Air Carriers’ Obligation in ‘Extraordinary Circumstances’

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Case C-12/11, McDonagh v Ryanair Ltd [2013] ECR o

The closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitutes “extraordinary circumstances” which does not release air carriers from their obligation, in the event of cancellation of a flight, to provide passengers care and assistance (author’s headnote).


Air passengers in EU are protected under two schemes. One is the international scheme, the Montreal Convention, ratified by the European Community through Regulation 889/2002,1 enforced in all EU Member States. The Montreal Convention provides international uniform rules on air carriers’ liability. The other is the European scheme, including Regulation 261/2004,2 Regulation 1107/2006,4 and Council Directive 90/314/EEC.5 Regulation 261/2004 is the most controversial EU instruments of the three. It provides extra Union protection to air passengers in circumstances of denied boarding, cancellation and long-delay. If denied boarding, cancellation and long-delay are caused by reasons other than ‘extraordinary circumstances’, passengers are entitled for compensation of a fixed sum established in Article 7. If these incidents are caused by ‘extraordinary circumstances’, air carriers are released from Article 7 obligation to pay compensation, but they are still obliged to provide care and assistance, including meals, refreshments, hotel accommodations and transport between the airport and accommodation.6

As a result, the concept of ‘extraordinary circumstances’ is crucial in deciding the extent of air carriers’ liability. This concept has been decided and interpreted in a few CJEU decisions, all of which concern whether an event is ‘extraordinary’ enough to release an air carrier from its liability to pay compensation.7 It is defined in the recital as circumstances ‘which could not have been avoided even if all reasonable measures had been taken’.8 Examples of such circumstances include ‘political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier’.9 ‘Extraordinary circumstances’ exist if cancellation or long-delay is caused by the decision of air traffic management which could not be avoided by air carriers through all reasonable measures.10

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7 Case C-549/07, Wallentin-Hermann v Alitalia-Linee Aeree Italiane SpA, 2008 ECR I-11061 (whether the ‘complex engine defect in the turbine’ is an extraordinary circumstance); Joined Cases C-402/07 & C-432/07, Sturgeon v Condor Flugdienst GmbH, Bock v Air France SA, 2009 ECR I-10923 (technical defects not inherent in the normal exercise of the activity of the air carrier are not extraordinary circumstances).
In most cases, air carriers try to argue for a broad definition of ‘extraordinary circumstances’, in order to limit the situations to pay compensation.\textsuperscript{11} It is generally understood that air carriers are protected by ‘extraordinary circumstances’ that limit air carriers’ obligation from paying hundreds euro compensation to providing care, which would not result in much financial burden to the industry. However, McDonagh v Ryanair shows that heavier than normal financial burden may still incur in offering necessary care and assistance.\textsuperscript{12} In the current case, air carriers aim to sub-categorise ‘extraordinary circumstances’ and to seek further limitation on their obligations to provide reasonable care pursuant to Article 9.

I. Facts

Ms McDonagh and Ryanair entered into a contract for the carriage of passengers by air. The flight was scheduled to departure from Portugal to Ireland on 17 April 2010. The ticket price was EUR 98. The eruption of the Eyjafjallajokull volcano during March and April 2010 caused the closure of the airspaces in several Member States, including Ireland, which lead to the cancellation of Ms McDonagh’s flight. Ms McDonagh was unable to be re-routed and returned to Ireland until 24 April 2010. During the seven days delay, meals, accommodation and transport were not provided pursuant to Article 5(1)(b) and 8 of the Regulation No 261/2004. Ms McDonagh brought an action against Ryanair in the Dublin Metropolitan District Court (Ireland) claiming compensation of EUR 1129.41 for the cost.

The Dublin Metropolitan District Court referred to the Court of Justice for a preliminary ruling on the interpretation of Articles 5 and 9 of the Regulation 261/2004. In particular, whether air carriers will be released of obligations of care imposed by Articles 5 and 9 in ‘super’ or ‘particularly extraordinary circumstances’, whether there should be temporal or monetary limitation on the air carrier’s obligation to provide care when cancellation is caused by extraordinary circumstances, and whether Articles 5 and 9 violate the principles of proportionality, non-discrimination and an ‘equitable balance of interests’ under the Montreal Convention.

