

## **AIR PASSENGER RIGHTS – EUROPEAN CASE LAW**

On many occasions, the Court of Justice of the European Union (CJEU) has been requested by national courts to clarify certain provisions of Regulation (EC) No 261/2004 on air passenger rights and of the Montreal Convention<sup>1</sup>. Its interpretative judgments reflect the current state of EU law, which has to be enforced by national courts and authorities.

Below, we provide references to relevant judgments with regard to air passenger rights. Please note that the case-law included below is not exhaustive, and that only the versions of the judgments published in the 'Reports of Cases' of the CJEU or the 'Official Journal of the European Union' are authentic.

### **Table of Contents**

DEFINITIONS.....	3
Air carrier and operating air carrier .....	3
Denied boarding.....	4
Cancellation .....	4
SCOPE OF THE REGULATION.....	6
Territorial scope .....	6
Confirmed reservation and check-in.....	7
Passengers travelling free of charge or at a reduced rate.....	7
LONG DELAY AS AN ADDITIONAL SOURCE OF RIGHTS .....	8
Compensation for long delay.....	8
Compensation for missed connecting flight(s) .....	8
Time of arrival.....	9
RIGHT TO COMPENSATION.....	10
Determining the amount of the compensation in case of connecting flights.....	10
“Double” compensation.....	10
Exemptions (other than extraordinary circumstances) and reductions.....	11
EXTRAORDINARY CIRCUMSTANCES.....	12
Technical problems .....	12
Strike by flight staff.....	13
‘External’ events .....	13

---

<sup>1</sup> The European Union is a contracting Party to this Convention and some of its provisions have been implemented in Union law by Regulation (EC) No 2027/97, as amended by Regulation (EC) No 889/2002. These rules are part of a set of measures aiming at protecting air passenger rights in the European Union along with Regulation (EC) No 261/2004.

Volcano eruption .....	14
Extraordinary circumstance on a previous flight with the same aircraft .....	14
Reasonable measures to be taken by the air carrier .....	15
RIGHT TO REIMBURSEMENT AND RE-ROUTING .....	16
Full cost of the ticket.....	16
Re-routing .....	16
Diversion of a flight to an airport serving the same town, city or region.....	17
RIGHT TO CARE .....	18
RIGHT TO INFORMATION .....	19
OBLIGATIONS IN CASE OF CONTRACT OF CARRIAGE WITH A THIRD PARTY .....	20
Flights part of a package travel.....	20
Stand-alone flights booked through an online booking platform .....	20
VARIOUS.....	21
Further compensation .....	21
Downgrading.....	21
Currency in which compensation is due .....	21
ENFORCEMENT BY NATIONAL AUTHORITIES AND COURTS .....	22
National enforcement bodies (NEB) .....	22
Time limit for bringing an action to a national court.....	22
Jurisdiction of a national court .....	23
CASE-LAW ON THE MONTREAL CONVENTION .....	25
The concepts of ‘damage’ and ‘accident’ .....	25
Limit to air carrier’s liability for baggage .....	26
Liability towards a passenger’s employer.....	26
Filing a complaint for baggage under the Montreal Convention .....	26

## DEFINITIONS

Article 2 of Regulation (EC) No 261/2004 defines a number of relevant terms for this Regulation. The CJEU interpreted some of them, and in particular the notions of 'air carrier', 'operating air carrier', 'denied boarding' and 'cancellation' (respectively Article 2(a), (b), (j) and (l) of the Regulation).

### **Air carrier and operating air carrier**

The Court ruled that an undertaking which had lodged an application for an operating licence, but which was not issued to it at the time of the performance of scheduled flights, cannot fall within the scope of Regulation (EC) No 261/2004, so that the passengers concerned have no right to compensation.

Case C-292/18 *Breyer*

<http://curia.europa.eu/juris/liste.jsf?num=C-292/18>

The Court has ruled that the air company which must pay the compensation owed to passengers under Regulation (EC) No 261/2004 is the air company which bears the operational responsibility for the flight, and not the air company which leased out the aircraft and its crew.

The Court thus clarified that in the case of a so-called "wet lease" (one airline, the lessor, provides an aircraft plus crew to another airline, the lessee), the lessor cannot be regarded as the operating air carrier for the purposes of the Regulation.

Case C-532/17 *Wirth*

<http://curia.europa.eu/juris/liste.jsf?num=C-532/17>

An air carrier may be classified as an 'operating air carrier' (against which the rights laid down in Regulation (EC) No 261/2004 are directed) in respect of a passenger if that passenger has concluded a contract with a tour operator for a particular flight operated by that air carrier without that air carrier having confirmed the hours of the flight or without that tour operator having made a booking for that passenger with that air carrier.

Joined Cases C-146/20, C-188/20, C-196/20 and C-270/20 *Azurair and Others*

<https://curia.europa.eu/juris/documents.jsf?num=C-146/20>

## Denied boarding

The concept of 'denied boarding' does not only relate to cases of overbooking but also to those where boarding is denied on other grounds, such as operational reasons. Airlines cannot validly justify a denied boarding and be exempted from paying compensation to passengers by invoking extraordinary circumstances or by assuming that passengers would not arrive on time for their connecting flight.

