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Policies and Doctrines in the Regulation of Air Passenger Rights

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Abstract. Air travel is not only a popular form of moving people for either business or leisure purposes but a risky activity that comes with so many complaints on the part of passengers. The aviation market is forced to face important consumer protection issues in Europe, and the European Union seems to be the first international organization to create unified liability rules for air carriers across the European Union and its Member States. The essay discusses the liability of air carriers and the interpretation and scope of defences listed in the Regulation, illustrating them with real cases in which national courts requested preliminary ruling from the European Court of Justice.

Keywords: strict liability, airlines, European Union, delay, cancellation, exoneration, compensation, Regulation (EC) No 261/2004, extraordinary circumstances

Aviation became a commonly accepted and popular form of travel and transportation during the 20th century. More and more people worldwide prefer flights over train or car travel. National legislative bodies realized early in the 20th century that operating aircrafts and conducting activities in the aviation business qualified as dangerous activities and risky business, so the aviation sector needed a set of safety and liability rules in order to guarantee the safety to passengers. There are multiple legislative products on the international level related to aviation, adopted by the majority of states of the world, just like the Warsaw and Montreal Conventions.[1]

1 Convention for the Unification of Certain Rules Relating to International Transportation by Air – Warsaw, October 12th, 1929 – and Convention for the Unification of Certain Rules for International Carriage by Air – Montreal, May 28th, 1999.

They unified the procedural and liability rules of carriers in case of accidents or if passengers' baggage were damaged or lost.

The events of 11 September 2001 in New York caused a big turmoil in the aviation sector, and the volume of air traffic decreased significantly as a consequence of the terrorist attacks carried out that day. It took a couple of years until everything got back to normal, and the intensity of air travel even superseded its past results.[2] Nowadays, aviation is one of the busiest and safest ways to travel.

However, aviation is not only a risky activity but also a sector of economy where carriers have to deal with passengers and satisfy their needs. This activity may come with many complaints coming on the part of passengers. On the other hand, carriers continuously compete with each other in order to convince millions of passengers to choose their services over the competition. In this heavy competition, passengers are left defenceless and may suffer harms caused by the carriers in the form of breaching the travel contracts.

At the beginning of the 21st century, the aviation market has to face important consumer protection issues in Europe, and thus a new regulatory approach has emerged in the continent. This new phenomenon is the recognition of passenger rights. States should provide more powerful rights to passengers and protect their interests against the carriers.

The European Union was the first international organization to establish unified liability rules[3] mandatory to air carriers across the European Union and enact new rules for the undesirable events of cancellation, delay, and overbooking. As a result of the new regime, passengers now have efficient and powerful rights when the carrier breaches the contract and fails to fulfil its obligations.

However, in case a flight is delayed or cancelled under the scope of the 261/2004/EC Regulation, it does not automatically mean that the carrier must pay a compensation. The airline is obliged to do so only if the passengers reach their destination at least 3 hours later than originally scheduled,[4] and there are no any extraordinary circumstances that could lead to the exoneration of the carrier.

This essay focuses on the policies that formed the valid rules in Europe and influenced the interpretation of the European Court of Justice. In order to do so, it is necessary to examine in which cases the carriers are able to successfully

2 http://www.icao.int/sustainability/Pages/Facts-Figures_WorldEconomyData.aspx.

3 Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport; Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

4 Court of Justice, judgment of 19 November 2009, case C-402/07, Christopher Sturgeon and Stefan Böck.

exonerate themselves under the strict liability rules based on the recent case-law and interpretation of the European Court of Justice.

Policies behind the Defences

An operating air carrier shall not be obliged to pay compensation in accordance with the Regulation 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.[5] Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings, and strikes that affect the operation of an operating air carrier. Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.

Defences under liability of air carriers still remain an uncertain and most crucial topic when it comes to the interpretation of the Regulation. Although the Regulation does not directly and explicitly list the potential defences in its text, its preamble gives some possible circumstances listed above. The ECJ carried the interpretation of these defences far in some aspects, while leaving doubtful questions and uncertainties in others.

The first question we should try to answer is why the ECJ interprets the Regulation in that way. We could assume that there must be some policy behind this concept.