II. Judgment

1. Extraordinary Circumstances

In answering the question as to whether certain extreme circumstances out of air carriers’ control cannot be regarded as normal ‘extraordinary circumstances’, but should be considered as “super extraordinary circumstances”,\textsuperscript{13} which provide air carriers full and total exemption from all obligations,\textsuperscript{14} the Court of Justice has considered the literal and purposive interpretation of the term.\textsuperscript{15} The word ‘extraordinary’ already includes the meaning of ‘out of ordinary’ and ‘beyond control’, ‘whatever the nature of those circumstances or their gravity’.\textsuperscript{16} Furthermore, a literal reading of the Regulation cannot suggest the conclusion that the lawmaker has any intention to further limit air carriers’ obligations in certain ‘extraordinary circumstances’ which cause more serious hampers and barriers than ordinary circumstances beyond air carriers’ control. The language used and the formulation of the provisions in Regulation 261/2004 simply cannot suggest the existence of separate categorises of normal ‘extraordinary circumstances’ and ‘particularly extraordinary circumstances’.\textsuperscript{17} More importantly, providing air carriers any exemption from the duty of care is inconsistent with the legislative purpose of Regulation 261/2004, which aims to provide ‘high level of protection for passengers’.\textsuperscript{18} The special nature of air transport makes cancellation seriously frustrating to air passengers, which makes this level of protection necessary and reasonable.\textsuperscript{19} The obligation to provide care in any circumstances does not aim to penalise air carriers for any wrongdoing, but to

\textsuperscript{11} eg. Wallentin-Herrmann v Alitalia Linee Aeree Italiane SpA; Sturgeon v Condor Flugdienst GmbH, Bock v Air France SA.
\textsuperscript{12} Case C-12/11, McDonagh v Ryanair Ltd [2013] ECR 0.
\textsuperscript{13} Para 16.
\textsuperscript{14} Para 16.
provide basic protection to relieve passengers from inconvenience and frustration associated with air travelling. It is contrary to the purpose of consumer protection by providing care to passengers facing limited trouble, because the circumstances are not severe enough, but denying care to passengers who have suffered more serious inconvenience.  

2. Limitation of obligation

In deciding whether the obligation to provide care under Article 9 should be limited in temporal or monetary terms, the Court of Justice again provides a negative answer, primarily based on the literal reading of the Regulation.  

This means that no matter how long the delay is or how much the financial cost would be, as far as the cost of care is reasonable and necessary, air carriers should bear the full cost for the whole period during the waiting. Furthermore, any attempt to limit the obligation is contrary to the purpose of the legislation in protecting air passengers in extraordinary inconvenient situations.  

3. Proportionality, non-discrimination and equitable balance of interests

The Court of Justice rejected the argument that obligations imposed by Regulation 261/2004 are disproportionate and should be invalid under the EU law, by relying on the previous ruling in IATA & ELFAA v Department for Transport. In IATA, the claimants argued that the financial obligations imposed by Regulation are disproportionate considering the air fares charged by law fares airlines. The Court of Justice, however, specifically said that these measures are effective to achieve the purpose of reducing cancellation and delay and of providing immediate relief to passengers. In particular, the high level of passenger protection does not relate to the amount of fare charged. This decision was directly relied on by the Court of Justice in the current case. The Court of Justice in McDonagh v Ryanair; however, gave more consideration to the argument on the negative financial consequences. While recognized that the negative financial consequences existed for air carriers, it found the financial consequences are ‘not such as to invalidate that finding’ because the objective of consumer protection is so important that it justifies ‘even substantial negative economic consequences for certain economic operators’. It is also suggested that air operators could foresee those costs and increase air fares to transfer the costs to passengers. Proportionality does not mean that the care provided should be proportionate to the fare charged, but means that passengers can only claim ‘necessary, appropriate and reasonable’ care, which shall be left for national courts to decide.  

