

REGULATION (EC) NO 261/2004 AND ITS RECENT CASE LAW DEVELOPMENTS

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1. The right to compensation

1.1 Compensation for long delays

In the analysis of Regulation (EC) no. 261 of 2004, with regard to the right to compensation, it can be observed that the occurrence of a prolonged delay authorizes passengers to the same compensation as in the case of a cancellation of the flight: the passenger has the right to compensation if he reaches the final destination with a delay of three hours or more. However, such a delay may not entitle passengers to compensation if the air carrier can prove that the delay was caused by “extraordinary circumstances”. In other words, these are circumstances outside the actual control of the air carrier that could not have been avoided even by taking all the reasonable measures. ⁽¹⁾

1.2 Compensation for connecting flights

Compensation for long delays is also due to passengers on connecting flights who reach their final destination with a delay of at least three hours. The delay to be taken into account is the delay at the arrival, even in the case of more than one coincidence. It does not matter, therefore, whether the delay occurred at the airport of departure or at the connecting airports or at any stage of the journey; only the delay in the final destination of the journey is relevant for the right to compensation. ⁽²⁾

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⁽¹⁾ Judgment of the Court (Fourth Chamber) of the 19 November 2009. Christopher Sturgeon, Gabriel Sturgeon e Alana Sturgeon v. Condor Flugdienst GmbH (C-402/07) e Stefan Böck e Cornelia Lepuschitz v. Air France SA (C-432/07). Joint Cases C-402/07 e C-432/07.

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⁽²⁾ Judgment of the Court (Grand Chamber) of the 26 February 2013 Air France v. Heinz-Gerke Folkerts e Luz-Tereza Folkerts. Case C-11/11

1.3 Compensation for delay and the Montreal Convention

Moreover, the compensation for the delay is not in conflict with international law, as established in the decision C-581/10 - Nelson *et alia*⁽³⁾, where the Court confirms its previous judgment (Sturgeon *et alia* v. Condor) in regard to the compensation due for long delays. The Court notes that the obligation to compensate passengers whose flights are delayed is in line with the principles of the Montreal Convention.

1.4 On the determination of the amount of compensation

The right to compensation under Regulation (EC) No 261/2004, as already mentioned, makes no distinction between passengers who reach their final destination by a direct flight or by one or more connecting flights. In both cases, passengers must also be treated equally with regard to the calculation of the amount of compensation. Consequently, when determining the amount of in the case of connecting flights, only the radial distance between the airport of departure and the airport of arrival shall be taken into account.⁽⁴⁾

2. Whether or not extraordinary circumstances have occurred

2.1 The technical defect does not constitute an extraordinary circumstance

An airline may be exempted from the payment of compensation in the event of a long delay or cancellation if it can prove the existence of “extraordinary circumstances”. The Court also clarified that a technical problem which is detected during aircraft maintenance or caused by the lack of maintenance of an aircraft cannot be considered as “extraordinary circumstances”. The Court of Justice has clarified that even a technical problem which occurs unexpectedly, and is therefore 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 example, a failure caused by premature malfunction of some aircraft components can certainly be an unforeseen event. Nevertheless, this failure remains

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⁽³⁾ Judgment of the Court (Grand Chamber) of the 23 October 2012, Emeka Nelson and others v. Deutsche Lufthansa AG e TUI Travel plc and others v. Civil Aviation Authority. Joined Cases C-581/10 e C-629/10. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=128861&pageIndex=0&doclang=it&mode=lst&dir=&occ=first&part=1&cid=12633546>

⁽⁴⁾ Judgment of the Court (Eighth Chamber) of the 7th September 2017, Birgit Bossen e a. v. Brussels Airlines SA/NV. Case C-559/16; <http://curia.europa.eu/juris/document/document.jsf?text=&docid=194108&pageIndex=0&doclang=IT&mode=lst&dir=&occ=first&part=1&cid=12634821>

intrinsically linked to the very complex operating system of the aircraft. Therefore, the unforeseen event must be considered to be inherent in the normal exercise of the air carrier's activity. The Court recalled on this point that, of course, the carrier may claim against the manufacturer of the aircraft where the non-use of the aircraft results from a manufacturing defect.

However, a manufacturing defect subsequently revealed by the aircraft manufacturer or a competent authority, as well as damage to the aircraft caused by acts of sabotage or terrorism, may constitute "extraordinary circumstances".⁽⁵⁾

2.2 The impact of a mobile boarding ladder does not constitute an extraordinary circumstance

The Court clarifies that the collision of the mobile boarding ladders with the aircraft cannot be considered as part of the extraordinary circumstances exempting the air carrier from the compensation obligation. Mobile ladders or walkways can be considered indispensable for the carriage of passengers by air and, therefore, air carriers are regularly confronted with situations arising from the use of such equipment. A collision between an aircraft and a series of escalators is, therefore, an event inherent in the normal exercise of the activity of the air carrier. Therefore, the recognition of the right to compensation is also mandatory in this case.⁽⁶⁾

2.3 The bird strike is not always an extraordinary circumstance

With regard to the bird strike, i.e. the collision of the aircraft with birds, the Court concluded that a collision between an aircraft and one or more birds is an extraordinary circumstance which may relieve the air carrier of the obligation to pay compensation if a flight is significantly delayed. However, if an authorised expert finds, following the collision, that the aircraft in question is fit to fly, the carrier cannot justify the delay by invoking the need to carry out a second check. The Court also confirmed that, in the case

