

CONSIDERATIONS REGARDING THE EC REGULATION NO. 261/2004 FROM THE PERSPECTIVE OF THE PROTECTION OF PASSENGERS, BUT ALSO OF AIR TRANSPORT OPERATORS

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Abstract: *The study regarding the interpretation and application of the provisions of the EC Regulation no. 261/2004 aims to highlight theoretical and practical aspects outlined since the entry into force of this normative act and until now. The European legislator has adopted this normative act, with direct binding force for the member states of the European Union, in order to ensure a protection of passengers who have concluded air transport contracts with different effective air transport operators. In essence, passengers are consumers and air carriers are in a dominant position, as a contracting party, in this type of contract, which is usually one of accession. However, the interpretation and application of this normative act in the different Member States has generated non-unitary practices from the perspective of the terms defined by the Regulation, but also unfair practices in the sense of forming an immoral market in which the right to compensation is traded.*

Key words: *Flight operator, Passenger, Air Transport Contract, Compensation, Tour operator*

1. Introduction

Regulation (EC) No 261/2004 of 11 February 2004 laying down common rules for the compensation and assistance of passengers in the event of denied boarding and cancellation or long delay of flights and repealing Regulation (EEC) No 2454/93 Regulation (EC) No 295/91, adopted by the European Parliament and the Council of the European Union, hereinafter referred to as the Regulation, laid down measures in the field of air transport aimed at ensuring a high level of passenger protection, taking into account consumer protection requirements in general.

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These measures were aimed at eliminating the serious difficulties and inconveniences caused to passengers in the event of denied boarding, cancellation of flights or prolonged delay.

The normative act took into account the improvement, at the level of the European Union, of the protection standards for the consolidation of the passengers' rights, as well as for the activity of the air carriers in harmonized conditions, on a liberalized market.

The provisions of this Regulation shall apply to both scheduled and scheduled flights, including those included in tourist packages.

Under the *Montreal Convention*, the obligations of actual air carriers must be limited or even exonerated in cases where the event which gave rise to the refusal of boarding, cancellation or delay of the flight is caused by exceptional events, which cannot be avoided for profit all reasonable measures taken. Such circumstances may occur in particular in the event of political instability, weather conditions incompatible with the conduct of the flight in question, safety risks, unforeseen deficiencies which may affect flight safety and strikes affecting the operations of the actual air carrier.

Extraordinary circumstances are also considered to exist if the impact of an air traffic management decision on a particular aircraft on a given day causes a prolonged delay, a one-night delay or the cancellation of one or more flights of that aircraft, notwithstanding any reasonable measures taken by the air carrier concerned in order to avoid this situation.

2. Obligation to Inform

As the air transport activity is carried out on the basis of air transport contracts concluded between passengers and air carriers, the general rules on the contract are applicable to them, with the specific features of the subject of these contracts.

Thus, once the contract has been validly concluded, its binding force towards the contracting parties intervenes and from this derives the obligation of good faith in the execution of the obligations, the obligation of information between the contracting parties and the obligation of cooperation and loyalty between the contracting parties.

With regard to the obligation to inform, the Regulation imposes an obligation on air carriers so that passengers are fully informed of their rights in the event of denied boarding and of cancellation or prolonged delay of flights, so that they can effectively exercise their rights.

From this perspective, the Regulation requires the Member States of the European Union to designate an authority to verify the fulfillment of the obligations imposed by this normative act, including the obligation to inform. As a rule, at the level of the Member States this institution is the Civil Aviation Authority, which has a distinct name from one country to another.

Member States are also free to impose sanctions on air carriers if they do not comply with the obligations laid down in the Regulation.

As a rule, these sanctions are the result of the establishment of certain forms of liability for infringements, which they find in fines, the amount of which is different set in the domestic laws of the Member States of the European Union.

The application of these sanctions by the State authority designated to verify compliance with the Regulation by air carriers is independent of their civil liability towards passengers.

3. Notions relevant to the applicability of the Regulation

The scope of the Regulation applies to passengers departing from an airport located in the territory of a Member State, or passengers departing from an airport located in a third country to an airport located in the territory of a Member State.

The regulation does not apply to passengers traveling for free or at a reduced fare, which is not available directly or indirectly to the public.

Refusal of boarding means refusing to carry passengers on a particular flight, even though they have presented themselves for boarding, unless there are still compelling reasons for refusing boarding, such as health, safety or security requirements or improper travel.

Cancellation of the flight means the non-execution of a flight previously scheduled and for which at least one reservation has been made.

By reservation is meant that the passenger possesses a ticket or other supporting document, which indicates that the reservation has been accepted and registered by the air carrier or tour operator.

Flight delay means exceeding the pre-established flight schedule by more than 2 hours in the case of flights of more than 1500 km or less; more than 3 hours for any other flight between 1500 and 3500 km; more than 4 hours in the case of other flight distances.