The Court of Justice also decided that the Regulation did not breach the principle of non-discrimination between different transport operators. Although there are no similar obligations imposed to other modes of transport, such as bus, coach and train operators, this is justifiable by the difference between the manner of operation, the accessibility, and the distribution of networks. Although Articles 16 and 17 of the Charter of Fundamental Rights of the European Union (the Charter) guarantee the freedom of business, this is not an absolute right and should be considered by accounting the social functioning of the business. Limitations may be imposed in order to strike a balance among several recognised rights, including the protection of consumers.

20 Para 33.
21 Para 40.
22 Para 41.
23 Para 42.
25 The claimants claimed that ‘the measures to assist, care for and compensate passengers that are prescribed by Articles 5, 6 and 7 of Regulation No 261/2004 in the event of cancellation of, or a long delay to, a flight do not enable the objective of reducing such instances of cancellation or delay to be achieved and are in any event, by reason of the considerable financial charges which they will impose on Community air carriers, totally disproportionate to the objective pursued’. Para 81, Case C-344/04.
26 Paras 84–91.
27 Para 87.
28 Para 45 of Case C-12/11.
29 Para 47.
30 Para 48.
31 Para 49.
32 Para 51.
33 Para 56.
34 Para 61–63.
Finally, the Court of Justice refused to apply the ‘equitable balance of interests’ test to the Regulation. The equitable balance of interests test is established in the Montreal Convention in helping its Contracting Parties to determine damages caused by delay, while the Regulation provides standardised, immediate compensation to provide care to passengers. The Regulation covers scopes different from the test set up in the Montreal Convention and should not be subject to the test.

III. Comment

McDonagh v Ryanair is another case confirming that the priority of the objectives of Regulation 261/2004 is to protect air passengers. In any circumstances, where passengers’ interest conflict with that of air carriers, priority is always given to passengers, as far as it does not contradict the express legislative provisions. The interpretation given to ‘extraordinary circumstances’ and the rejection to limit the obligation to provide care in temporal or monetary is not wrong, taking into account of the wording and purpose of the Regulation. Regulation 261/2004, indeed, does not suggest, by any means, that air carriers could be exempt from its obligations to provide care whenever a flight is cancelled by whatever reasons, or the care should be subject to any limitation. The obligation of care is imposed when ‘extraordinary circumstances’ occur, which means no force majeure defence can be used to release this obligation.

If air carriers criticise this decision as being one-sided and imposing heavy burden on air carriers, this is caused by the legislation instead of the Court of Justice. The civil law tradition of the European legal system determines that judgments cannot depart from the explicit meaning of legislation. However, one may remember another CJEU ruling in Sturgeon v Condor Flugdienst GmbH where the Court of Justice held that delay of more than three hours makes passengers entitled to claim the same level of damages as cancellation under Article 7. This judgment cannot be referred anywhere from the wording of the Regulation. The only consistent thing between the two judgments is that both provide the interpretation in favour of passengers.

The Regulation intends to provide a high level of protection to air passengers by imposing obligations on air carriers and, at the same time, offering extensive rights to air passengers. The Regulation simply fails to properly consider the balance between the conflict interests. It is claimed that the ‘extraordinary circumstances’ exception to enable air carriers to avoid liability to pay compensation shows that the Regulation has watched the interest of air carriers. However, one may wonder whether it is truly the intention of lawmakers to impose unlimited obligations to air carriers whenever passengers meet inconvenience by reasons out of reasonable control. It is hard to say whether European lawmakers have predicted that the cost of care can go beyond one thousand euro in certain circumstances. If this level of obligation has not been predicted at the time of legislation, it is difficult to justify the argument that there is certainly no legislative intention to cap the amount of compensation.

