

# NO COMPENSATION PAYMENTS PURSUANT TO REGULATION (EC) No. 261/2004 IN CASE OF STRIKES?

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*In this article the authors provide hope, and sympathy, for air carriers who feel under siege from consumers (and the ECJ) claiming compensation under Regulation 261/2004*

## Introduction

On 24 October 2012, much to the dismay of the airline industry, the ECJ confirmed the controversial Sturgeon decision (*Nelson and Others v Deutsche Lufthansa* (C-581/10) and *TUI Travel and Others v Civil Aviation Authority* (C-629-10)). In its judgment, the ECJ affirmed that passengers have a right to claim compensation pursuant to Regulation (EC) No. 261/2004 in case of long delays as well as for cancellations. At the same time, the ECJ emphasised that airlines can make use of the extraordinary circumstances defence contained in Art. 5(3) of Regulation 261/2004 to avoid such compensation payments.

Yet in practice it has become increasingly difficult for airlines to rely on the extraordinary circumstances defence, especially in relation to technical defects. This is due to (a) the typically very high costs involved in gathering the necessary evidence to prove the defence in light of the typically very small claim values in Regulation 261/2004 proceedings and (b) the case law handed down by the ECJ which continues to weaken the airlines' position. The recent decision of the German Federal Court (*Bundesgerichtshof*, 'BGH') in a judgment dated 21.08.2012 (X ZR 146/11) determining that airlines do not have to pay compensation to passengers in case of a strike was thus most likely a pleasant surprise to airlines.

In the following, we will look closely at the BGH's reasoning in this airline favourable judgment before concluding and looking into the future in light of a relevant ECJ case, which has been published since the BGH judgment.

## The German Federal Court ruling

### Facts

The claimants had booked return flights from Frankfurt to Miami and were claiming compensation from the airline pursuant to Art. 5 and Art. 7 of Regulation 261/2004. The return flight had been scheduled for 23 February 2012. However, for the period of 22 to 25

February 2010 the pilot association Cockpit announced a strike. The defendant airline therefore cancelled the claimants' return flight on 19 February 2010 and subsequently rebooked them on a flight for 1 March 2010. The local court awarded the claimants compensation under Regulation 261/2004. The appellate court overturned the first instance judgment and only granted claimant No. 2 the claimed costs for a rented car as well as legal fees. The claimants therefore appealed to the BGH.

### Decision

The BGH confirmed the decision of the appellate court that the claimants did not have a claim for

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compensation payments under Regulation 261/2004, because the cancellation of the return flight was due to extraordinary circumstance in accordance with Art. 5(3) of Regulation 261/2004. It was held that strikes by the operating air carrier's staff are extraordinary circumstances pursuant to Art. 5(3) of Regulation 261/2004, because recital 14 of the regulation mentions "strikes that affect the operation of an operating air carrier" without differentiating between "internal" or "external" strikes.

The BGH also shared the view of the appellate court that the defendant airline could not have avoided the cancellation of the flight in question even though all reasonable measures had been taken by it. In particular, it did not have a duty to engage other pilots as temporary employees. Even though the strike was announced four days before the scheduled departure of the flight in question, there was not enough time to find adequate substitutes in the labour market for approximately 4,000 pilots who had been called on strike, to examine their eligibility and to train them for the relevant types of aircraft.

### *Interpretation of the term 'extraordinary circumstances'*

In its reasoning, the BGH stated that the term "extraordinary circumstances" is not defined in Art. 2 nor in any other provision of Regulation 261/2004. The meaning and scope of the term should therefore be determined by interpreting Art. 5(3) of Regulation 261/2004. Generally, the meaning and scope of terms which are not defined by EU law have to be interpreted according to their wording, the context in which they are used and in light of the intention behind the relevant provision. In addition, the recitals to a legislation should be consulted. Provisions which constitute an exception from EU customer protection provisions, should be interpreted

narrowly so that the level of protection intended by the legislator is safeguarded.

