

REGULATION BRIEFING
no. 17 of 24 July 2019

CURRENT CASE LAW FROM THE COURT OF JUSTICE
ON PASSENGER RIGHTS IN AIR TRANSPORT

(I)	INTRODUCTION.....	2
(II)	REGULATION 261/2004 ON COMPENSATION AND ASSISTANCE TO PASSENGERS.....	2
	II.1 Flights to third countries	3
	II.2 Activity of the branch and jurisdiction	3
	II.3 Place of performance of a transport contract	4
	II.4 Concept of 'denied boarding' for connecting flights.....	4
	II.5 Notice of flight cancellation to the intermediary.....	4
	II.6 Flight cancellation	4
	II.7 Delay due to flight making an unscheduled stopover.....	5
	II.8 Concept of arrival time.....	5
	II.9 Technical problem of the aircraft.....	5
	II.10 Aircraft damaged by a mobile boarding stair during a previous flight	5
	II.11 Presence of fuel on an airport runway.....	6
	II.12 Damage to an aircraft tyre	6
	II.13 Wildcat strike	6
	II.14 Collision between an aircraft and a bird	7
	II.15 Volcanic eruption	7
	II.16 Concept of distance in case of connecting flights	7
	II.17 Calculation of price of the ticket	8
	II.18 Reimbursement of the ticket in case of downgrading	8
(III)	THE MONTREAL CONVENTION	8
	III.1 Liability of the air carrier for checked baggage.....	9
(IV)	REGULATION 1008/2008 ON COMMON RULES FOR THE OPERATION OF AIR SERVICES.....	9
	IV.1 Currency of the final price to be paid	10
	IV.2 Composition and presentation of air fares	10

(I) INTRODUCTION

The creation of a single European aviation market in the second half of the 1990s radically transformed the air transport sector and significantly contributed to the strong growth which it recorded in Europe over the last twenty years. The harmonisation of the rules and their consistent interpretation is a necessary condition of the single market and its success. In this context, the European Court of Justice has played and continues to play a fundamental role, especially through preliminary rulings, i.e. those rendered upon questions referred by the Member States' courts. On the other hand, the transposition of international conventions into European law has resulted in the widening of the remit of the European Court of Justice, with particular reference to the interpretation of the Montreal Convention on international air transport.

The purpose of this briefing is to provide an overview of the current case law from the European Court of Justice in the field of air passenger rights, as they are set out in Regulation 261/2004, the Montreal Convention and Regulation 1008/2008.

(II) REGULATION 261/2004 ON COMPENSATION AND ASSISTANCE TO PASSENGERS

Regulation 261/2004 introduced common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellations, or long flight delays. The scope of application is defined in Article 3, according to which it shall apply "to passengers departing from an airport located in the territory of a Member State" and, if the airline is a EU carrier, "to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State".

The rules on pecuniary compensation have de facto been widened by the Sturgeon ruling of 19 November 2009 (cases C-402/07 and C-432/07); despite the silence of the Regulation on this point, the Court stated that in case of a delay over the "tolerance level" of 3 hours, passengers are entitled to receive compensation from the airline (between 250 and 600 euros

depending on the length of the flight), except when the air carrier can prove the existence of extraordinary circumstances¹.

II.1 FLIGHTS TO THIRD COUNTRIES (C-537/17 – JUDGEMENT OF 31 MAY 2018)

Pursuant to Article 3, the scope of the Regulation 261/2004 includes also connecting flights – under a single booking – that comprise, between the departure from an airport situated in a Member State and the arrival in an airport situated in a third State, a scheduled stopover outside the European Union, even if the second flight involves a change of aircraft.

II.2 ACTIVITY OF THE BRANCH AND JURISDICTION (C-464/18 – JUDGEMENT OF 11 APRIL 2019)

The passenger who has simply purchased a flight ticket, rather than a travel package, cannot rely on rules on special jurisdiction over consumer contracts under Regulation 1215/2012.

