

THE DIFFERENCE BETWEEN CANCELLATION AND LONG DELAY UNDER EU REGULATION 261/2004

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This is a commentary on the judgment of the European Court of Justice dated 19 November 2009 (Sturgeon v Condor Flugdienst GmbH and Böck & Lepuschitz v Air France SA, joined cases C-402/07 and C-432/07)

On 19 November 2009, the European Court of Justice ruled as follows:

1. Articles 2(l), 5 and 6 of Regulation (EC) No 261/2004 must be interpreted as meaning that a flight which is delayed, irrespective of the duration of the delay, even if it is long, cannot be regarded as cancelled where the flight is operated in accordance with the air carrier's original planning.

2. Articles 5, 6 and 7 of Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.

3. Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical

problem in an aircraft which leads to the cancellation or delay of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.

The differentiation between 'delay' and 'cancellation' of a flight has been very important from the very beginning of the

application of Regulation 261/2004 because cancellation entitles passengers to compensation but – based on the literal wording of the Regulation – delay does not. The European Court of Justice (the ECJ) has issued a surprising judgment with significant negative consequences for airlines. In the following article I would like to provide some information and our comments on the judgment, even though the legal remedies against the decision are very limited because the interpretation given by the ECJ is practically the last word.

The Judgment

The question as to whether a flight delay has to be regarded as a cancellation rather than a delay and whether this is dependent on the duration of the delay has been presented to the ECJ by a German and an Austrian Court, involving Condor

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Airlines and Air France, whose flights reached their destination after delays of 25 and 22 hours respectively. The Court came to the conclusion that a flight 'delay', even if it is long, and a 'cancellation' are two different things in legal terms (first finding noted above). The legal differentiation, however, does not lead to any practical result: According to the Court's second finding, passengers whose flights are delayed by at least three hours enjoy the same rights as passengers whose flights are cancelled.

The Court came to the conclusion that it is the legislator's intention for passengers to be entitled to compensation for a delay, even though the literal wording of the regulation only grants compensation for cancelled flights. The Court deduced this conclusion from Recital No (15) of the Regulation. This recital refers to the term 'extraordinary circumstances' allowing air carriers to be released from the obligation to pay compensation under Article 7 of the Regulation – dealing with cancellation exclusively – and reads as follows:

(15) 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.

As the notion of 'long delay' is mentioned in the context of extraordinary circumstances, the Court held that the legislature also linked that notion to the right to compensation. In addition, the Court said that Recitals (1) to (4) in the preamble to the Regulation, in particular Recital (2), make it clear that the regulation seeks to ensure a high

level of protection for air passengers regardless of whether they are denied boarding or whether their flight is cancelled or delayed, since they are all caused similar serious trouble and inconvenience connected with air transport.

To summarise, the Court based its decision on the principle of equal treatment. This principle seemed more important to the Court than a merely linguistic interpretation. The Court clearly says that 'it does not expressly follow from the wording' of the Regulation that passengers whose flights are delayed have a right to compensation. Yet, it draws exactly this conclusion.

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Legal Certainty versus Equal Treatment

Obviously the court wanted to avoid the consequences of declaring parts of the Regulation invalid in the light

of the principle of equal treatment, as suggested by Advocate General Sharpston in her Opinion delivered in the subject cases on 2 July 2009. It is worth re-reading the following two statements of Advocate General Sharpston leading directly into the legal problem caused (instead of resolved) by the recent ECJ judgment:

The Community legislator can select a particular time-limit (23 and a half hours, 24 hours, 25 hours, or 48 hours – whatever it be) triggering a right to compensation. The Court cannot.

I do not think that the underlying problem can be 'fixed' by interpretation, however constructive ...

The first criticism is the fact that the Court goes beyond the limits of interpretation. As the court itself actually admitted in its judgment, the wording of the relevant provisions does not really

show ambiguity. The legal consequences of delay and cancellation are just different. Making them equal (under the principle of equal treatment) is not interpretation, but rewriting of existing legal provisions. The authority to make law (as opposed to interpretation) is with the Community legislators and not the ECJ.

However, if it was the legislators' intention to include delays in the compensation scheme, and if the legislator just forgot to mention this in the Regulation, why should it make a difference whether the legislator itself or the Court reveals this intention? – Because the legislator actually did not have such intention and it can therefore not be found in the Regulation. Advocate General Sharpston in her Opinion referred to the following statements in the explanatory memorandum to the original Commission proposal for a regulation:

Cancellation by an operator ... represents a refusal to supply the service for which it has contracted, except in exceptional circumstances ... For the passenger, cancellation in ordinary circumstances, for commercial reasons, causes unacceptable trouble and delay, particularly when not warned in advance.