According to the wording of Art. 5(3) of Regulation 261/2004, the circumstances have to be 'extraordinary' i.e. not equal to the usual course of events, but circumstances which are different to what can normally be described as the process of transportation of passengers in air traffic. The legislator therefore aimed at events which are not linked to air transportation but special circumstances, generally coming from the outside, which affect the operation of an operating air carrier or render the operation impossible. In addition, the operating air carrier must take all reasonable measures to avoid the disruption.

According to the BGH, recitals 14 and 15 of Regulation 261/2004 demonstrate that for

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**It was held that strikes by the operating air carrier's staff are extraordinary circumstances**

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circumstances to qualify as 'extraordinary' neither the potentially manifold causes nor the circumstances in the sphere of responsibility of the airline, or a third party, or their general lack of controllability are important, but the fact

that they can be differentiated from events which the airline typically faces in relation to the operation of a flight.

The BGH further stated that the standards developed by the ECJ in relation to technical defects are to be considered in relation to the incidents listed in recital 14. In this regard, it is decisive whether the cancellation is due to unusual events, stemming from outside of the operation of the airline which cannot be controlled by the airline.

### *A strike of the airline's own staff as 'extraordinary circumstances'?*

The BGH held that in case of a strike, it is not important whether the operations of an airline are affected by a pay dispute between third parties (e.g. airport staff) or by its own staff (e.g.

ground staff or crew). Neither the wording of Art. 5(3) of Regulation 261/2004, nor recital 14, or the purpose of the provision give an indication for such an interpretation.

Strikes by the airline's staff will typically be prompted by a trade union, usually demanding better working conditions or higher wages. A call for a strike therefore affects an airline 'from the outside' and is *not* part of its usual operations. A strike also usually does not affect one flight, but the entire or the majority of operations of an airline. According to the BGH, the purpose of Regulation 261/2004 to protect passengers from the 'trouble and inconvenience' (Recital 12 of Regulation 261/2004) of avoidable cancellations, does not take effect in case of this form of strike, just like it does not take effect in case of a strike by third parties or any other event resulting in a standstill of the entire or a significant part of the normal business operations of the airline.

The BGH explicitly stated that some scholars appear to take a different view based either on the interpretation of Art. 19 of the Montreal Convention or on the assumption that pay disputes with own staff fall into the sphere of responsibility of the airline. However, according to the BGH, both these viewpoints are not crucial as a result of the wording of Regulation 261/2004 and the ECJ's case law.

In the BGH's opinion the announcement of a strike by the Cockpit association therefore qualified as extraordinary circumstances pursuant to Art. 5(3) of Regulation 261/2004. The call for a strike was directed at approximately 4,000 pilots. The defendant airline therefore had to anticipate that the employees called upon would go on strike and that it would therefore probably lack the necessary number of pilots in order to operate its scheduled flights as planned. Thus, the airline had reason to act upon the announcement and to reorganise the flight schedule so

that the adverse effects for passengers would be as little as possible under the circumstances and so that it would be in a position to return to normal operations as soon as possible after the strike. According to the BGH, this type of situation cannot be regarded as normal business operations of an airline.

Furthermore, the BGH took the view that the situation for an airline in case of a pay dispute is not controllable. The decision to go on strike is taken by staff in line with their autonomy in wage bargaining. Hence the airline has no influence on the staff as to whether they will go on strike or not. In this regard, the argument that airlines can prevent strikes by complying with the demands of the staff is not persuasive, as one would then ask airlines to waive their freedom of association protected by EU law and to adopt the role of the underdog straight away. The BGH stated that this cannot reasonably be expected from airlines apart from the fact that this would also not be in the long-term interest of passengers.