At first sight, the lobbying activity and influence of various carriers may be one of the reasons. By examining the liability rules of all carriers in the European Union, there is an important fact we have to pay attention to. Bus and water carriers are in a better position than railway and air carriers. They can seek for exoneration much easier than carriers in the aviation and rail business. For example, according to the findings in the McDonagh case,[6] airlines have to cover the costs of accommodation and take sufficient and reasonable care of passengers when extraordinary circumstances – such as a volcanic eruption – leads to the cancellation of a flight. When bus and water carriers have to face a force majeure situation, they are not obliged to cover the costs of accommodation for passengers.

5 Art. 5, para. 3 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

6 Court of Justice, judgment of 31 January 2013, case C-12/11, Denise McDonagh.

The other significant difference is that the amount of compensation is much higher when air carriers breach the travel contract. Carriers in other sectors have an obligation only to pay back a fix percentage – no more than 50% –[7] of the cost of the fare, taking into consideration the length of the delay. Airlines, however, have to compensate passengers with €250, €400, or €600, depending on the length of the flight.[8] It seems that the airlines have the weakest influence and lobby power in vindicating rights, while other carriers could certainly achieve better positions. There is a significant difference in the status of the carriers not only because the European Union's legislative bodies have enacted such rules but because of the even more rigid interpretation of the European Court of Justice.

The second question is why the European Court of Justice interprets the rules of the Regulation (EC) 261/2004 in such a way to establish an even stricter liability of the airlines. It is not a question that the Regulation has originally introduced a strict liability of the air carriers for the events of delay, cancellation, and denied boarding. Although there is no such thing as a unified European tort law and there are no principles that could govern the adjudication of compensation, national courts still have to deal with these questions, theoretically, in a somewhat unified way. National courts can, however, rely on the case-law and interpretation of the ECJ, as the ECJ is the only judicial body that has a right to authentically interpret the primary and secondary law of the European Union. Based on our experiences, the ECJ often uses the methods of grammatical and teleological interpretation. The purpose of Regulation (EC) 261/2004 aims to give more power to passengers and to protect their interests against the cost-efficient policy of the airlines. The Court is definitely widening the scope of the Regulation by emphasizing the consumer protection approach.

In the analysis of the case-law of the ECJ, we can also notice that there should be a contract between the airline and the passenger. It means that, theoretically, we are facing with a breach of contract situation when a delay or a cancellation occurs. Although the Vienna Convention on International Sale of Goods (CISG) is not applicable, we may still identify certain similarities when an airline tries to seek for defences in order to exonerate itself under the burden of strict liability. According to the CISG, a fundamental breach occurs when one party substantially fails to deliver what the other reasonably anticipated receiving. In order for the

7 Art. 17 Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations; Art. 19 Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004; Art. 19, para. 2 Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004.

8 Art. 7, para 1 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

breaching party to exonerate himself, he should prove that his failure was due to an impediment beyond his control, the impediment was not something he could have reasonably taken into account at the time of contracting, and he remains unable to overcome the impediment or its consequences. The breaching party should prove these circumstances at the same time, as these conditions are meant to be interdependent conditions. In the aviation business, it is quite easy to prove the second requirement, namely that the airline could not foresee a circumstance that impedes it in fulfilling the contractual obligations. The remaining two conditions, however, seem to be more problematic; still, we can see that the ECJ applies these rules with analogy based on the case-law attached to the application of the CISG. We believe that it is quite obvious that if the European Parliament and the Council adopt a law in order to establish new rules for a sector as the aviation sector, the ECJ needs to look elsewhere to fill the gaps the Regulation has left. The CISG seems to be a sufficient choice as we are facing a contractual problem in both cases. According to the 261/2004/EC Regulation, the liability of the airlines shall be strict liability. The case-law attached to the application of the CISG is quite developed by now, so it may really help the ECJ in interpreting the rules of the Regulation. In order to understand the exact cases when the airlines are not held liable for breaching the contract, we should examine the case-law of the ECJ related to the interpretation of the Regulation.

