

Publications

Aviation Regulation 261-2004

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Ec Regulation 261/2004, will there be a limit?

As EC Regulation 261/2004 is due to be revised in the next coming years, the European Court of Justice continues to add pressure to the Airlines with its - unfortunately now famous - interpretation of the concept of “extraordinary circumstances”.

After the Wallentin and Sturgeon court decisions, it seems that “Denise McDonagh case” will be a new case to be taken into account if we consider the opinion of the Advocate General Yves Bot as it was published on the past 22nd of March.

In a nutshell, the passenger claim arises from a cancellation of a Faro-Dublin flight on the 17th of April 2010. According to the airline, although interested in providing the agreed services under the contract of carriage, it was not permitted to do so due to closure of airspace.

According to Ms. McDonagh’s claim, no assistance was provided to her during the relevant period.

In conclusion, the relevant issue was to know if the closure of airspace due to the Eyjafjallajökull volcano is considered an “extraordinary circumstance” for the purposes of Regulation 261/2004.

Taking such facts into consideration, the Advocate-General presented new surprising arguments to

deny the airline claim on the basis of lack of proportionality.

For a start, it's not surprising that the obligation to provide assistance by the carrier is reinforced "(...) the obligation to provide care must remain compelling, whatever the event which resulted in the cancellation and whether or not the air carrier was responsible for that event."...

...equally not surprising, the request for a limitation on assistance is denied: "I consider that a limitation would in some measure deprive Articles 5 and 9 of Regulation No 261/2004 of their effectiveness, since after a few days the air passengers concerned would be abandoned to their fate."

A position that, if supported by the Commission in the next revision of the Regulation means one of the main claims carriers have been fighting for at the Regulation revision will, quite simply, not occur.

However, the worse is yet to come, it appears that the carriers argument on the lack of proportionality between the assistance as interpreted previously and the service agreed from an equitable balance of interests between the parties will not prevail. It's stated in the opinion rendered that there is no lack of proportionality since the carrier "introduced an 'EU 261' levy per passenger and per flight in order to cover the costs which it has incurred in connection with its obligation, among other things, to provide care for passengers whose flights have been cancelled in cases of force majeure. (...)In so far as Ryanair passes on to passengers, as it is entitled to do, the costs incurred as a result of compensation, if it is difficult to see how it can be suffering an inequitable imbalance."

Naturally, the existence of such charge, although it might reduce the unbalance between the cost of assistance provided and the cost of the ticket (specially uneven with low-cost airlines), does not clear the gap existing between one and the other. However, such argument could actually be seen as the opening of Pandora's box to an economical analysis of overall costs in rendering assistance and airline's policy in respect of a price increase to support such charge. Airlines are free to determine the overall ticket price, naturally, but to start such practice should not be considered a waiver on the airline rights to fight what most consider to be an unjust regulation.