Besides consumer protection, another objective of the Regulation is to provide the uniform rules to facilitate competition in air transport. It is likely that some airlines may provide care for the whole duration of the delay while others only provide limited amount of care. This, however, does not mean the operators are not in equal footing in competition. Is not the different policy justifiable by the different prices paid to an air ticket? The level of services and care in extraordinary circumstances are budgeted in the air fare. Passengers selecting the lower fares arguably could expect the lower standard of services and protection. One may wonder whether it is sound to impose the same requirements to all air carriers, or whether it is better to allow such differences exist and to provide air passengers more informed choice.

Furthermore, the financial consequence is not taken into account by the Court of Justice. The justifica-
tion is rather unconvincing. It should be reminded that the interests of air carriers and passengers are consistent in certain circumstances. Especially, the adverse financial burden of the industry would likely be internalised and be transferred to passengers by the increased price.\textsuperscript{43} Although both the CJEU and the Advocate General support increasing prices, as far as immediate relief can be provided to passengers in inconvenient, it is questionable whether the unlimited burden to provide care plus increased air ticket price can achieve the ultimate aim of protecting air passengers. The economic effect of the increased price is similar to an involuntary insurance. The difference between the increased fare and the insurance to cover air travel risks is that the former is not optional. It deprives passengers the freedom of choice between (1) higher fares with better care and services, (2) lower fares with a reasonable, but with limit, level of care and services, and (3) lower fares with a reasonable, but limited, level of care and services, plus voluntary insurance to cover extra risk. However, the ECJ does not consider relying on voluntary insurance is a sufficient alternative.\textsuperscript{44} One possibility is passengers without insurance cannot receive relief. Furthermore, claiming compensation from insurers may take time and the insurer’s assist may not provide ‘immediate’ relief. The compulsory protection may also be necessary because in cases of serious disturbance, even expensive airlines may try to avoid the obligations to provide care due to the number of passengers affects and the length of the disruption. In order to protect passengers in all circumstances, legislators have to impose a hard-and-fast duty without granting any exemption. While recognising these justifications, it is still questionable whether the compulsory, unlimited obligation to an air carrier is the only the most appropriate choice.

The result of the case may cause some fear in air industry. All air carriers and their insurers should now be prepared for the extra financial burden cost by volcanic ash or similar unexpected events, which result in large-scale and long-term of cancellation of flight. It is claimed by a commentator that in these circumstances, the Regulation may ‘spell the end for many air carriers, especially those with ‘low cost’ financial models’.\textsuperscript{45} Given the rarity of similarly serious circumstances and the annual passenger figure of an airline, the statement may be exaggerated. However, it will be interesting to know whether the level of obligations is still considered proportionate if it causes the close of business of some air operators.

Finally, effective enforcement of Regulation 261/2004 is always a concern.\textsuperscript{46} Although airlines have the obligation to inform passengers their rights, in practice few operators strictly comply with the requirements. Information leaflets are available at the counter, but they are rarely voluntarily handed over. Information can also be accessed online, but it is rarely actively offered. Especially, the low fare air carriers may refuse to perform their Regulation obligations. It is necessary to wait whether the compulsory, unlimited obligation to an air carrier is the only the most appropriate choice.

43 Ryanair had introduced an extra 2 EUR per passenger to internalise the obligations imposed by Regulation 261/2004 in 2011 by estimating over 100 million EUR compensation for cancellation and long delay of flight during the volcanic ash incidents. However, it was claimed that Ryanair carried over 72 million passengers in that year, the extra fees exceeded the real cost. See J Prassl, “Case C-12/11 Denise McDonagh v Ryanair: Volcanic ash and ‘super extraordinary circumstances’”, <http://eutopialaw.com/2013/02/04/case-c-1211-denise-mcdonagh-v-ryanair-volcanic-ash-and-super-extraordinary-circumstances/> (last accessed on 14 May 2013).

44 Case C-344/04 International Air Transport Association and European Low Fares Airline Association v Department for Transport [2006] ECR I-403.

45 Lee, Wheeler, supra note 39, at 80.

46 Communication from the Commission to the European Parliament and the Council pursuant to Article 17 of Regulation (EC) No 261/2004 on the operation and the results of this Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, COM(2007)168 final, s.4.1.3; Broberg, supra note 37, at 728.