According to the Sturgeon decision ruled in 2009, the ECJ found that passengers might also be entitled for compensation not only in case of cancellation and denied boarding but in case the flight is delayed three or more hours.[9]

First of all, we have to clarify what the relevant time is under the term 'time of arrival'. We may list four different circumstances that can easily qualify as 'time of arrival'. These events are the following:

– the time the aircraft lands on the runway ('touchdown');

– the time the aircraft reaches its parking position and the parking brakes are engaged or the chocks have been applied ('in-block time');

– the time the aircraft door is opened;

– a time defined by the parties in the context of party autonomy.

There could be slight differences in these referred moments, and these several-minute differences should decide whether the air carrier has breached the contract, and therefore is obliged to pay compensation to the passengers. In the Germanwings GmbH versus Ronny Henning case,[10] the European Court of Justice had an opportunity to examine this problem and to interpret the underlying provisions in the Regulation. According to the ECJ's ruling, the time that the aircraft door is opened should be

9 Court of Justice, judgment of 19 November 2009, case C-402/07, Christopher Sturgeon and Stefan Böck.

10 Court of Justice, judgment of 4 September 2014, case C-452/13, Ronny Henning.

relevant in such cases as passengers may feel the end of the journey at that time. This is when the physical opportunity to leave the plane opens to all passengers.

After the question of breach has been decided, the airline can seek for defences and state that one of the following extraordinary circumstances was the underlying cause of the delay or the cancellation: political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings, strikes that affect the operation of an operating air carrier, and air traffic management decisions. All of these situations seem to offer easy defences under the strict liability; however, they are more complicated than they seem. At least, this is what the recent case-law of the European Court of Justice proves.

Unexpected Flight Safety Shortcomings

Before we interpret unexpected flight safety shortcomings as easy defences for the air carrier, we must state that all safety issues must fall outside the control of the airline in order to provide successful exoneration under the duties as stipulated by the Regulation. This is the reason why the ECJ can only accept safety shortcomings as defences with many restrictions.

In order to get the true meaning of unexpected flight safety shortcomings, we have to analyse two cases: the Wallentin-Hermann[11] case and the Siewert[12] case. In the first case, Alitalia airline had some trouble with the plane's engines and the flight was delayed 24 hours. In the second case, the flight was performed with a six-and-a-half-hour-long delay that occurred because the aircraft that was due to operate the flight concerned suffered some damage at Stuttgart Airport the evening before. A set of mobile boarding stairs had bumped against the aircraft, causing structural damage to the wing, and, as a consequence, the aircraft needed to be replaced. The two most important questions the court had to examine was whether the airline could not, on any view, have avoided the extraordinary circumstances 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,[13] and the circumstances surrounding such an event can be characterized as 'extraordinary' within the meaning of the Regulation only if they relate to an event which is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.[14]

11 Court of Justice, judgment of 22 December 2008, case C-549/07, Wallentin-Hermann.
12 Court of Justice, judgment of 14 November 2014, case C-394/14, Sandy Siewert.
13 Court of Justice, judgment of 12 May 2011, case C-294/10, Eglītis and Ratnieks, para. 25.
14 Court of Justice, judgment of 22 December 2008, case C-549/07, Wallentin-Hermann, para. 23.

The reason of this strict and narrow interpretation of the Regulation is the fact that consumers need a high level of consumer protection in the EU.[15,16]

There are only three unexpected safety shortcoming cases which can qualify as circumstances outside the interest of the carrier. Manufacturing defect is one of those cases, when the airline has no influence on the risk. The other two cases are terrorist attacks or sabotage. In the two latter cases, terrorists or saboteurs are responsible for the mechanical failures of the plane. Anything else other than the three cases mentioned above could be prevented with exercising the necessary maintenance duties.[17]

Meteorological Conditions Incompatible with the Operation of the Flight Concerned

Weather is always an uncertain factor in the aviation business. In most countries of the world, bad weather will not constitute liability for the air carriers since weather is a typical example of force majeure. It is true that the air carriers do not have influence on this extraordinary circumstance. Although science and technology are well-developed and high-standard these days, it is a generally accepted fact that airplanes cannot take off in a snowstorm, T-storm, or in thick fog.[18]

Seeking for the interpretation of meteorological conditions incompatible with the operation of the flight concerned, we would like to demonstrate the Denies McDonagh[19] case. Volcano Eyjafjallajökull in Iceland started to erupt on 20 March 2010. On 15 April, right after the volcano had entered an explosive phase, the authorities shut down the airspace over a number of Member States due to potential risk and hazard to aircrafts, and grounded many planes for almost a week. Some airlines interpreted the rules of the regulation as an absolute, unconditional reason to exonerate under strict liability. They thought they were not obliged to provide any services or compensation to their customers at all. Even the necessary care (food, accommodation, communication, etc.) does not seem relevant.

