THE APPLICATION OF EU REGULATION 261/2004 IN CRISIS SITUATIONS

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Choice between reimbursement (plus return flight to first point of departure) and re-routing at the earliest opportunity

Meals, refreshments and hotel accommodation

Compensation of between €125 and €600, unless the cancellation is caused by “extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken”
REGULATION 261/2004 - DELAY

- Reimbursement/re-routing when delay of at least 5 hours
- Meals, refreshments and hotels
- Compensation – according to the CJEU in Sturgeon!
PRACTICAL APPLICATION OF REG 261/2004 IN CRISIS SITUATIONS AND THE COMMISSION’S “INFORMAL GUIDELINES”

- Guiding principle – sanctions inappropriate where airlines can prove they used their best endeavours to comply in the circumstances
- Compensation not payable, because extraordinary circumstances – including where cancellation for directly linked cause (eg, out of hours crew)
- Right to reimbursement or re-routing
  - No exception for extraordinary circumstances
  - Sanctions may be inappropriate where airline fails to make explicit offer, in circumstances of disruption
  - Where airline tried to contact passenger, but passenger made own arrangements, normal inference that passenger opted for reimbursement
  - Where period of disruption unknown, passenger may opt first for re-routing and then change to reimbursement
PRACTICAL APPLICATION OF REG 261/2004 IN CRISIS SITUATIONS AND THE COMMISSION’S “INFORMAL GUIDELINES” (2)

- Reimbursement
  - of whole ticket, where outbound flight of return journey (whether or not sold as return)

  NB - including parts of journey already made (eg, Buenos Aires – Madrid – Amsterdam)
  - return flights (eg, Buenos Aires – Madrid – Amsterdam)

- Re-routing
  - principles of proportionality and reasonableness
  - normally, but not necessarily, all costs of transport to final destination (eg, passenger must themselves bear the additional costs of travelling in a higher class)

  - can be by other airlines and/or transport modes
  - later re-routing – balance between passenger and airline, having regard to purpose of contract
PRACTICAL APPLICATION OF REG 261/2004 IN CRISIS SITUATIONS AND THE COMMISSION’S “INFORMAL GUIDELINES” (3)

- Care
  - No exception for extraordinary circumstances
  - No limit in time but:
    - ends when passenger opts for reimbursement
    - “adequate care … without imposing a disproportionate and unfair burden on the air carrier”
  - Possible criteria for “adequacy”:
    - distance of passenger/airport from place of residence
    - availability and average standards/prices of local hotels and restaurants
    - treatment of other passengers in comparable situations
    - balancing adequate care against unnecessary expense
  - Passengers not necessarily entitled to:
    - continue staying in same hotel
    - decide on accommodation and demand full reimbursement: it may be limited to a reasonable level, particularly in light of efforts made by the airline
Notice/waiver of rights

- Not giving notice of rights may be excusable in particular disruption circumstances but giving partial, misleading or wrong information never is.

- Attempts to get passengers to waive rights is an infringement.

- These are serious infringements.
Art 21

The Commission proposes “the extension of the provisions on compensation, on reimbursement or re-routing and on assistance at the airport to passengers whose flights have been cancelled. An exception would naturally be made for cancellations that an operator can prove were made for reasons outside its responsibility”

Art 10

- Choice between reimbursement or re-routing + compensation + care
- No obligations where cancellation “solely because of exceptional circumstances beyond [the carrier’s] responsibility or that of it sub-contracting agent”
18.3.03 Council common position – removed exception from reimbursement/re-routing and retained exception for care obligations, in terms of “extraordinary circumstances” rather than “force majeure” – “for reasons of legal clarity”!

3.7.03 Parliament second reading – agreed

1.12.03 Conciliation Committee – removed exception from care obligation

22.12.08 CJEU’s ruling in Wallentin-Hermann v Alitalia – reduced scope of “extraordinary circumstances”
21.12.01 Commission proposal – care obligations only for disabled passengers and unaccompanied children

18.3.03 Council common position – care obligations introduced, but with extraordinary circumstances exception

3.07.03 Parliament second reading – exception removed
CONCLUSION

Unlimited care obligations not the Commission’s original intention

Force majeure exception from care obligations in case of delayed flights introduced by Council, but removed by Parliament

Force majeure exception from care obligations in case of cancelled flights agreed by Parliament and Council but removed by Conciliation Committee

Originally even force majeure exception from reimbursement/re-routing obligations in case of cancelled flights (though removed by Council)

Original concept of “force majeure” narrowed to “extraordinary circumstances”

Narrowed further by the CJEU

Case for changing the law – but beware!