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### *Measures which the operating air carrier should take in case of a strike*

The BGH stated that this depends on the individual facts of each case. In cases where an airline faces the extraordinary circumstance that a significant part of its pilots will not be available, the airline has to reorganise its flight operations. In this regard, the airline should work towards minimising the impact on passengers as much as possible, as well as towards returning to normal flight operations as quickly as possible after the strike. The BGH takes the view that if the airline uses all resources available to do so, then the cancellation of a single flight cannot generally be regarded as avoidable simply for the reason that another flight could have been cancelled. In consideration of the complex decision-making

situation for the airline, where a large number of flights and their connections to each other have to be taken into account, one has, in fact, to allow the airline the necessary leeway in relation to the assessment of the required measures to be taken in the particular situation. However, according to the BGH, this does not lead to a restriction of consumer protection, because it is ultimately in its own economic interest for the airline to minimise the adverse effects of a strike on passengers as much as possible.

The BGH ruled that in the case before it the measures taken by the defendant airline were sufficient to minimise the impact of the strike by limiting the cancellations to an unavoidable minimum. Here, the aircraft was not available due to the cancelled flight from Frankfurt to Miami on the day before the scheduled return flight of the claimants. The BGH did not examine the question whether it would have been reasonable from an economic point of view for the airline to arrange for a substitute aircraft, because the airline did not have the necessary staff to conduct the flight anyway.

## Commentary

In light of the recent affirmation of the *Sturgeon* decision by the ECJ, a favourable decision by the German Federal Court for airlines in relation to the extraordinary circumstances defence under Regulation 261/2004 is to be welcomed. This judgment is of particular interest because the BGH interpreted the meaning of the term 'extraordinary circumstances' in relation to strikes by examining the wording and the purpose of Regulation 261/2004 closely. The result is what appears to be a very sensible judgment.

However, it remains to be seen how the extraordinary circumstances defence in relation to

strikes will be handled in future in light of the recent ruling of the ECJ in the case of *Finnair Oyj v Timy Lassooy* (Case C-22/11). In that case, Finnair had to cancel a scheduled flight from Barcelona to Helsinki as a result of a strike by staff at Barcelona airport. In order that the stranded passengers would not have to wait for too long, Finnair decided to reorganise its subsequent flight plan. The consequence of such rescheduling was that some of the passengers, who had bought tickets for subsequent flights, were denied boarding in favour of passengers already waiting. One of these subsequent passengers was Mr Lassooy, who brought an action in Finland against Finnair for compensation under Regulation 261/2004. The facts of this case can therefore be distinguished from those of the BGH case discussed above, in that the Finnair case

regarded the cancellation of a later flight due to a strike and resulting from the reorganisation of the flight plan by the airline rather than a flight directly affected.

The Finnish Court in this case sought guidance on the

concept of 'denied boarding' and also as to whether an air carrier may rely on extraordinary circumstances and validly deny passenger boarding on flights after the flight which was cancelled because of such circumstances, or exempt itself from its obligation to compensate passenger thus denied boarding. The ECJ ruled that the concept of denied boarding does not only relate to cases of overbooking, but also to those concerning other grounds, such as operational reasons. Furthermore, the ECJ decided that the occurrence of extraordinary circumstances, such as strike, resulting in an air carrier rescheduling subsequent flights does not give grounds for denying boarding or for exempting the carrier from its obligation to compensate passengers denied boarding on those later flights. In the ECJ's view, extraordinary circumstances only relate to flights on a particular day of the strike

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and not to boarding which is denied because flights are rescheduled as a result of the extraordinary circumstances affecting an earlier flight. The ECJ also points to the fact that air carriers can seek compensation from the third party which has caused the denied boarding to reduce the additional financial burden for carriers. This certainly is an interesting approach taken by the ECJ, especially seeing that lengthy additional litigation with third parties is unlikely to reduce the cost burden. There is also the question as to whom or which company an airline should sue in case of a strike and on what grounds.

In Germany airlines have been affected by a number of strikes recently and it will thus be

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interesting to see how these cases will be handled by the courts in future. Unfavourable ECJ cases in relation to the extraordinary circumstances defence (like the *Finnair* case), are of great concern to airlines, seeing that the defence has become something like the last best hope for airlines to avoid compensation payments under Regulation 261/2004. Having to make large amounts of compensation payments as a result of strikes would no doubt be a significant additional cost burden for the already struggling carriers and would thus ultimately be detrimental for the economy as a whole.

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