Cases C-22/11 *Finnair* and C-321/11 *Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor*

<https://curia.europa.eu/juris/liste.jsf?num=C-22/11>

<http://curia.europa.eu/juris/documents.jsf?num=C-321/11>

Regulation (EC) No 261/2004 does not confer on the air carrier concerned the power to assess and decide unilaterally and definitively whether denied boarding is reasonably justified, and consequently, to deprive the passengers in question of the protection they are entitled to under that Regulation. The standard terms and conditions of carriage cannot contain a clause that limits or waives the air carrier's obligations under this Regulation to compensate the passenger in the event of denied boarding due to supposedly inadequate travel documentation.

Case C-584/18 *Blue Air – Airline Management Solutions*

<http://curia.europa.eu/juris/liste.jsf?num=C-584/18>

## Cancellation

A flight which is delayed, irrespective of the duration of the delay, even if it is long, cannot be regarded as cancelled where there is a departure in accordance with the original planning. In those circumstances, where passengers are carried on a flight whose departure time is later than the departure time originally scheduled, the flight can be classified as 'cancelled' only if the air carrier arranges for the passengers to be carried on another flight whose original planning is different from that of the flight for which the booking was made.

Joined Cases C-402/07 and C-432/07 *Sturgeon*

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-402/07>

A flight is also not regarded as having been 'cancelled' in the case where the operating air carrier postpones the time of departure of that flight by less than three hours, without making any other change to that flight.

However, a flight must be regarded as having been 'cancelled' in the case where the operating air carrier brings that flight forward by more than one hour.

Joined Cases C-146/20, C-188/20, C-196/20 and C-270/20 *Azurair and Others*, Case C-263/20 *Airhelp* and Case C-395/20 *Corendon Airlines*

<https://curia.europa.eu/juris/documents.jsf?num=C-146/20>

<https://curia.europa.eu/juris/documents.jsf?num=C-263/20>

<https://curia.europa.eu/juris/documents.jsf?num=C-395/20>

'Cancellation' does not refer only to the situation in which the aeroplane in question fails to take off at all, but also covers the case in which that aeroplane took off but, for whatever reason, was subsequently forced to return to the airport of departure where the passengers of the said aeroplane were transferred to other flights. A flight in respect of which the places of departure and arrival accorded with the planned schedule but during which an unscheduled stopover took place cannot be regarded as cancelled.

Cases C-83/10 *Sousa Rodríguez* and C-32/16 *Wunderlich*

<http://curia.europa.eu/juris/liste.jsf?num=C-83/10>

<http://curia.europa.eu/juris/liste.jsf?num=C-32/16>

A flight diverted to an airport which is not that for which the booking was made must, as a rule, be regarded as a cancelled flight. This is not the case where the airport to which the flight was diverted serves the same town, city or region as the destination airport for which the booking was made.

Cases C-826/19 *Austrian Airlines* and C-253/21 *TUIfly*

<https://curia.europa.eu/juris/liste.jsf?num=C-826/19>

<https://curia.europa.eu/juris/liste.jsf?num=C-253/21>

## SCOPE OF THE REGULATION

*The scope of Regulation (EC) No 261/2004 is defined in Article 3. The CJEU has already answered several preliminary questions related to the territorial scope of the Regulation (Article 3(1)) and also ruled on the (burden of) proof related to the confirmed reservation and the check-in time (Article 3(2)), as well as on the application of the Regulation to passengers travelling at a reduced rate (Article 3(3)).*

### Territorial scope

The Court stated that a return flight is a separate flight from the outbound flight under Regulation (EC) No 261/2004, even if they were the subject of a single booking. In case the return flight does not originate in the EU and is not operated by an EU carrier, it is not subject to the Regulation.

Case C-173/07 *Emirates Airlines*

<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-173/07&td=ALL>

The Court clarified that it follows from the wording of Article 3(1) of Regulation (EC) No 261/2004, that defines its territorial scope, that the Regulation applies to passengers and not to the flights that those passengers have taken, meaning that only the location of the passenger's airport of departure and airport of arrival matter, and not those of the airports where the passenger undertakes a stopover in order to reach the final destination.

Therefore, the Regulation does not apply to connecting flights operated by an EU carrier which have been the subject of a single booking, where both the airport of departure of the first leg of the journey and the airport of arrival of the second leg of the journey are located in a third country, and only the airport where the stopover takes place is located in the territory of a Member State.

Case C-451/20 *Airhelp*

<https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-451/20>

Conversely, the Court confirmed that the right to compensation for long delays of flights applies to connecting flights from the EU to non-EU countries with stopovers outside the EU where these flights were booked as a single unit. This also applies where that delay takes place outside of the EU and there was a change of aircraft at the stopover. Moreover, where such connecting flights that were subject of a single reservation were performed under a code-share agreement with an EU carrier performing the first leg and a non-EU carrier performing the second leg, a passenger may bring his or her action for compensation against the EU carrier.

Cases C-537/17 *Wegener* and C-502/18 *České aerolinie*

<http://curia.europa.eu/juris/liste.jsf?num=C-537/17>

<http://curia.europa.eu/juris/documents.jsf?num=C-502/18>

Similarly, in the case of connecting flights booked as a single unit from a non-EU country to the EU with a stopover in the EU, where the cause of a long delay arises in the first flight operated, under a code-share agreement, by a carrier established in a non-EU country, a passenger may bring his or her action for compensation against the EU air carrier that performed the second flight.

Case C-367/20 *KLM Royal Dutch Airlines*

<http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-367/20&jur=C>

## **Confirmed reservation and check-in**

A passenger who has booked a flight has a 'confirmed reservation' (which is a necessary condition for entitlement to benefit from the rights laid down in Regulation (EC) No 261/2004) not only where he or she is in possession of a ticket, but also where the tour operator submits to that passenger, with whom it has a contract, other proof by which he or she is assured transport on a particular flight, individualised by points of departure and destination, times of departure and arrival, and the flight number.

