegener (C-537/17), Folkerts (C-11/11), Iberia Express (C-186/17), České aerolinie (C-502/18)

> need for clarity!

ECJ C 561/20

Case history :

- Pax booked, by means of a single reservation made through a travel agent with Lufthansa, a flight from Brussels (Belgium) to San José (United States), with a stopover in Newark (United States). All flight legs were operated entirely by United Airlines. Due to a disruption on the flight leg in the US pax reached the final destination with a delay of 223 minutes.

ECJ C 561/20

Question :

- Is the non EU-carrier liable under Art. 5 Reg. 261, when pax has a single booking and suffers a delay of more than three hours caused on the last leg of the flight outside the EU, when the point of initial departure is in the EU and pax booked all flights with a EU carrier that did not operate any leg of the flights (code-share)?
- Would a liability of the non-EU carrier for a disruption outside the EU be an infringement of international law given that each State is the sovereign over its territory and airspace?

ECJ C 561/20

Answers from the ECJ (1):

- In case of a single booking assessment of first point of departure and final destination has to be made to determine if Reg. 261 applies. The place causing the disruption has no relevance.
- A different approach, i.e. by referring to the place causing the disruption would lead to unjustified results, as the pax would suffer the same inconvenience by arriving with a delay.
- Even if the operating carrier has no contractual relationship with pax, it is deemed to be acting on behalf on the carrier having a contractual relationship with pax.

ECJ C 561/20

Answers from the ECJ (2) :

- Right of recourse against third parties in accordance with “applicable” law is stressed again.
- Reg. 261 is not applied for flights performed entirely in third country or between two third countries; therefore there is no indication that the EU institutions infringed any principle of customary international law.

what next?

Proposals

- «**flight**» means an air transport operation between two airports; intermediate stops for technical and operational purposes only shall not be taken into consideration
- „**connecting flight**” means a flight which, under a single contract of carriage, is intended to enable the passenger to arrive at a transfer point in order to depart on another flight, or, where appropriate in the context, means that other flight departing from the transfer point
- "**journey**" means a flight or a continued series of connecting flights transporting the passenger from an airport of departure to his final destination in accordance with the contract of carriage. **The outward and the return journey are not the one and the same journey.**

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3. Online travel agencies (OTAs)

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New cases on bookings via travel agencies

- ECJ C 436/21 One single booking by TA for flights with different airlines
- ECJ C 263/20 Information of schedule change to OTA

ECJ C 436/21

Case history for 25 July 2018 (1):

- Pax gave gave a travel agent an agency order for the purchase of a uniform electronic ticket for a flight operated by Swiss International Air Lines from Stuttgart (Germany) to Zurich (Switzerland) and two flights operated by American Airlines from Zurich to Philadelphia (United States) and from Philadelphia to Kansas City. The flights were combined by the TA.
- The number of the ticket appeared on the boarding cards for these flights. The ticket indicated American Airlines as the “service provider” and was marked with a single booking number (“filekey”) for the entire route.

ECJ C 436/21

Case history for 25 July 2018 (2):

- The travel agency issued an invoice showing a single "participant fare" for the entire route and for the return flight from Kansas City to Stuttgart via Chicago (United States) and London (United Kingdom).
- The flights from Stuttgart to Zurich and from Zurich to Philadelphia took place as scheduled. The flight from Philadelphia to Kansas City was delayed by more than four hours on arrival.
- Pax assigned claim to CMC, who is claiming for compensation from American Airlines in a German court.

ECJ C 436/21

Answers from the ECJ :

- Definition of “direct connecting flight” and “reservation”.
- Reg 261 does not contain a provision where the classification as a flight with direct connections depends on the existence of a special legal relationship between the operating air carriers operating the single flight legs.
- The operating carrier may seek recourse - under applicable national law - from the OTA or other persons with whom it has a contractual relationship.

Note: Pending case at German Federal Court of Justice on two flights combined by OTA and connection was missed (BGH X ZR 84/22)

ECJ C 263/20

Case history on 14 June 2018

- Two pax reserved, through an online booking platform, a flight from Palma de Mallorca (Spain) to Vienna (Austria), operated by Laudamotion. When making the reservation pax entered their private email addresses and telephone numbers. That platform then reserved the flight with Laudamotion in the names of pax, generating an electronic address specific to that reservation. That address was the only contact address available to Laudamotion.
- The reserved flight was re-scheduled by the operating air carrier to an earlier departure on the same day, i.e. by more than six hours.
- A notification of the flight time being changed had been sent on 23 and 29 May 2018 to the specific email address provided by the booking platform. Pax claimed that they had not been notified of the schedule change until four days before the scheduled departure, on 10 June 2018, via the booking platform.

ECJ C 263/20

Question (among others):

- Is the notification on the schedule change to be regarded as information in line of Art. 5 subs. 1 lit c) i) to iii) Reg. 261, even where the booking platform does not forward, or delays forwarding, the air carrier's notification to the passenger?

ECJ C 263/20

Answers from the ECJ (1):

- Art. 5 Reg. 261 imposes an additional condition on the operating air carrier. It is apparent from subs. 4 that the burden of proof concerning the question as to whether and when pax has been informed of the cancellation of the flight rests with the operating air carrier.
- It follows from the clear wording of Art. 5 subs. 1 lit c) i) that, where the operating air carrier is unable to prove that pax was informed of the cancellation of his or her flight at least two weeks before the scheduled time of departure, this carrier is liable.

ECJ C 263/20

Answers from the ECJ (2):

- If the operating air carrier communicates solely with the TA, that is not in itself sufficient for proving that communication to pax has been made.
- The situation might be different were pax expressly authorises the TA to receive information transmitted by the operating carrier and that carrier is aware of the authorisation.
- Again, the right of recourse of the operating carrier against any person who caused the air carrier to fulfil its obligations is stressed.

Right of redress (Art. 13)

REGULATION 261/2004

- In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.

PROPOSAL 1 (same as PROPOSAL 2)

- In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation or of national law may be interpreted as restricting its right to seek compensation for the costs incurred under this Regulation from any third parties which contributed to the event triggering compensation or other obligations.

(ultimate?) liability of airlines

- **Proposals 2013/2020**
 - intention to ease the pressure on airlines by reducing the frequency of compensation payments through an increase of the time threshold
 - denial of compensation for a delay which had been caused on a connecting flight operated entirely outside the EU



Other important
questions

Other important questions

1. clarification of other **key principles** and/or introducing definitions, such as:
 - a. reservation (2020 Proposal)
 - b. final destination (2020 Proposal)
 - c. cancellation (2013 vs 2020 Proposal)
 - d. tarmac delays
 - e. right to rerouting
 - f. “No show” policy etc.
2. various changes in regard to **right to compensation** (Art. 7)
3. obligations to **inform passengers** (Proposal 2020)
4. more regulation on the **role and importance of NEBs**

Thank you for
your
attention!