Ms McDonagh booked a flight with Ryanair that was scheduled to depart on 17 April 2010. The airfare costed €98. Her flight was cancelled due to the eruption. During the period between 17 and 24 April, Ryanair did not provide Ms McDonagh

15 Court of Justice, judgment of 10 January 2006, case C-344/04, IATA and ELFAA, articles 43–47.

16 These authors criticize the C-549/07. Friederike Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA case and the rules of the Regulation: Arnold. de Leon 2010, 91-112, Balfour 2009, 224–231, Croon 2011. 1–6, 2012. 609–617.

17 Court of Justice, judgment of 22 December 2008, case C-549/07, Wallentin-Hermann.

18 Arnold, K. 2007. 105.

19 Court of Justice, judgment of 31 January 2013, case C-12/11, Denies McDonagh.

any care as it was laid down in details in the Regulation.[20] The question was whether a meteorological condition like a volcano eruption can qualify as *vis maior*, in which case airlines do not have to pay compensation and provide sufficient and reasonable care to their passengers. The plaintiff claimed €1,129 to cover her meal, accommodation, and transportation during that period. The ECJ did not argue that a volcanic eruption was a force majeure, however, the ECJ ruled for the plaintiff. The Court emphasized that the duty to provide passengers with reasonable care in the undesired events of delay or cancellation are imperative rules ordering an absolute obligation for the airlines, and they cannot be neglected on the sole reason that a force majeure arose. Providing meals, accommodation, and transportation to passengers is an absolute obligation of the air carriers, and therefore they do not have proper defences that could lead to their exoneration, according to the interpretation of the ECJ. Regarding the amount spent on these expenses, the Court examined whether the given care was adequate and reasonable. The evaluation of the exact amount belongs to the jurisdiction of national courts, according to the ECJ.

Security Risks

Security risks are not defined in the regulation and no ECJ case-law exists in this field. If boarding is completed and doors are closed although the final check before take-off reveals extra bags on the plane travelling without passengers, this may qualify as a security risk that prevents the airline to operate the flight according to schedule. Another typical security risk may be when more passengers boarded the plane that it is shown on the check-in list. In these cases, it is not relevant whether this situation is a result of the airline's negligence or the intentional conduct of passengers since these security risks must be clarified before take-off in order to provide safe service to customers. Especially after 9/11, the European Union and air carriers value security measures a lot more than before.

Worker Strikes

In the case of either a lawful or wrongful strike of employees, the air carrier is exempted from liability.[21] The reason why there is no difference between a lawful and a wrongful strike is that both are outside the influence of the employer, the air carrier. Even if the airline later gets a decision from the national court to

20 Art. 9, Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

21 ILO judgment No 368.

evaluate the strike as an unlawful one, the employer had no reasons to believe so and, more importantly, had no lawful instruments to intervene without a binding court decision. However, the European Court of Justice drew attention to the fact that the carrier's exemption is only valid for the passengers of the actual flight concerned in the strike. All other flights must operate according to schedule and the carrier cannot extend this defence generally to more flights.[22]

Air Traffic Management Decision

According to the Preamble, the extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.

However, the air carriers cannot rely on extraordinary circumstances as general defences that lead to their exoneration. The moment the extraordinary obstacle diminishes, the airline has to continue the service as planned. In one case, passengers have already boarded the plane, waiting for take-off, when a sudden black-out intervened. When the power had come back, the plane still could not take-off, and the airline cancelled the flight. Later, passengers learned that the real reason of cancellation was not the black-out, which is an extraordinary circumstance, but that the flight attendants' time shift expired. The European Court of Justice ruled for the passengers claiming damages for the cancellation. The court stated that an air carrier must plan ahead and think of such extraordinary measures that differ from force majeures. Since these extraordinary circumstance may happen at any time, the carrier must plan accordingly and take reasonable care in order to minimize their consequences. This is why all flight schedules are planned with some gaps. If the airline does not fulfil this obligation, he cannot successfully refer to the defence of extraordinary circumstances.