A court of a Member State where a branch of the airline company (established in the territory of another Member State) is placed, has territorial jurisdiction to hear a dispute under the Regulation 261/2004, only if the above mentioned branch has been individually involved in the legal relationship between the airline and the passenger. Therefore, the passenger must prove that he concluded the transport contract with the branch and not with the parent company.

It is worth noting that, in determining the jurisdiction in case of air transport of passengers operated by a carrier domiciled in another Member State, the Court of Justice states the principle whereby the court having jurisdiction to deal with a claim for compensation is that, at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that contract (*Peter Rehder v. Air Baltic Corporation*, case C-204/08, Judgement of the 9 July 2009).

¹ This principle was reaffirmed by the Court in the judgement of 23 October 2012 (Joined cases C-581/10 Nelson et al. / Deutsche Lufthansa AG and C-629/10 TUI Travel et al. / Civil Aviation Authority).

II.3 PLACE OF PERFORMANCE OF A TRANSPORT CONTRACT (C-274/16 – JUDGEMENT OF 7 MARCH 2018)

Article 5 of Regulation 1215/2012 on jurisdiction must be interpreted as meaning that, in case of a connecting flight, the 'place of performance' of the flight is the place of arrival of the second leg, even though the irregularity took place on the first flight. Therefore, the latter will be the place where correctly ground the competence in passengers claims.

II.4 CONCEPT OF 'DENIED BOARDING' FOR CONNECTING FLIGHTS (C-321/11 - JUDGEMENT OF 4 OCTOBER 2012)

The concept of 'denied boarding' within the meaning of Article 4 of Regulation 261/2004 includes a situation where an air carrier denies boarding to some passengers on an immediately connecting flight, because it mistakenly expected those passengers not to arrive in time to board the second flight on the ground that the first flight included in their reservation has been subject to a delay.

II.5 NOTICE OF FLIGHT CANCELLATION TO THE INTERMEDIARY (C-302/16 – JUDGEMENT OF 11 MAY 2017)

Pursuant to Articles 5 and 7 of Regulation 261/2004, the air carrier must pay the pecuniary compensation even though he gave notice of the flight cancellation to the travel agent via whom the contract for carriage had been entered into with the passenger concerned and the passenger had not been informed of that cancellation by that agent within the prescribed period.

II.6 FLIGHT CANCELLATION (CASE C-130/18 – ORDER OF 27 JUNE 2018)

Pursuant to Article 5, par. 1, letter c), iii) of Regulation 261/2004, a passenger who was informed of the cancellation of his flight less than seven days before the scheduled departure of the flight, has the right to compensation whenever the re-routing offered by the carrier allowed him to reach his final destination more than two hours after the scheduled time of arrival of the cancelled flight, but less than three hours after that scheduled time of arrival.

II.7 DELAY DUE TO FLIGHT MAKING AN UNSCHEDULED STOPOVER (CASE C-32/16 – ORDER OF 5 OCTOBER 2016)

Aircraft's delay in arriving of less than three hours caused by an unscheduled stopover cannot give rise to the passenger's right to pecuniary compensation.

It would be contrary to the principal of equal treatment to recognize the right to compensation to a passenger who, owing to the unscheduled stopover, suffered a delay in arriving of less than three hours, whilst a passenger who suffered the identical delay for a different reason would not have a right to the compensation provided.

II.8 CONCEPT OF 'ARRIVAL TIME' (CASE C-452/13 – JUDGEMENT OF 4 SEPTEMBER 2014)

When measuring the length of the delay under the meaning of Articles 2, 5 and 7 of Regulation 261/2004, the concept of "arrival time" refers to the time at which at least one of the doors of the aircraft is opened, the assumption being that, at that moment, the passengers are permitted to leave the aircraft.

II.9 TECHNICAL PROBLEM OF THE AIRCRAFT (C-257/14 - JUDGEMENT OF 17 SEPTEMBER 2015)

A technical problem of the aircraft (in the specific case, the failure of the engine fuel pump and of the hydro mechanical unit) is not included in the concept of 'extraordinary' circumstance within the meaning of Regulation 261/2004 even if it (i) arose suddenly, (ii) is not attributable to a lack of maintenance of the air carrier and (iii) did not emerge during a regular monitoring.