It is irrelevant in this respect whether the tour operator has received confirmation from the air carrier concerned as to the times of departure and arrival of that flight. Passengers cannot be required to obtain information about the relationship between the tour operator and the air carrier.

Joined Cases C-146/20, C-188/20, C-196/20 and C-270/20 *Azurair and Others*

<https://curia.europa.eu/juris/documents.jsf?num=C-146/20>

Passengers who hold a confirmed reservation on a flight and have taken that flight, must be considered to have properly satisfied the requirement to present themselves for check-in without being required to produce, to that end, the boarding card or any other document confirming their presence, within the time limits prescribed, for check-in for the delayed flight.

Case C-756/18 *easyJet Airline*

<http://curia.europa.eu/juris/liste.jsf?num=C-756/18>

## **Passengers travelling free of charge or at a reduced rate**

A passenger who travels free of charge on account of his or her young age, but who does not have an allocated seat or a boarding pass and whose name does not appear on the reservations booked by his or her parents, is excluded from the scope of Regulation (EC) No 261/2004.

Case C-686/20 *Vueling Airlines*

<https://curia.europa.eu/juris/documents.jsf?num=C-686/20>

Regulation (EC) No 261/2004 does not apply to a passenger who travels by means of a preferential fare ticket issued by an air carrier as part of an event sponsorship operation, the benefit of which is restricted to certain specified persons and whose issue requires the prior and individual authorisation of that air carrier.

Case C-316/20 *Sata International - Azores Airlines*

<https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-316/20&jur=C>

## LONG DELAY AS AN ADDITIONAL SOURCE OF RIGHTS

*Regulation (EC) No 261/2004 establishes minimum rights for passengers when they are denied boarding against their will (Article 4) or when their flight is cancelled (Article 5) or delayed (Article 6).*

*While Article 6 of this Regulation associates certain rights to a delay at departure, the Court also considered that a long delay in arrival entitles passengers to compensation. In subsequent rulings, the Court applied a similar reasoning for missed connecting flights, and further defined the concepts of ‘arrival time’ and ‘scheduled arrival time’ used as benchmarks for determining a long delay.*

### Compensation for long delay

A long delay entitles passengers to the same compensation as in the case of a flight cancellation: the passenger is entitled to compensation if he reaches his/her final destination with a delay of three hours or more. 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.

Joined Cases C-402/07 and C-432/07 *Sturgeon*, Joined Cases C-581/10 and C-629/10 *Nelson*, and Case C-413/11 *Germanwings*

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-402/07>

<http://curia.europa.eu/juris/liste.jsf?num=C-581/10>

<https://curia.europa.eu/juris/liste.jsf?num=C-413/11>

### Compensation for missed connecting flight(s)

The compensation for long delays is also due to passengers of directly connecting flights reaching their final destination with a delay of at least three hours. The delay to be taken into account is the delay at arrival, including in case of flight connections. It does not matter whether the delay occurred at the departure airport, at the connecting airport(s) or at any stage of the journey, only the delay at the final destination of the journey is relevant for the right to compensation.

Case C-11/11 *Folkerts*

<http://curia.europa.eu/juris/liste.jsf?num=C-11/11&language=EN>



## **Time of arrival**

The CJEU considered that the 'arrival time', which is used to determine the length of the delay to which passengers on a flight have been subject, corresponds 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. The 'scheduled arrival time' used as the starting point for calculating a delay is the time which is fixed in the flight schedule and indicated on the reservation (ticket or other proof) held by the passenger concerned.

Cases C-452/13 *Germanwings*, C-654/19 *FP Passenger Service* and Joined Cases C-146/20, C-188/20, C-196/20 and C-270/20 *Azurair and Others*

<http://curia.europa.eu/juris/liste.jsf?num=C-452/13>

<http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-654/19&jur=C>

<https://curia.europa.eu/juris/documents.jsf?num=C-146/20>

For the purposes of determining the extent of the delay in arrival incurred by a passenger on a diverted flight which landed at an airport which is not that for which the booking was made but which serves the same town, city or region, it is necessary to take as a reference the time at which the passenger actually reaches, at the end of the transfer, either the airport for which the booking was made or, as the case may be, another close-by destination agreed with the operating air carrier.

Case C-826/19 *Austrian Airlines*

<https://curia.europa.eu/juris/liste.jsf?num=C-826/19>

## RIGHT TO COMPENSATION

*The amount of compensation is determined by Article 7 of Regulation (EC) No 261/2004. The CJEU ruled on the determination of this amount in case of connecting flights, and also confirmed that compensation might be due more than once in case of a re-routing flight. In addition, it ruled on possibilities to be exempted from the obligation for operating air carriers to provide compensation other than those arising from extraordinary circumstances under Article 5(3) of the Regulation, as well as, on the possibility foreseen by Article 7(2) of the Regulation to reduce the amount of the compensation by 50 %.*

### **Determining the amount of the compensation in case of connecting flights**

With regard to the right to compensation, Regulation (EC) No 261/2004 makes no distinction as to whether the passengers concerned reach their final destination by means of a direct flight or an air journey with connecting flights. In both cases, the passengers must be treated equally when calculating the amount of compensation. Consequently, when determining the amount of compensation in case of a connecting flight, only the radial distance ('great circle' distance) between the first airport of departure and the airport of the final destination should be taken into consideration, even if there was only a delay on the second leg, or where the long delay at arrival was caused by a cancellation of the second leg, which was to have been operated by a carrier other than the one with which that passenger concluded the contract of carriage.