Political Instability

Political instability does not have a commonly accepted definition neither in the text of the regulation nor in the practice of the European Court of Justice since no case has ever reached the ECJ to scrutinize this problem. In order to get closer to the definition of political instability, we should take into consideration constitutional and public international law institutions as well. According to

22 Court of Justice, judgment of 4 October 2012, case C-22/11, Timy Lassooy.

these, political instability is the governing of a country without a stable and well-functioning government. In this case, an opposition party or militia aspire to the acquisition or alteration of the governing political power. Such circumstances may be military operations, military coups, civil wars, revolutions, or rebellions.

Although political instability seems to be an objective defence for the air carriers, still, in every case, we must examine whether the air carrier could have avoided the influence of such circumstances by taking necessary and reasonable measures and care. Another criterion for a successful exoneration under the strict liability rules is that political instability should qualify as force majeure, independent of the influence of the air carrier.

In one case, a British Airways flight was forced to stay on the ground due to the activity of military groups in Kuwait.[23] The English court had to decide whether this situation is qualified as one outside the air carrier's scope of influence.[24] The court applied the rules of the Montreal Convention[25] in this case. The trial judge came to the conclusion that military group activities did not belong to the influence of the air carrier, so it could not have been foreseeable and avoidable even if the air carrier had been aware that military operations were going on in the country. This interpretation might be applicable in cases under the scope of the EU regulation.

Closing Remarks

After having examined the nature of the regulation on air passenger rights, we can safely conclude that the problem is not only the strict liability imposed against air carriers and other transportation service providers but the interpretation and application of such rules by the European Court of Justice. A rigorous approach on the defences available to air carriers may easily change the structure of competition in the European aviation market. It may have a significant impact on not only the fares but on the mentality of the passengers too. We may already experience a change in the passengers' attitude. More and more disputes are raised against airlines based on claims about insufficient services. In these disputes, national courts are obliged to follow the interpretation of the ECJ as the Regulation requires a uniform application across the entire European Union.

The strict rules on passenger rights in the European market may also induce a change in the U.S. and in Asia, and the competitiveness of American, Asian, and European airlines may also suffer consequences induced by this improving

23 Panalpina International Transport v Densil Underwear Ltd [1981] 1 Lloyd's Rep 187.
24 Jones 1996 134–135.
25 Convention for the Unification of Certain Rules for International Carriage by Air – Montreal, May 28th, 1999.

concept on passenger rights in Europe. The revision of the Regulation on air passenger rights is ongoing in the European Union. However, we believe that any restriction on the rights granted to air passengers would be a significant step back from the current situation, and it could lead to a long adoption and implementation process.

References

ARNOLD, K. 2007. Application of Regulation (EC) No 261/2004 on Denied Boarding, Cancellation and Long Delay of Flights. *Air and Space Law* 2.

ARNOLD, K.–DE LEON, P. M. 2010. Regulation (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a Change? *Air and Space Law* 2: 91–112.

BALFOUR, J. 2009. The 'Extraordinary Circumstances' Defence, in EC Regulation 261/2004 after Wallentin-Hermann v. Alitalia. *German Journal of Air and Space Law (ZLW)*, 224–231.

CROON, J. 2011. Placing Wallentin-Hermann in Line with Continuing Airworthiness – a Possible Guide for Enforcers of EC Regulation 261/2004. *Air and Space Law* 1: 1–6.

2012. 'Wallentin-Hermann' and a Safe Flight. In Aviation There Are No Minimum Rules on Maintenance. *German Journal of Air and Space Law (ZLW)* 4: 609–617.

JONES, O. 1996. When Is a Late Flight Not a Delayed Flight? The Warsaw Rules Relating to Delay. *Travel Law Journal*.