Although passengers suffer similar inconvenience and frustration from delays as from denied boarding or cancellation, there is a difference in that an operator is responsible for denied boarding and cancellation (unless for reasons beyond its responsibility) but not always for delays. Other common causes are air traffic management systems and limits to airport capacity. As stated in its communication on the protection of air passengers, the Commission considers that in present circumstances operators should not be obliged to compensate delayed passengers.

It was not the legislator's intention to include delays in the compensation scheme

Therefore, I believe that it was not the legislators' intention to include delays in the compensation scheme and that the Court was not entitled to make an interpretation that is contradictory to the wording of the Regulation and the expressed legislators' intention.

The Montreal Convention

In addition – and this is the second material point to be criticised here – European law has to comply with international law, and in this case specifically with the Montreal Convention. Article 29 of the Montreal Convention, which is binding law in all EU Member States, reads as follows:

Article 29 – Basis of claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought

subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Surprisingly, the ECJ does not mention, on the basis of which argument Article 29 of the Montreal Convention may be overruled. This is even more significant because the Court expressly refers to its previous judgment in the IATA and ELFAA case (*R v Department for Transport on the application of the International Air Transport Association & European Low Fares Airline Association*, Case: C-344/04) where it had explained that the Montreal Convention could not prevent the action taken by the Community

legislature to lay down the conditions under which damage linked to the inconvenience caused by delay in the carriage of passengers by air, should be redressed. Since the assistance and taking care of passengers required by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute standardised and immediate compensatory measures, they are not, according to the Court, regulated by the Montreal Convention.

In other words: At the time of the *IATA and ELFAA* case, the Court had not even discussed the compatibility of compensation claims under Article 7 of Regulation No 261/2004 in case of delay on the one hand and the scope of Article 29 of the Montreal Convention on the other hand. It had not even identified the now developed 'interpretation' – for the simple reason that the Court as well the parties to the proceedings adhered to the 'literal' interpretation according to which delay, even if it is long, does not trigger compensation claims but only redress in the form of standardised and immediate assistance or care. At that time, the Court had taken the view that delay in the carriage of passengers by air may, generally speaking, cause two types of damage, one of which is exclusively covered by the Montreal Convention (the Court refers to 'individual damage' and 'compensation') and one that is not affected by the Montreal's Convention priority – this type of damage is 'almost identical for every passenger' and redress for it may 'take the form of standardised and immediate assistance or care for everybody concerned'. This is the type of damage addressed by Articles 8 and 9 of the Regulation ('assistance' and 'right to care').

As the ECJ at the time of the *IATA and ELFAA* case had not (yet) held the view that 'Articles 5, 6 and 7 of Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are

delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled' (cf. second finding mentioned above), the differentiation into two types of damage, of which one falls under the scope of the Montreal Convention and the other not, is obviously no longer of any use. I believe that the reference to the *IATA and ELFAA* judgment simply does not support the 'new' interpretation and has to be regarded as a circular argument.

Conclusions

I believe there are reasonable arguments to contest the recent judgment of the ECJ. However, the options to challenge this court decision are very limited. The interpretation given by the ECJ is practically the last word. It may be possible to bring a different case to a national court and eventually once again to the ECJ. This would, of course, not necessarily result in a different decision. Also, I would not rule out the possibility that the Commission might take the steps necessary for a formal amendment of the Regulation.

I recommend that airlines analyse the claims put forward against them on an individual basis and make a case-by-case decision as to whether compensation should be paid. I am convinced that – especially here in Germany – further cases will be brought to court and that further court decisions will provide a broader basis for legal assessment.

Another issue currently seems unclear, that is the further handling by the German Civil Aviation Authority – Luftfahrtbundesamt (LBA). The question here is whether the LBA is entitled (and actually will make use of such authority) to impose fines for failing to pay compensation to passengers whose flight has been delayed.

The reference to the IATA and ELFAA judgment simply does not support the 'new' interpretation and has to be regarded as a circular argument

Should the LBA decide to go forward in this manner, this would cause severe additional problems because under German law, prosecution is only allowed on the basis of a clear and unambiguous law. On the other hand, should the LBA decide to prosecute only cancellations (because it is clearly the law), but not delays (because of the unclear legal basis), then the ECJ's aberrant 'interpretation' would become more obvious. This might also influence the

European Commission in its efforts to enforce consumer protection and passenger rights so that further action might be initiated by them.

For the time being, I believe that it could be very helpful to explore the legal view in other EU countries and to try to establish all arguments available to contest the judgment. Public and political activity by (international) airline associations should also be taken into consideration.

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