Cases C-559/16 *Bossen*, C-939/19 *flightright* and C-592/20 *British Airways*

<http://curia.europa.eu/juris/liste.jsf?num=C-559/16>

<http://curia.europa.eu/juris/liste.jsf?num=C-939/19>

<https://curia.europa.eu/juris/liste.jsf?num=C-592/20>

### **“Double” compensation**

An air passenger who has received compensation for the cancellation of a flight and has accepted the re-routing flight offered to him is also entitled to compensation for the delay of the re-routing flight, where that delay is such as to give rise to entitlement to compensation and the air carrier of the re-routing flight is the same as that of the cancelled flight.

Case C-832/18 *Finnair*

<http://curia.europa.eu/juris/liste.jsf?num=C-832/18>

## **Exemptions (other than extraordinary circumstances) and reductions**

In case of connecting flights, compensation is not payable to a passenger that reaches his or her final destination at the arrival time originally scheduled where the air carrier changes the passenger's reservation for the first leg while still allowing the passenger to board the second of his or her reserved flights.

Case C-191/19 *Air Nostrum*

<http://curia.europa.eu/juris/liste.jsf?num=C-191/19>

An operating air carrier is not exempted from paying compensation where the passenger was not informed of a flight cancellation at least two weeks before the scheduled time of departure where the intermediary (e.g. travel agent, online travel agency) with whom the passenger had the contract of carriage did not pass on this information from the air carrier to the passenger in time, and the passenger did not expressly authorise that intermediary to receive the information transmitted by that operating air carrier.

Cases C-302/16 *Krijgsman* and C-263/20 *Airhelp*

<http://curia.europa.eu/juris/liste.jsf?num=C-302/16>

<https://curia.europa.eu/juris/documents.jsf?num=C-263/20>

Where a flight has been brought forward by a significant amount of time, giving rise to a right to compensation (which implies, inter alia, late communication that the flight has been brought forward), the operating air carrier is still required to pay the total amount (which is, depending on the distance, € 250, 400 or 600). It does not have the possibility to reduce any compensation to be paid by 50 % on the ground that it has offered the passenger re-routing, allowing him or her to arrive without delay at his or her final destination.

Joined Cases C-146/20, C-188/20, C-196/20 and C-270/20 *Azurair and Others*

<https://curia.europa.eu/juris/documents.jsf?num=C-146/20>

## EXTRAORDINARY CIRCUMSTANCES

*An important number of rulings of the CJEU on air passenger rights concern the application of Article 5(3) of Regulation (EC) No 261/2004, which foresees an exemption to the obligation to pay compensation if the operating air carrier can prove that the cancellation or long delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.*

*The Court developed two cumulative conditions for the classification of events as 'extraordinary circumstances' which it has consistently applied throughout its case-law, namely if (1), by their nature or origin, they are not inherent in the normal exercise of the activity of the air carrier concerned and (2) they are outside that carrier's actual control.*

### Technical problems

The Court has clarified further that a technical problem which comes to light during aircraft maintenance or is caused by failure to maintain an aircraft cannot be regarded as 'extraordinary circumstances' as a general principle.

For instance, a breakdown which was caused by the premature malfunction of certain components of an aircraft may constitute an unexpected event. Nevertheless, such a breakdown remains intrinsically linked to the very complex operating system of the aircraft, which is operated by the air carrier in conditions, particularly meteorological conditions, which are often difficult or even extreme, it being understood moreover that no component of an aircraft lasts forever. The same is also true, in principle, for the failure of a part which is only replaced by a new part when it becomes defective ('on condition' part).

However, a hidden manufacturing defect revealed by the manufacturer of the aircraft or by a competent authority, or damage to the aircraft caused by acts of sabotage or terrorism may constitute extraordinary circumstances.

Cases C-549/07 *Wallentin-Hermann*, C-257/14 *van der Lans* and C-832/18 *Finnair*

<http://curia.europa.eu/juris/liste.jsf?num=C-549/07>

<http://curia.europa.eu/juris/liste.jsf?num=C-257/14>

<http://curia.europa.eu/juris/liste.jsf?num=C-832/18>

## Strike by flight staff

The Court has ruled that neither a 'wildcat strike' by flight staff following the surprise announcement of a restructuring of the air carrier, nor a strike organised by a trade union of the staff of an air carrier that is intended to assert workers' demands do constitute an 'extraordinary circumstance', and thus do not release the airline from its obligation to pay compensation in the event of cancellation or long delay of flights. The existence of prior negotiations with workers' representatives does not affect this conclusion. 'External' strikes, such as strike action taken by air traffic controllers or airport staff, may constitute an extraordinary circumstance nonetheless.

Cases C-195/17 *Krüsemann and Others*, C-28/20 *Airhelp*, C-613/20 *Eurowings* and

<http://curia.europa.eu/juris/liste.jsf?language=en&num=c-195/17>

<https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-28/20&jur=C>

<https://curia.europa.eu/juris/liste.jsf?num=C-613/20>

## 'External' events

It is apparent from the Court's case-law relating to the concept of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation (EC) No 261/2004 that events whose origin is 'internal' must be distinguished from those whose origin is 'external' to the operating air carrier. The latter events, which generally qualify as 'extraordinary circumstances', result from the activity of the air carrier and from external circumstances which are more or less frequent in practice but which the air carrier does not control because they arise from a natural event or an act of a third party, such as another air carrier or a public or private operator interfering with flight or airport activity.

