



Litigation: The importance of the Court of Justice of the European Union Practice in Ensuring Passenger Rights in Accordance with Regulation 261/2004

1. Background

In a world where air travel is becoming more frequent and affordable, 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 („**Regulation 261/2004**”) ensures that the rights of passengers are respected in case of flight schedule incidents.

Regulation 261/2004 provides a basic set of rules to be easily employed in case of long flight delays, cancellation or denied boarding. Such rules are meant to raise the standards of protection for passengers as well as create predictability for the airlines and ensure that air carriers operate under harmonised conditions in a liberalised market.

In member states, Regulation 261/2004 represents the ground for claims filed before the national courts against airline carriers, should compensations not be granted after a formal request. However, since Regulation 261/2004 provides a broad set of rules, tailoring them to practical situations presented a challenge.

Hence, the Court of Justice of the European Union (the “ECJ”) has aided the field significantly through its practice, offering extended interpretation of the terms of the legislation, as well as the proper means to apply it.

2. Basic passenger rights in accordance with Regulation 261/2004

2.1. Legal provisions

Regulation 261/2004 will apply to all flights to or from a member state. Should the flight be from a third-party state to a member state, the Regulation is applicable only in case of Community air carriers.

In the case of delay, cancellation or denied boarding, passengers have the following main rights:

- (i) rights to compensation in case of cancellation or denied boarding;
- (ii) the right to reimbursement or rerouting and care in case of cancellation, delay or denied boarding;
- (iii) the right to be informed about their rights.

In practice, most litigations refer to the compensation provided by Article 7 of Regulation 261/2004 which provides that, in case of cancellation or denied boarding, passengers are entitled to a compensation determined according to the distance of the flight as follows:

- (i) EUR 250 for all flights of 1,500 kilometers or less;
- (ii) EUR 400 for all intra-Community flights of more than 1,500 kilometers and all other flights between 1,500 and 3,500 kilometers;
- (iii) EUR 600 for all flights over 3,500 kilometers.

Regulation 261/2004 provides that the distance will be determined based on the last destination at which the denial of boarding or cancellation will delay the passenger's arrival.

The amounts provided by Article 7 of Regulation 261/2004 will not limit passenger's right to further compensations provided by Article 12 of the same. In case of a request for further compensation, the compensation granted under Article 7 of Regulation 241/2006 may be deducted from the one provided by Article 12 of the same.

2.2. Relevant practice of the ECJ

The provisions detailed above have created multiple confusions for national courts, especially regarding when the compensation can be requested, and which is the distance in case of flights with multiple legs when only one of the connecting flights is cancelled.

One of the most revolutionary changes in the applicability of Regulation 261/2004 was a result of Joined Cases C-402/07 and C-432/07 (*Sturgeon & others*)¹ when the ECJ ruled that passengers whose flights suffer a delay of over three hours to their final destination may be assimilated with passengers whose flights are cancelled, and are therefore entitled to compensation under Article 7 of Regulation 241/2004.

Through *Sturgeon & others*, the ECJ extended the applicability of Article 7 of Regulation 261/2004, initially restricted to cancellations and denied boarding, to delayed flights as well, so long as the delay to the final destination is of three hours or more.

¹ <http://curia.europa.eu/juris/celex.jsf?celex=62007CJ0402&lang1=en&type=TXT&ancre=>

As a result, awarding compensation for long delays to passengers has become common practice for national courts.

Furthermore, in recent case C-832/18 (*A & others v. Finnair Oyj*)², the ECJ decided that passengers are entitled to compensations both for the cancellation of the initial flight and the delay of the rerouted flight.

Regarding the concept of “*distance*”, in Case C-559/16 (*Bossen & others v. Brussels Airlines SA/NV*)³, the ECJ decided that in the case of air routes with connecting flights, distance will be determined as if the flight was performed between the takeoff point and the final landing point, without taking into consideration additional stops in connecting airports.

The ECJ further stated in case C-502/18 (*CS & others v. České aerolinie a.s.*)⁴ that, in order to calculate distance, the flight as a whole will be determined according to the initial reservation which will be considered a single ticket, regardless of the number of connecting flights and whether connections will be made in third-party states or the airplane will change.

In the matter of further compensation in accordance with Article 12 of Regulation 261/2004, the ECJ decided in Case C-354/18 (*Rusu v. Blue Air*)⁵ that the compensations provided by Article 7 of Regulation 261/2004 are meant to cover the discomfort felt by passengers as a result of delay, cancellation or denied boarding.

Therefore, the predetermined compensations are to be applied solely in similar situations as stated in Cases C-344/04 (*IATA and ELFA*)⁶ and C-629/10 (*Nelson & others*)⁷.

All damages surpassing the mere discomfort of passengers, such as loss of salary, will be determined by the national courts and awarded in accordance with Article 12 of Regulation 261/2004. The national court may deduct the compensation awarded under Regulation 261/2004 from the further compensation, but is not obliged to do so.

3. Competent courts

As the ECJ stated most recently in Case C-464/2018 (*ZX v. Ryanair DAC*)⁸, Regulation 261/2004 does not include provisions regarding the international jurisdictions of member state courts. Hence, the competent national courts will be determined in accordance with Regulation 1215/2012.