II.10 AIRCRAFT DAMAGED BY A MOBILE BOARDING STAIR DURING A PREVIOUS FLIGHT (C-394/14 - ORDER OF THE COURT OF 14 NOVEMBER 2014)

A situation where an airport's set of mobile boarding stairs collides with an aircraft cannot be categorised as extraordinary circumstance, releasing the air carrier from its responsibility in the event of a long delay to a flight

operated by that aircraft. Such event shall be considered inherent in the normal exercise of the activity of the air carrier.

II.11 PRESENCE OF FUEL ON AN AIRPORT RUNWAY (C-159/18 – JUDGEMENT OF 26 JUNE 2019)

The presence of fuel on the airport runway that prevents the take-off or the landing of an aircraft, giving rise to a long delay or the cancellation of the flight concerned, must be classified as 'extraordinary circumstances', if such event is not related to a malfunction of the aircraft operating the flight (it could not have been avoided even if all reasonable measures had been taken within the meaning of that provision).

II.12 DAMAGE TO AN AIRCRAFT TYRE (C-501/17 – JUDGEMENT OF 4 APRIL 2019)

The damage to an aircraft tyre caused by a screw lying on the airport runway is an 'extraordinary circumstance' because the maintenance of runways is not inherent in the normal exercise of the aircraft's activity and such circumstances are outside carrier's actual control.

To be exempted from responsibility, the carrier shall prove that it has adopted all the appropriate measures in order to avoid the outbreak of the disservice.

II.13 WILDCAT STRIKE (C-195/17 – JUDGEMENT OF 17 APRIL 2018)

The so-called wildcat strike shall not be classified as an 'extraordinary circumstance' within the meaning of Article 5(3) of Regulation 261/2004.

The spontaneous absence of a significant part of the flight crew staff, which stems from the surprise announcement by an operating air carrier of a corporate restructuring process, is not covered by the concept of 'extraordinary circumstances', as the risks arising from the social consequences that go with such measures must be regarded as inherent in the normal exercise of the activity of the air carrier concerned.

II.14 COLLISION BETWEEN AN AIRCRAFT AND A BIRD (C-315/15 – JUDGEMENT OF 4 MAY 2017)

The collision between an aircraft and a bird, as well as any damage caused by that collision, must be classified as extraordinary circumstances within the meaning of Article 5(3) of Regulation 261/2004, read in the light of recital 14 of the said regulation, must be interpreted as meaning that a collision between an aircraft and a bird is classified under the concept of 'extraordinary circumstances'.

In the meantime, the operating carrier must prove that it has taken all the reasonable measures in order to reduce or even prevent the risks of collision with a bird, to be released from its obligation to compensate passengers.

II.15 VOLCANIC ERUPTION (C-12/11 – JUDGEMENT OF 31 JANUARY 2013)

Volcanic eruption constitutes an extraordinary circumstance within the meaning of Art. 5 of Regulation 261/2004, releasing the air carrier from its responsibility.

However, the occurrence of such circumstance does not release the air carrier from its obligation laid down in Articles 5(1)(b) and 9 of the regulation to provide care to passengers.

The air carrier is solely held to provide for reimbursement of the amounts incurred by the passenger by reason of cancellation or long delay of the flight, which proved necessary, appropriate and reasonable.

II.16 CONCEPT OF DISTANCE IN CASE OF CONNECTING FLIGHTS (C-559/16 – JUDGEMENT OF 7 SEPTEMBER 2017)

The concept of distance relates, in the case of air routes with connecting flights, only to the distance calculated between the first point of departure and the final destination on the basis of the great circle method, regardless of the distance actually flown.