The Court concluded that a collision between an aircraft and a bird is an extraordinary circumstance which may exempt the air carrier from its obligation to pay compensation if a flight is delayed significantly. However, where an authorised expert finds after the collision that the aircraft concerned is airworthy, the carrier cannot justify the delay by invoking the need to carry out a second check. The judgment has also confirmed that any delay caused by an extraordinary circumstance needs to be deducted from an overall delay in arrival in order to assess whether compensation must be paid.

Case C-315/15 *Pešková and Peška*

<http://curia.europa.eu/juris/liste.jsf?num=C-315/15>

A situation where an airport's set of mobile boarding stairs collides with an aircraft cannot be categorised as 'extraordinary circumstances'. However, a collision between the elevator of an aircraft in a parking position and the winglet of an aircraft of another airline caused by the movement of the latter aircraft falls within the concept of 'extraordinary circumstances'.

Cases C-394/14 *Siewert* and C-264/20 *Airhelp*

<http://curia.europa.eu/juris/documents.jsf?num=C-394/14>

<https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-264/20&jur=C>

Damage to an aircraft tyre caused by a foreign object, such as loose debris, lying on an airport runway falls within the notion of 'extraordinary circumstances'. This is also true in case of presence of petrol on

a runway of an airport which led to its closure and, consequently, the long delay of a flight to or from that airport, when the petrol in question does not originate from an aircraft of the carrier that operated that flight.

Cases C-501/17 *Germanwings* and C-159/18 *Moens*

<http://curia.europa.eu/juris/liste.jsf?num=C-501/17>

<http://curia.europa.eu/juris/liste.jsf?num=C-159/18>

The unruly behaviour of a passenger which has justified the pilot in command of the aircraft in diverting the flight concerned to an airport other than the airport of arrival in order to disembark that passenger and his baggage falls within the concept of 'extraordinary circumstances', unless the operating air carrier contributed to the occurrence of that behaviour or failed to take appropriate measures in view of the warning signs of such behaviour.

Case C-74/19 *Transportes Aéreos Portugueses*

<http://curia.europa.eu/juris/documents.jsf?num=C-74/19>

## **Volcano eruption**

Circumstances such as the closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute 'extraordinary circumstances' within the meaning of Regulation (EC) No 261/2004 which do not release air carriers from their obligation laid down in Articles 5(1)(b) and 9 of the regulation to provide care.

Case C-12/11 *McDonagh*

<http://curia.europa.eu/juris/liste.jsf?num=C-12/11>

## **Extraordinary circumstance on a previous flight with the same aircraft**

In order to be exempted from its obligation to compensate passengers in the event of a long delay or cancellation of a flight, an operating air carrier may rely on an 'extraordinary circumstance' which affected a previous flight which it operated using the same aircraft, provided that there is a direct causal link between the occurrence of that circumstance and the long delay or cancellation of the subsequent flight.

Cases C-74/19 *Transportes Aéreos Portugueses* and C-826/19 *Austrian Airlines*

<http://curia.europa.eu/juris/documents.jsf?num=C-74/19>

<https://curia.europa.eu/juris/liste.jsf?num=C-826/19>

## Reasonable measures to be taken by the air carrier

Article 5(3) of Regulation (EC) No 261/2004 must be interpreted as meaning that an air carrier, since it is obliged to implement all reasonable measures to avoid extraordinary circumstances, must reasonably, at the stage of organising the flight, take account of the risk of delay connected to the possible occurrence of such 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. However, the required reserve time should not result in the air carrier being led to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time.

Case C-294/10 *Eglītis and Ratnieks*

<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-294/10>

An air carrier must prove that it deployed all its resources in terms of staff or equipment and the financial means at its disposal in order to avoid the changing of a tyre damaged by a foreign object, such as loose debris, lying on the airport runway from leading to long delay of the flight in question.

Case C-501/17 *Germanwings*

<http://curia.europa.eu/juris/liste.jsf?num=C-501/17>

Re-routing a passenger, on the ground that the aircraft carrying that passenger was affected by an extraordinary circumstance, by means of a flight operated by that carrier and resulting in that passenger arriving on the day following the day originally scheduled, does not constitute a 'reasonable measure' releasing that carrier from its obligation to pay compensation, unless there was (i) no other possibility of direct or indirect re-routing by a flight operated by itself or any other air carrier and arriving at a time which was not as late as the next flight of the air carrier concerned or (ii) unless the implementation of such re-routing constituted an intolerable sacrifice for that air carrier in the light of the capacities of its undertaking at the relevant time.

Cases C-74/19 *Transportes Aéreos Portugueses* and C-264/20 *Airhelp*

<http://curia.europa.eu/juris/documents.jsf?num=C-74/19>

<https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-264/20&jur=C>

## RIGHT TO REIMBURSEMENT AND RE-ROUTING

*Article 8 of Regulation (EC) No 261/2004 foresees that passengers should be offered a one-off choice between (a) a reimbursement and, where relevant, a return flight to the first point of departure at the earliest opportunity, (b) re-routing to their final destination at the earliest opportunity or (c) re-routing to their final destination at a later date at the passenger's convenience (commonly referred to as re-booking). Article 8 applies in the case of denied boarding, cancellation or delay at departure of at least five hours (but then only the right to reimbursement under (a) applies).*

*The CJEU has ruled on the scope of the reimbursement, as well as on additional responsibilities on operating air carriers arising from the application of Article 8 of the Regulation.*

### Full cost of the ticket

The price of the ticket to be taken into consideration for the purposes of determining the reimbursement owed by the air carrier to a passenger in the event of cancellation of a flight includes the difference between the amount paid by that 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, unless that commission was set without the knowledge of the air carrier.