⁽⁵⁾ Judgment of the Court (Fourth Chamber) of the 22nd December 2008, *Friederike Wallentin-Hermann v. Alitalia - Linee Aeree Italiane SpA*. Case C-549/07. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=73223&pageIndex=0&doclang=IT&mode=lst&dir=&occ=first&part=1&cid=12638887>; Judgment of the Court (Ninth Chamber) of the 17th September 2015, *C. van der Lans v. Koninklijke Luchtvaart Maatschappij NV*. Case C-257/14. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=167942&pageIndex=0&doclang=IT&mode=lst&dir=&occ=first&part=1&cid=12639121>

⁽⁶⁾ Order of the Court (Fifth Chamber) of 14th November 2014 (request for a preliminary ruling from the *Amtsgericht Rüsselsheim* — Germany) — *Sandy Siewert and Others v Condor Flugdienst GmbH*; Case C-394/14. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160962&pageIndex=0&doclang=IT&mode=req&dir=&occ=first&part=1&cid=12639792>

of a cumulative delay, any delay caused by an extraordinary circumstance must be deducted from the total delay, calculated at the time of arrival, in order to assess whether or not compensation should be paid in the specific case.⁽⁷⁾

2.4 The wildcat strike does not constitute an extraordinary circumstance

The Court held that a strike by flight staff following the surprise announcement of a restructuring of the company does not constitute an “extraordinary circumstance” and therefore does not relieve the airline of its obligation to pay compensation in the event of cancellation or long delay of the flight. The Court notes that the Regulation lays down two cumulative conditions for the classification of an event as an extraordinary circumstance: (1) it must not, by its nature or origin, be inherent in the normal exercise of the airline's activity, and (2) it must be beyond its effective control. The mere fact that a recital of the Regulation⁽⁸⁾ mentions that such circumstances may arise, in particular in the case of a strike, does not mean that a strike is necessarily and automatically a cause for 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 met.⁽⁹⁾

2.5 Obligation to provide assistance even in the presence of extraordinary circumstances

In the event of cancellation of a flight, the air carrier must also provide assistance to passengers as well as paying compensation. With regard to the obligation to provide assistance, the air carrier must provide free of charge, on the basis of the waiting time, refreshments, meals and, where appropriate, hotel accommodation and transport between the airport and the place of accommodation, as well as the means of communication. The air carrier is also obliged to fulfil this obligation where the cancellation of the flight is

⁽⁷⁾ Judgment of the Court (Third Chamber) of the 4 May 2017, Marcela Pešková e Jiří Peška v. Travel Service a.s. Case C-315/15;

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=190327&pageIndex=0&doclang=IT&mode=lst&dir=&occ=first&part=1&cid=12643360>

⁽⁸⁾ Recital n. 14: “As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. 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.”

⁽⁹⁾ Judgment of the Court (Third Chamber) of the 17 April 2018 Helga Krüsemann e a. v. TUIfly GmbH, Joint Cases C-195/17, C-197/17 – C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, from C-278/17 to C-286/17 and from C-290/17 to C-292/17.

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caused by “extraordinary circumstances”, i.e. circumstances which could not have been avoided even if all reasonable measures had been taken.⁽¹⁰⁾

Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that, since an air carrier is obliged to take all reasonable measures to avoid extraordinary circumstances, it must reasonably, at the stage of the organisation of the flight, take account of the risk of delay associated with the possible occurrence of such circumstances. It must, therefore, provide for a certain amount of 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 fall-back time should not be such that the airline is induced to make sacrifices which, in the light of its business capacity, are intolerable.⁽¹¹⁾

3. Denied boarding and cancellation

The concept of "denied boarding" covers not only cases of overbooking, but also those where boarding is denied for other reasons, such as operational reasons. Airlines cannot validly justify denied boarding and be exempted from paying compensation to passengers by extraordinary circumstances or by assuming that passengers would not arrive in time for their connecting flight.⁽¹²⁾

With regard to the concept of “cancellation”, it also covers the case where the aircraft has taken off yet, for whatever reason, is subsequently forced to return to the airport of departure where the passengers of that aircraft are transferred to other flights.⁽¹³⁾

⁽¹⁰⁾ Judgment of the Court (Third Chamber) of the 31 January 2013, *Denise McDonagh v. Ryanair Ltd.* Case C-12/11;

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=134659&pageIndex=0&doclang=IT&mode=req&dir=&occ=first&part=1&cid=12647159>

⁽¹¹⁾ Judgment of the Court (Third Chamber) of the 12 May 2011. *Andrejs Eglītis e Edvards Ratnieks v. Latvijas Republikas Ekonomikas ministrija.* Case C-294/10.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=82052&pageIndex=0&doclang=IT&mode=lst&dir=&occ=first&part=1&cid=12648367>

⁽¹²⁾ Judgment of the Court (Third Chamber) of the 4 October 2012, *Finnair Oyj v. Timy Lassooy.* Case C-22/11

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=129525&pageIndex=0&doclang=IT&mode=req&dir=&occ=first&part=1&cid=12653023>; Judgment of the Court (Third Chamber) of the 4 October 2012 *Germán Rodríguez Cachafeiro, María de los Reyes Martínez-Reboredo Varela-Villamor v. Iberia, Líneas Aéreas de España SA,* Case C-321/11,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=129554&pageIndex=0&doclang=IT&mode=req&dir=&occ=first&part=1&cid=12653330>

⁽¹³⁾ Judgment of the Court (Third Chamber) of the 13 October 2011, *Aurora Sousa Rodríguez and others v. Air France SA,* Case C-83/10,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=111221&pageIndex=0&doclang=IT&mode=lst&dir=&occ=first&part=1&cid=12653688>