



## EU REGULATION 261/2004 ON DENIED BOARDING, CANCELLATION AND DELAY- KEY CONSIDERATIONS FOR RUSSIAN AIR CARRIERS

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## EU REGULATION 261/2004 - SCOPE

- Applies to all passengers departing from an EU airport
- Applies to flights operated by non-EU carriers
- Always applies to operating carrier
- Regulation specifies that protection should also be applied to passengers on non-scheduled flights
- Directly effective in EU law
- Regulation is silent on jurisdiction. CJEU has held place of arrival and departure have sufficient link but not stopover

## EU REG 261/2004 – ESSENTIAL PROVISIONS

	DENIED BOARDING	CANCELLATION	DELAY
Compensation €250 / €400 / €600	x	x unless – two weeks advance notice – shorter advance notice and satisfactory re-routing – extraordinary circumstances	? 3 hours +
Reimbursement	x	x	5 hours +
or re-routing	x	x	
Care (refreshments, hotels)	xX	x	2/3/4 hours +

## CJEU's VIEW OF EXTRAORDINARY CIRCUMSTANCES DEFENCE – WALLENTIN-HERMANN DECISION DEC 08

- Circumstances only extraordinary if “not inherent in normal exercise of activity of carrier and beyond actual control of carrier on account of its nature and origin”
- Necessary for carrier to also show extraordinary circumstances could not have been avoided by all appropriate measures – **compliance with minimum rules on maintenance no defence!**
- Need to show deployed all resources and financial means at its disposal and still could not avoid without intolerable sacrifices in light of capacities of its undertaking
- Recent developments in UK – CAA monitoring compliance with Wallentin-Hermann by requesting information from airlines by 1 February 2012

## EXTRAORDINARY CIRCUMSTANCES EGLITIS AND RATNIEKS v DEPARTMENT OF THE ECONOMY OF LATVIA – CJEU - MAY 2011

- Flight cancelled because of closure of Swedish airspace (and crew out of hours when it reopened after a little over two hours)
- Because of the “all reasonable measures” requirement, an air carrier “must reasonably, at the stage of organising the flight, take account of the risk of delay connected to the possible occurrence of extraordinary circumstances. It must, consequently, provide for a certain reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end”
- The amount of reserve time required depends on the facts of each case, and must not require the carrier to make “intolerable sacrifices”.
- Art 5(3) – reasonable measures to avoid the extraordinary circumstances, not the cancellation.
- Practical difficulties caused by ruling

## STURGEON v. CONDOR / BÖCK v. LEPUSCHITZ v. AIR FRANCE – CJEU – NOV 2009

- Delay rather than cancellation if flight operated in accordance with the airline's original planning, however long the delay
- Normally cancellation where a delayed flight is "rolled over" into another
- Passengers reaching final destination 3 hours or more after originally scheduled arrival time are entitled to compensation as for cancellation or denied boarding
- Courts main concern – principle of equal treatment
- Subject to the extraordinary circumstances defence
- Compensation for flights over 3,500km halved where delay less than 4 hours

## UNCLEAR POSITION REGARDING LIABILITY FOR DELAY

- Joint judicial review application – TUI, BA, easyJet and IATA v UK CAA
- High Court referred following questions to CJEU:
  - Does regulation require compensation to be paid to delayed pax?
  - If not, are provisions of Regulation invalid – breach equal treatment?
  - If Regulation does require compensation, are provisions on cancellation/delay invalid?
  - If not require compensation, does ruling have any effect?
- UK Court proceedings stayed. Others not but some Courts may be persuaded to stay. Position in Germany more difficult due to BGH rulings. Commission takes view all NEBs should apply Sturgeon (Kallas – December 2011).
- Some encouraging decisions from lower courts in Germany and Netherlands. Further references to CJEU.

## PRACTICAL APPLICATION OF REG 261/2004 IN CRISIS SITUATIONS AND THE COMMISSION'S "INFORMAL GUIDELINES"

- Compensation not payable, because extraordinary circumstances – including where cancellation for directly linked cause
- Right to reimbursement or re-routing
- No exception for extraordinary circumstances
- Sanctions may be inappropriate where airline fails to make explicit offer, in circumstances of disruption
- Where airline tried to contact passenger, but passenger made own arrangements, normal inference that opted for reimbursement
- Where period of disruption unknown, passenger may opt first for re-routing and then change to reimbursement



## PRACTICAL APPLICATION OF REG 261/2004 IN CRISIS SITUATIONS AND THE COMMISSION'S "INFORMAL GUIDELINES" (2)

### ➤ Reimbursement

- of whole ticket, where outbound flight of return journey (whether or not sold as return)
- including parts of journey already made
- return flights

### ➤ Re-routing

- principles of proportionality and reasonableness
- normally, but not necessarily, all costs of transport to final destination
- can be by other airlines and/or transport modes
- later re-routing – balance between passenger and airline, having regard to purpose of contract
- questions of priority among passengers

## PRACTICAL APPLICATION OF REG 261/2004 IN CRISIS SITUATIONS AND THE COMMISSION'S "INFORMAL GUIDELINES" (3)

### ➤ Care

- No exception for extraordinary circumstances
- No limit in time but:
  - ends when passenger opts for reimbursement
  - “adequate care ... without imposing a disproportionate and unfair burden on the air carrier”
- Possible criteria for “adequacy”:
  - distance of passenger/airport from place of residence
  - availability and average standards/prices of local hotels and restaurants
  - treatment of other passengers in comparable situations
  - balancing adequate care against unnecessary expense

## COMMISSION'S COMMUNICATION 11 APRIL 2011

- Launch in 2011 of Impact Assessment to assess proportionality of current measures with view to proposing further measures including of a legislative nature, probably this year.
- Impact assessment looking at other possible remedies and interrelation of Regulation and pre-existing law, particularly Montreal Convention.
- May see new measures as in other modes e.g. ferry pax limit no. nights/price of hotel.
- Measures to encourage harmonisation amongst approach of NEBs towards enforcement.
- Measures to raise passengers' awareness of their rights.

## ISSUES FOR RUSSIAN INSURERS

- Currently no cover available for exposure to claims under the Regulation
- View generally taken is that no insured event unlike accident or loss, damage or delay to baggage
- Distinction with liability for delay under MC and extension for diversion costs
- Some insurers do offer cover for loss of business caused by natural phenomenon such as ash cloud

Thank you for your attention!

Any questions?

## CONTACT DETAILS

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