Case C-601/17 *Harms*

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-601/17&td=ALL>

### Re-routing

In case of denied boarding, operating air carriers must present the passengers concerned with comprehensive information on all the options concerning reimbursement and re-routing, with the passengers in question being under no obligation to contribute actively to seeking information to that end. The burden of proving that re-routing was performed at the earliest opportunity lies with the operating air carrier.

Case C-354/18 *Rusu*

<http://curia.europa.eu/juris/liste.jsf?num=C-354/18>

Informing a passenger, before the beginning of the journey, that his or her flight has been brought forward may constitute an 'offer of re-routing'.

Joined Cases C-146/20, C-188/20, C-196/20 and C-270/20 *Azurair and Others*

<https://curia.europa.eu/juris/documents.jsf?num=C-146/20>



## **Diversion of a flight to an airport serving the same town, city or region**

Where a diverted flight lands at an airport which is not that for which the booking was made but which serves the same town, city or region, the operating air carrier must on its own initiative offer the passenger to bear the cost of transfer either to the destination airport for which the booking was made or, as the case may be, to another close-by destination agreed with the passenger. Breach by the operating air carrier of this obligation does not confer on the passenger a right to flat-rate compensation under Article 7(1) of Regulation (EC) No 261/2004. By contrast, that breach gives rise, for the benefit of the passenger, to a right to reimbursement of the amounts incurred by him or her and which, in the light of the specific circumstances of each case, prove necessary, appropriate and reasonable to remedy the shortcomings of the air carrier.

The bearing of the cost of transferring the passenger between the two airports is not subject to the condition that the first airport be situated in the territory of the same town, of the same city or of the region as the second airport. The words 'town, city or region' must be understood as referring less to a specific infra-State territorial entity, of an administrative or even political nature, than to a territory characterised by the presence of airports which are in close proximity to that territory which they are intended to serve.

*Case C-826/19 Austrian Airlines*

<https://curia.europa.eu/juris/liste.jsf?num=C-826/19>

## **RIGHT TO CARE**

As regards the obligation to provide care, the air carrier must provide free of charge, in light of the waiting time, refreshments, meals and, where appropriate, hotel accommodation and transport between the airport and place of accommodation, as well as means of communication with third parties. The air carrier is obliged to fulfil that obligation even when the cancellation of the flight is caused by extraordinary circumstances, that is to say circumstances which could not have been avoided even if all reasonable measures had been taken. The obligation to offer hotel accommodation free of charge does not mean that the carrier is required to take care of the accommodation arrangements as such.

Cases C-12/11 *McDonagh* and C-530/19 *Niki Luftfahrt*

<http://curia.europa.eu/juris/documents.jsf?num=C-12/11>

<http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-530/19>

## RIGHT TO INFORMATION

In the event of denied boarding or of cancellation, the operating air carrier is required to inform the air passenger of the precise name and address of the undertaking from which that passenger may claim compensation and, where appropriate, to specify the documents which must be attached to his or her claim for compensation, without, however, that carrier being required to inform the air passenger of the exact amount of compensation which the latter may potentially obtain.

Joined Cases C-146/20, C-188/20, C-196/20 and C-270/20 *Azurair and Others*

<https://curia.europa.eu/juris/documents.jsf?num=C-146/20>

In case of denied boarding, operating air carriers must present the passengers concerned with comprehensive information on all the options concerning reimbursement and re-routing, with the passengers in question being under no obligation to contribute actively to seeking information to that end. The burden of proving that re-routing was performed at the earliest opportunity lies with the operating air carrier.

Case C-354/18 *Rusu*

<http://curia.europa.eu/juris/liste.jsf?num=C-354/18>

## OBLIGATIONS IN CASE OF CONTRACT OF CARRIAGE WITH A THIRD PARTY

The CJEU has ruled in four judgments on the obligations of the operating air carrier arising from Regulation (EC) No 261/2004 where a flight ticket was booked through an intermediary (e.g. travel agent or booking platform), entailing the absence of a contractual relationship between the passenger and the operating air carrier. Two of these rulings concerned the application of the Regulation in relation to the Package Travel Directive,<sup>2</sup> which will be first discussed below.

### Flights part of a package travel

A passenger who has the right to hold his travel organiser liable for reimbursement of the cost of his air ticket under the Package Travel Directive, can no longer claim reimbursement of the cost of that ticket from the air carrier under Regulation (EC) No 261/2004, even where the travel organiser is financially incapable of reimbursing the cost of the ticket and has not taken any measures to guarantee such reimbursement.

Case C-163/18 *Aegean Airlines*

<http://curia.europa.eu/juris/liste.jsf?num=C-163/18>

A passenger may bring an action for compensation against the operating air carrier, even if there is no contract between them and the flight in question forms part of a package under the Package Travel Directive.

Case C-215/18 *Primera Air Scandinavia*

<http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-215/18>

### Stand-alone flights booked through an online booking platform

The onus is on the air carrier, in the event of cancellation of a flight, to offer assistance to the passengers concerned in the form of offering them, inter alia, reimbursement of their ticket, at the price at which it was bought, and, where necessary, a return flight to their first point of departure.