The air carrier is an air carrier that holds a valid operating license.

The actual air carrier is the air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, who has entered into a contract with that passenger.

The tour operator is an organizer within the meaning of Article 2 (2) of Council Directive 90/314 / EEC of 13 06 1990 on package travel, package holidays and package tours.

The ticket is a valid document giving the right to transport, or its equivalent in another form, including in electronic form, issued or authorized by the air carrier or its authorized agent.

4. Liability Established by the Regulation

The Regulation regulated a form of civil liability on the part of the effective air transport operator, as this notion is defined by art. 2 letter b, towards the passengers who are in one of the established premise situations.

Thus, according to Article 2 paragraph 5 of the Regulation, it applies to all effective air transport operators that provide passenger transport. If an actual air carrier that has not entered into a contract with the passenger performs its obligations under this Regulation, then it shall be deemed to do so on behalf of the person who has a contract with that passenger.

Thus, the illicit deed pre-established by the Regulation, may consist in the refusal of boarding (art. 4 of the Regulation), the cancellation of the flight (art. 5 of the Regulation) or the delay of the flight (art. 6 of the Regulation).

Regarding the existence of such hypotheses, art. 14 of the Regulation imposes the obligation to inform passengers about their rights.

Thus, in case of flight delay or cancellation, a legible poster with clear characters in the passenger registration area is required. In the event of denied boarding or cancellation of the flight, the actual air carrier shall provide each passenger with a written communication specifying the assistance provided and the amount of compensation.

We appreciate that the form of civil liability established by the Regulation is tortious and extracontractual liability, respectively.

Thus, although an air transport contract was concluded directly or indirectly between the air carrier and the passenger through a travel agent or operator, the liability established by the Regulation does not relate to the breach of the contractual obligations assumed by the air carrier, which subsists separately, but takes into account the breach of non-contractual obligations resulting from the establishment of obligations at European Union level for the protection and safety of passengers and intra-Community flights.

Regarding the damage, art.7 of the Regulation established its limit, referring to the right to compensation. Thus, the amount of compensation is 250 euros for all flights of 1500 km or less, 400 euros for intra-Community flights of more than 1500 km and for all flights between 1500 and 3500 km and 600 euros for all other flights that do not fall into the mentioned categories. .

According to art.12 of the Regulation, passengers may receive additional compensation, according to specific agreements or conventions, and the value established by the Regulation may be deducted from their value.

According to art.15 of the Regulation, the right to compensations established by this normative act cannot be the object of a limitation or contractual waiver.

This provision leads to the conclusion that the liability established by the Regulation is not a contractual civil liability, taking into account the provisions of art.1355 of the Civil Code regarding the clauses regarding the liability.

Regarding the value of the transport ticket, art. 8 of the Regulation establishes the right to reimbursement or redirection.

Thus, passengers have the right to choose between the refund, within 7 days of the full cost of the ticket, at the purchase price or the redirection, under comparable transport conditions, to the final destination.

With regard to the requirement of guilt, as a condition for bringing the actual liability of the air carrier, I am of the opinion that the Regulation establishes a presumption of guilt in case of refusal to board, cancellation or delay of the flight.

In this respect, according to Article 5 point 3 of the Regulation, the effective air transport operator is not obliged to pay compensation if it can prove that the cancellation is caused by exceptional circumstances that could not be avoided despite the adoption of all possible measures.

This situation of exoneration from liability provided by the Regulation, can be assimilated to the fortuitous case, respectively a circumstance that cannot be foreseen or prevented by the called party to answer if the event would not have occurred.

As far as I am concerned, we appreciate that for the exoneration of liability of the effective air transport operator, within the meaning of art.5 point 3, the circumstance must not meet the requirements of force majeure, respectively an external event, unpredictable, absolutely invincible and inevitable.

5. The case-law on the Interpretation of the Concept of Effective Air Carrier

5.1. The practice of the courts in the Member States

The implementation of the provisions of this Regulation has generated a non-unitary judicial practice at the level of the courts of the Member States of the European Union, regarding the notion of effective air transport operator.

Air carriers often conclude agreements whereby certain air routes operated by more than one airline, depending on the flow of passengers, are operated by one or the other, and passengers who have concluded transport contracts with a particular airline or transported to the destination by another company, with which the first company has a one-off agreement.

Or, a civil aviation company needs (for various reasons) a surplus of aircraft, with or without flight crew, thus turning to another company.

These types of agreements are often leases, which concern aircraft, with or without crew (wet lease).

The problem that arose in practice was that of who will bear the compensation established by the Regulation towards passengers, namely the transport operator with whom the passenger concluded an air transport contract or the transport operator who actually performed the flight and caused the refusal to embarkation, delay or cancellation of the flight. In such a situation, the operator who concluded air transport contracts with the passengers and did not operate the flight leased part or all of the aircraft that operated the flight, but which was under the legal protection of another air transport operator.