² <http://curia.europa.eu/juris/celex.jsf?celex=62018CJ0832&lang1=en&type=TXT&ancre=>

³ <http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0559&lang1=en&type=TXT&ancre=>

⁴ <http://curia.europa.eu/juris/celex.jsf?celex=62018CJ0502&lang1=en&type=TXT&ancre=>

⁵ <http://curia.europa.eu/juris/celex.jsf?celex=62018CJ0354&lang1=en&type=TXT&ancre=>

⁶ <http://curia.europa.eu/juris/celex.jsf?celex=62004CJ0344&lang1=en&type=TXT&ancre=>

⁷ <http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0581&lang1=en&type=TXT&ancre=>

⁸ <http://curia.europa.eu/juris/celex.jsf?celex=62018CJ0464&lang1=en&type=TXT&ancre=>

To determine the jurisdiction of the national courts, the nature of the compensation passengers are entitled to must be established.

In Joined Cases C-274/16 (*Fightright GmbH v. Air Nostrum Líneas Aéreas del Mediterráneo SA*), C-447/16 (*Roland Becker v. Hainan Airlines Co. Ltd*) and C-448/16 (*Mohamed Barkan and others v. Air Nostrum Líneas Aéreas del Mediterráneo*), the ECJ established that the rights to compensation provided by Regulation 261/2004 have their roots in the transport agreement concluded with the air carrier and are therefore of contractual nature.

Hence, the competent court will be determined in accordance with Article 7(1), letter b) of Regulation 1215/2012, namely the member state where, according to the contract, the services were or should have been rendered.

The ECJ also clarified the matter of national jurisdiction in Case no. C-204/08 (*Peter Rehder v. Air Baltic Corporation*) where it stated that when submitting a claim for compensations, passengers are free to choose between the national courts at the place of take-off or landing.

4. Limitation of liability and exonerating causes

Regulation 261/2004 limits the liability of the airlines if the delay, cancellation or denied boarding is due to extraordinary circumstances that cannot be avoided.

However, the ECJ has ruled that the exceptional situations provided in paragraphs 14 and 15 of the preamble of Regulation 261/2004 (as extreme weather conditions, union and airport personnel strikes, security risks due to political or civil unrest, *etc.*) are mere examples and in themselves do not constitute grounds not to award compensation, unless the air carrier can prove that the incident was not inherent to the carriage activity and could not be prevented through reasonable measures.

The ECJ considered the following events to be extraordinary circumstances:

- (i) a collision between an aircraft and a bird, as well as the damage caused by it (Case C-15/15 *Pešková & Peška*)⁹;
- (ii) the closure of air space due to the eruption of the Icelandic volcano *Eyjafjallajökull*, (Case C-12/11 *McDonagh*)¹⁰;

On the other hand, the ECJ ruled that the following events do not fall within the definition of extraordinary circumstances:

⁹ <http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0315&lang1=en&type=TXT&ancre=>

¹⁰ <http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0012&lang1=en&type=TXT&ancre=>

- (i) technical issues occurring unexpectedly, not attributable to poor maintenance and which were not detected during routine maintenance checks, (Case C-257/14 Van der Lans)¹¹;
- (ii) an airport's set of mobile boarding stairs colliding with an aircraft (Case C-394/14 Siewert)¹².

As a rule, each national court should determine whether the supposed extraordinary circumstance can be considered inherent to the carriage activity and easily preventable.

Some national courts considered the following situations extraordinary circumstances:

- (i) the failure of all computer systems at the check-in counters of a terminal for several hours, since the airport operator (and not the airline) is responsible for the technical facilities of an airport (the German Federal Court of Justice);
- (ii) the aircraft has been struck by lightning (the French Supreme Court); however, in a similar situation, the English Luton County Court considered that lightning strikes were inherent to the normal exercise of an air carrier's activity.

Such situations arise because, decisions of national courts are not compulsory for other jurisdictions.

For a better understanding of the different interpretation of the notion of extraordinary circumstances, cases based on the recent Corona Virus outbreak will be relevant given that:

- (i) passengers cancelled flights and asked for refunds due to unsafe travel conditions;
- (ii) some air carriers cancelled flights and invoked the Corona Virus outbreak as an extraordinary circumstance for not refunding the tickets.

In the near future we will probably have a clearer definition of extraordinary circumstances based on a virus outbreak. In this respect, we hope the ECJ will not consider such circumstances as regular.

5. Aspects outside ECJ regulation

Once member state jurisdiction is established, the claims for compensation shall be judged in accordance with applicable national rules.

Procedural aspects will therefore be subjected to the national legislation of the member state, such as:

- (i) the competent court in terms of rank and national jurisdiction;

¹¹ <http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0257&lang1=en&type=TXT&ancre=>

¹² <http://curia.europa.eu/juris/celex.jsf?celex=62014CO0394&lang1=en&type=TXT&ancre=>

- (ii) hearing and judgement rules;
- (iii) types of applicable procedures, including special procedures;
- (iv) statute of limitation;
- (v) awarding supplementary compensation under Article 12 of Regulation 261/2004;
- (vi) assessment of exonerating circumstances in accordance with Article 5(3) of Regulation 261/2004.

6. Litigation under Regulation 261/2004 before the Romanian courts

In Romania, claims for compensation under Regulation 261/2004 are usually subject to two procedures:

- (i) the small claim procedure which will always initially take place before the courts of first instance (the “**Small Claim Procedure**”);
- (ii) the general judgement procedure which may initially take place before the courts of first instance or tribunals, depending on the value of the claim (the “**General Procedure**”).

Both claims may be submitted within three years as of the moment the right to compensation is born (in general, three years as of the date of the flight).



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