II.17 CALCULATION OF PRICE OF THE TICKET (C-601/17 – JUDGMENT OF 12 SEPTEMBER 2018)

Article 8(1)(a) of Regulation 261/2004 must be interpreted as meaning that the price of the ticket to be taken into consideration for the purposes of determining the reimbursement, shall include the difference between the amount paid by the passenger and the amount received by the air carrier, which corresponds to a commission collected by a person acting as an intermediary between those two parties (e.g. a travel agency), unless the court estimates that the commission was set without the knowledge of the air carrier.

II.18 REIMBURSEMENT OF THE TICKET IN CASE OF DOWNGRADING (C-255/15 - JUDGEMENT OF 22 JUNE 2016)

Article 10 of Regulation 261/2004 must be interpreted as meaning that where a passenger is downgraded on one of the flights belonging to the same booking, the price to be taken into account in determining the reimbursement for the passenger affected, is the price of the flight on which he was downgraded unless that price is not indicated on the ticket entitling him to transport on that flight.

In case the price of the flight is not indicated on the ticket, the reimbursement shall be proportioned to the distance travelled by the flight for which the passenger has been downgraded.

Moreover, such reimbursement shall not include taxes and charges indicated on that ticket, as long as neither the requirement to pay those taxes and charges nor their amount depends on the class for which that ticket has been purchased.

(III) THE MONTREAL CONVENTION

The Montreal Convention “*for the Unification of Certain Rules Relating to International Carriage by Air*” is a multilateral treaty adopted by a diplomatic meeting of International Civil Aviation Organization (ICAO) member states on 28th May 1999. Although the Convention only applies to international air

transport, its scope of application has been extended also to national flights within the European Union by Regulation 2027/1997.

The Convention regulates hypotheses of flight delay (art. 19), of death or personal injuries and of destruction, loss or damage of the checked baggage (art. 17).

The compatibility of the responsibility regime foreseen by the Convention with the subsequent one introduced by Regulation 261/2004 has been confirmed in the Judgement *IATA/ELFAA v. Department for Transport*, rendered in the Case C-344/04.

III.1 LIABILITY OF THE AIR CARRIER FOR CHECKED BAGGAGE (C-258/16 – JUDGEMENT OF 12 APRIL 2018)

A passenger must complain to the carrier for the loss or damage of his baggage (i) in writing (handwritten, printed on paper or recorded in electronic form) and (ii) within the times set out in Article 31(3) of the Montreal Convention (seven days from the date of receipt in the case of checked baggage and twenty-one days in case of delay of the receipt).

In doing so, the passenger may seek the assistance of a representative of the air carrier, provided that he can check the accuracy of the text of the complaint before expiry of the prescribed period. The requirement of being in a written form is fulfilled even if the complaint is recorded in electronic form by an agent of the air carrier.

(IV) REGULATION 1008/2008 ON COMMON RULES FOR THE OPERATION OF AIR SERVICES

Chapter IV of Regulation 1008/2008 sets out some fundamental principles on air fares, among which the duty to indicate the applicable tariffs and their components in a transparent and exhaustive manner. Customers should be able to compare effectively the prices of air services applied by different airlines. The Italian Competition Authority adopted several decisions on these

issues, such as those on travel insurance, refund of air passenger duties, and surcharges on payments by credit cards.

IV.1 CURRENCY OF THE FINAL PRICE TO BE PAID (C-330/17 – JUDGEMENT OF 15 NOVEMBER 2018)

Pursuant to Article 23, par. 1 of Regulation 1008/2008, the air carrier must express the air fares for intra-Community air services, in euros or in another local currency that is common currency in the Member State in which the place of departure or arrival of the flight is located.

IV.2 COMPOSITION AND PRESENTATION OF AIR FARES (C-290/16 – JUDGEMENT OF 6 JULY 2017)

Under Article 23 of Regulation 1008/2008, the air carrier must specify separately the amounts payable by customers in respect of taxes, airport charges and other charges, surcharges or fees and it may not as a consequence include those items, even partially, in the air fare.

The final price to be paid by the customer must include all applicable taxes, charges, surcharges and fees which are foreseeable at the time of publication.

For further information please contact Gennaro d'Andria (gdandria@3dlegal.it)