In one opinion (Romania, Italy and Spain case law), it was noted that the liability established by the Regulation is imposed on the air carrier with which the passenger has directly or indirectly concluded an air transport contract.

In another opinion (Great Britain, Germany and Czech case law), it was noted that the Regulation defined in Article 2 a series of notions, and the obligation to pay compensation belongs exclusively to the actual air carrier and not to the air carrier that leased its aircraft to another air carrier, who performed the flight.

Because most often the requests for summons of passengers fell within the jurisdiction of the courts from their domicile, according to the general rules on consumer protection, and they took the form of low value claims, according to EC Regulation No. 861/2007 establishing of a European procedure regarding low value applications and the Civil Procedure Codes of the Member States (in Romania, in the Code of Civil Procedure - Procedure regarding low value applications: art.1026-1033), these being resolved in the part of the cases in the council chamber and in the absence of the parties, air carriers have often found themselves unable to defend themselves.

Moreover, certain entities (Airhelp, Airclaim, etc.) have been set up, mostly outside the European Union member states, which follow on online applications the departures/arrivals of flights from different airports to and from states members of the European Union.

Entering in unknown ways in possession of information regarding the identity of passengers, such entities have as sole object of activity the assignment of the right of claim of passengers having as object the payment of compensations established by the Regulation and then the action in national courts of air carriers.

In other words, the compensation established by the Regulation has over time become a business for such entities - assignment of claims - which in practice has been shown to pay modest prices to passengers for their claim (right to compensation) and not a means of protection or reparation for passengers.

5.2. Jurisprudence of the Court of Justice of the European Union on the notion of effective air transport operator

The Court of Justice of the European Union has recently ruled on the notion of effective air transport operator - wet lease, in Case C-532/17 - Wolfgang Wirth and Others v. Thomson Airways Ltd., by Judgment of the Court - Third Chamber - of 04 July 2018 (reference for a preliminary ruling from the Landgericht Hamburg Germany - preliminary reference - Transport - EC Regulation No 261/2004 - Article 2 (b)).

That judgment, which is binding on the national law of the Member States of the European Union, established that the concept of effective air carrier must be interpreted as not including the air carrier leasing to another air carrier a manned aircraft in under a wet lease. It does not bear operational responsibility for flights, even when the confirmation of the reservation of a seat on a certain flight issued to passengers mentions that this flight is performed by this first carrier.

By that judgment, the Court of Justice of the European Union, in interpreting the concept of an effective air carrier, established that that definition required two cumulative conditions, namely: flight and the existence of a contract with a passenger.

By the notion of flight, the Court of Justice of the European Union held that it was an air transport operation, thus being a unit of that transport, performed by an air transport operator, which establishes its itinerary (see Judgment of 10 July 2008, *Emirate Airlines*, in Case C-173/07, EU: C: 2008: 400, paragraph 40, Judgment of 13 October 2011, *Sausa Rodriguez and Others*, in Case C-82/10, EU: C: 2011: 652 , paragraph 27; Case C-255/15 *Mennens* [2016] ECR I-0000, paragraph 20).

According to that case-law, it is considered that the actual air carrier is the carrier which, in the course of its passenger transport business, decides to operate a particular flight, including to establish its itinerary, and thus to create, for those interested, an air transport offer.

The adoption of such a decision thus implies that the carrier is liable for the flight in question, including, *inter alia*, for any cancellation or prolonged delay in arrival.

Such a solution is confirmed by the objective of ensuring a high level of passenger protection as set out in recital 1 in the preamble to the Regulation, since it seeks to ensure that transported passengers will be compensated or served without having to take into account the agreements reached by the air carrier that has decided to operate the flight in question with another carrier in order to ensure its actual performance.

In addition, that solution is consistent with the principle set out in recital 7 in the preamble to the Regulation, according to which, for the purpose of its effective application, the related obligations should remain with the actual air carrier, regardless of whether it owns the aircraft or the latter is the subject of a manned aircraft lease.

Following this decision of the Court of Justice of the European Union, the owners or holders of a leasing contract who transferred the use of the aircraft to actual air carriers and who were sued for the compensation established by the Regulation invoked the exception of lack of passive procedural capacity, this being a condition for the promotion of any civil action in court.

In Romania, according to art.36 Code of Civil Procedure, the procedural quality represents a condition for exercising the civil action, and according to art.32 paragraph 1 letter b it results from the identity between the parties and the subjects of the litigious legal relationship, as it is deduced to the court. The existence or non-existence of asserted rights and obligations is a matter of substance.

The conditions for the exercise of the summons must be proved by the applicant. In such conditions, the person claiming the compensation established by the Regulation has the obligation to identify (usually based on the boarding pass, or with other documents) who is the debtor of the obligation, respectively the operator who executes or intends to execute the flight.

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