Case C-601/17 *Harms*

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-601/17&td=ALL>

An operating air carrier is required to pay the compensation where the passenger was not informed of a flight cancellation at least two weeks before the scheduled time of departure where the intermediary (e.g. travel agent, online travel agency) with whom the passenger had the contract of carriage did not pass on this information from the air carrier to the passenger within that period, and the passenger did not expressly authorise that intermediary to receive the information transmitted by that operating air carrier.

Cases C-302/16 *Krijgsman* and C-263/20 *Airhelp*

<http://curia.europa.eu/juris/liste.jsf?num=C-302/16>

---

<sup>2</sup> Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326, 11.12.2015, p. 1.

## **VARIOUS**

*The CJEU also ruled on other rights and obligations arising from Regulation (EC) No 261/2004, and in particular those related to downgrading (Article 10), further compensation (Article 12) and the exclusion of waiver (Article 15). Additionally, it ruled on the currency in which compensation under Article 7 is due.*

### **Further compensation**

The meaning of ‘further compensation’ allows a national court to award compensation, under the conditions provided for by the Montreal Convention or national law, for damage, including non-material damage, arising from breach of a contract of carriage by air. A national court can also deduct the compensation granted under Regulation (EC) No 261/2004 from further compensation but that regulation does not require it to do so.

Cases C-83/10 *Sousa Rodríguez*, C-354/18 *Rusu* and C-153/19 *DER Touristik*

<http://curia.europa.eu/juris/liste.jsf?num=C-83/10>

<http://curia.europa.eu/juris/liste.jsf?num=C-354/18>

<http://curia.europa.eu/juris/liste.jsf?num=C-153/19&language=EN>

### **Downgrading**

Where a passenger is downgraded on a flight, 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 which case it must be based on the part of the price of the ticket corresponding to the quotient resulting from the distance of that flight and the total distance which the passenger is entitled to travel. This price does not include taxes and charges indicated on the ticket.

Case C-255/15 *Mennens*

<http://curia.europa.eu/juris/liste.jsf?td=ALL&language=en&jur=C,T,F&num=c-255/15>

### **Currency in which compensation is due**

Passengers whose flights have been cancelled or subject to a long delay may demand payment of the amount of the compensation in the national currency of their place of residence.

Case C-356/19 *Delfly*

<http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-356/19>

## **ENFORCEMENT BY NATIONAL AUTHORITIES AND COURTS**

*The enforcement of Regulation (EC) No 261/2004 is ensured on the level of the Member States by national enforcement bodies (or NEBs) and national courts.*

*Article 16 of Regulation (EC) No 261/2004 foresees in this regard that Member States shall designate NEBs responsible for the enforcement of the Regulation. The CJEU has ruled on the applicable obligations of these bodies where a passenger files an individual complaint. The Court has also responded to a number of preliminary questions on the competent courts for judicial actions based on the Regulation, as well as on the applicable time limit for launching such an action on the national level.*

### **National enforcement bodies (NEB)**

Under Regulation (EC) No 261/2004, national enforcement bodies carry out general monitoring activities in order to guarantee air passengers' rights but are not required to act on individual complaints. Hence, a national enforcement body is not required to take enforcement action against air carriers with a view to compelling them to pay the compensation provided for in the Regulation in individual cases. Its sanctioning role consists of measures to be adopted in response to the infringements which the body identifies in the course of its general monitoring activities.

However, the Court observes that, in view of the objectives of the Regulation and the discretion enjoyed by Member States in the allocation of the powers with which they intend to endow the bodies in question, it is open to Member States, in order to remedy inadequate protection for air passengers, to empower those bodies to adopt measures in response to individual complaints.

Joined Cases C-145/15 and C-146/15 *Ruijsenaars and Jansen*  
<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-145/15>

### **Time limit for bringing an action to a national court**

The time-limits for bringing actions for compensation for flight cancellation under Union law are determined in accordance with the rules of each Member State on the limitation of actions. The provisions of the Warsaw and Montreal Conventions are not relevant, because the compensation measure laid down by Regulation (EC) No 261/2004 falls outside their scope.

Case C-139/11 *Cuadrench Moré*  
<http://curia.europa.eu/juris/documents.jsf?num=C-139/11>

## Jurisdiction of a national court

For flights from one Member State to another Member State, carried out on the basis of a contract with a single operating air carrier, a claim for compensation under the Regulation can be brought, at the applicant's choice, to the national court which has territorial jurisdiction either over the place of departure or place of arrival, as stated in the contract of carriage (in application of Council Regulation (EC) No 44/2001 ('Brussels I'), now recast under Regulation (EU) No 1215/2012 ('Brussels I bis')). Under Article 2(1) of Brussels I, passengers also retain the option of bringing the matter before the courts of the defendant's (air carrier's) domicile.

Case C-204/08 *Rehder*

<http://curia.europa.eu/juris/documents.jsf?num=C-204/08>

In the case of connecting flights, an action may be brought under Brussels I bis before the national court of the place of arrival of the second leg where the carriage was operated by two different air carriers and the action for compensation is based on an irregularity which took place on the first of those flights operated by the air carrier with which the passengers concerned do not have contractual relations. Similarly, an action may be brought before the national court of the place of departure of the first leg where the claim for compensation arises from the cancellation of the final leg of the journey and is brought against the air carrier in charge of that last leg.

However, in the case of connecting flights consisting of two or more legs on which transport is performed by separate air carriers, an action cannot be brought before the place of arrival of the first leg where the claim for compensation arises exclusively from a delay of the first leg of the journey caused by a late departure and is brought against the air carrier operating that first leg.

Joined Cases C-274/16, C-447/16 and 448/16 *flightright*, Case C-606/19 *flightright* and Case C-20/21 *LOT Polish Airlines*

<http://curia.europa.eu/juris/liste.jsf?num=C-274/16>

<http://curia.europa.eu/juris/documents.jsf?num=C-606/19>

<http://curia.europa.eu/juris/liste.jsf?num=C-20/21>

A court of a Member State does not have jurisdiction to hear a dispute concerning a claim for compensation directed against an airline established in another Member State on the ground that that company has a branch in the territorial jurisdiction of the court seised, if that branch was not involved in the legal relationship between the airline and the passenger concerned.

Case C-464/18 *Ryanair*

<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-464/18>

A jurisdiction clause incorporated in a contract of carriage concluded between a passenger and an airline cannot be enforced by the airline against a collection agency to which the passenger has assigned the claim, unless, under the legislation of the Member State whose courts are designated in that clause, that collection agency is the successor to all the initial contracting party's rights and obligations. Where appropriate, such a clause, incorporated, without having been subject to an individual negotiation, in a contract concluded between a consumer, that is to say, the air passenger, and a seller or supplier, that is to say, the airline, and which confers exclusive jurisdiction on the courts

which have jurisdiction over the territory in which that airline is based, must be considered as being unfair within the meaning of Article 3(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

Case C-519/19 *DelayFix*

<https://curia.europa.eu/juris/documents.jsf?num=C-519/19>

Under Brussels I, a passenger may bring an action for compensation towards an operating air carrier, even if no contract was concluded between them and the flight was part of a package travel contract.

Case C-215/18 *Primera Air Scandinavia*

<http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-215/18>

While the territorial jurisdiction on a claim for compensation under Regulation (EC) No 261/2004 should be assessed under the Brussels I bis Regulation, a jurisdiction regarding a complementary claim for further damage falling within the scope of the Montreal Convention should be assessed under that Convention.

Case C-213/18 *Guaitoli e.a.*

<http://curia.europa.eu/juris/liste.jsf?num=C-213/18&language=EN>



## CASE-LAW ON THE MONTREAL CONVENTION

*An air carrier's liability in respect of passengers and their baggage is further regulated by the Montreal Convention. The CJEU has delivered several judgments on the interpretation of this Convention, six of which are highlighted below.*

### The concepts of 'damage' and 'accident'

The term 'damage', which underpins Article 22(2) of the Montreal Convention that sets the limit of an air carrier's liability for the damage resulting, inter alia, from the loss of baggage, must be interpreted as including both material and non-material damage.

Case C-63/09 *Walz*

<http://curia.europa.eu/juris/liste.jsf?num=C-63/09>

The concept of 'accident' within the meaning of Article 17(1) of the Montreal Convention, which establishes the liability of an air carrier for damage sustained in the case of death or bodily injury of a passenger, covers all situations occurring on board an aircraft in which an object used when serving passengers has caused bodily injury to a passenger, such as a hot coffee spill, without it being necessary to examine whether those situations stem from a hazard typically associated with aviation.

This concept does not cover a landing that has taken place in accordance with the operating procedures and limitations applicable to the aircraft in question, including the tolerances and margins stipulated in respect of the performance factors that have a significant impact on landing, and taking into account the rules of the trade and best practice in the field of aircraft operation, even if the passenger concerned perceives that landing as an unforeseen event.

Cases C-532/18 *Niki Luftfahrt* and C-70/20 *Altenrhein Luftfahrt*

<http://curia.europa.eu/juris/liste.jsf?num=C-532/18>

<https://curia.europa.eu/juris/documents.jsf?num=C-70/20>

## **Limit to air carrier's liability for baggage**

The sum provided in Article 22(2), which is the limit of the air carrier's liability in the event of destruction, loss and delay of, or of damage to, checked baggage which has not been the subject of a special declaration of interest in delivery constitutes a maximum amount of compensation which the passenger concerned does not enjoy automatically and at a fixed rate.

Case C-86/19 *Vueling*

<http://curia.europa.eu/juris/liste.jsf?num=C-86/19>

The right to compensation and the limits to a carrier's liability in the event of loss of baggage apply also to a passenger who claims that compensation by virtue of the loss of baggage checked in in another passenger's name, provided that that lost baggage did in fact contain the first passenger's items.

Case C-410/11 *Espada Sánchez and Others*

<https://curia.europa.eu/juris/liste.jsf?num=C-410/11>

## **Liability towards a passenger's employer**

An air carrier which has concluded a contract of international carriage with an employer of persons carried as passengers is liable to that employer for damage occasioned by a delay in flights on which its employees were passengers pursuant to that contract, on account of which the employer incurred additional expenditure.

Case C-429/14 *Air Baltic Corporation*

<https://curia.europa.eu/juris/liste.jsf?num=C-429/14>

## **Filing a complaint for baggage under the Montreal Convention**

A complaint must be made in writing within the periods referred to in Article 31(2) of the Montreal Convention, failing which no action may be brought against the carrier. This requirement is fulfilled if this complaint is recorded in the information system of the air carrier by its representative, provided that the passenger can check the accuracy of the text of the complaint, as taken down in writing and entered in that system, and can, where appropriate, amend or supplement it, or even replace it, before expiry of the period laid down in Article 31(2) of that Convention. Finally, making a complaint is not subject to further substantive requirements in addition to that of giving notice to the air carrier of the damage sustained.

Case C-258/16 *Finnair*

<https://curia.europa.eu/juris/liste.jsf?num=C-258/16>