

Passenger Rights Under EU Regulation 261/2004: New Guidelines for Gulf Airlines Flights Departing the EU

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Whilst all eyes were on the UK this summer regarding the outcome of its forthcoming 'Brexit' referendum on whether to remain within the European Union (EU), the implementation of EU aviation law designed to protect air passenger rights has continued apace.

On 10 June 2016, the European Commission (EC) published new guidelines aimed at providing EU National Enforcement Bodies (invariably the Civil Aviation Authority of each EU country) with a blueprint document with the intention of tackling issues most frequently raised by passengers, and in an attempt to give clarity to the enforcement of existing passenger rights legislation.

All Gulf-based airlines departing from airports within the EU are subject to a wide body of EU air passenger rights legislation, the purpose of which is stated to be to offer a high degree of protection against unforeseen circumstances to people travelling by air to and from the EU. This legislation consists of a series of EC Regulations dealing with subjects such as the rights of persons with reduced mobility, the protection of air passengers, aviation safety and 'black lists' of high risk airlines. As part of this body of rules, EC Regulation 261/2004 (EC 261) deals with the denied boarding of passengers, cancellations, delays and subsequent rules on compensation and assistance to passengers.

The Interpretive Guidelines on EC 261 (The Guidelines) have been welcomed by International Air Transport Association (IATA) as an important stop gap until crucial reform of the passenger rights legislation is implemented, and the International Air Carrier Association (IACA) has called the initiative 'the right step towards legal clarity for both airlines and passengers awaiting the adoption of a balance new legislation by the European institutions.' The Guidelines are available for all to download from the EC website, and they make important clarifications on interpreting EC 261, and reprise the many case law decisions made by the European Court of Justice (ECJ) over the years since the Regulation has been in force.

EC 261 has now been in place for more than a decade and, since the date of implementation, there have been inconsistencies and ambiguities in how it has been applied. The Regulation was originally designed to protect passengers who were denied boarding and for cancelled flights, but not specifically delays to the passenger's flight. However, the scope of EC 261 was extended in 2011 by the European Court of Justice judgment in Case C-402/7 and C-432/7 *Sturgeon v Condor* [2011] ECR, so that a passenger who suffers a delay in excess of three hours is entitled to compensation under Article 7 of EU 261. A passenger may therefore claim:

- *For cancelled flights, denied boarding, and flights delayed by three hours or more at the point of destination, compensation of:*

– 250 Euros for flights of 1500 kms or less

– 400 Euros for all other intra EU flights, and all other flights between 1500-3500 kms

– 600 Euros for all other flights over 3500 kms

- For cancelled flights and flights delayed by five hours or more, rights to reimbursement or re-routing
- For cancelled flights and flights delayed by two hours or more (depending on the distance), rights to care (refreshments, meals, accommodation)

By Article 7.2 of EC 261, if the carrier offers re-routing in the event of a cancellation, denied boarding or delay then the above amounts can be discounted by 50%.

The right to compensation is subject to an 'extraordinary circumstances' defence, so that the carriers are not obliged to pay compensation if they can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. The Guidelines throw further light on the interpretation of 'extraordinary circumstances' and should be read by all airlines operating from EU airports.

'Extraordinary circumstances' are not defined comprehensively within the legislation, and again, a body of case law has developed to restrict the carrier's defences, such as there being no defence for the airline for complex engine defects unless they stem from events which are not in adherence to the normal exercise of the activity of the air carrier and beyond its control, such as hidden manufacturing defects (Case C-549/07 Wallentin – Herrmann v Al Italia [2008] ECR).

Other examples of 'extraordinary circumstances' may include sabotage/terrorism, strikes, air traffic control problems and freak weather conditions such as the 2010 Icelandic ash cloud. However, even a technical problem that occurs unexpectedly and that is not attributable to poor maintenance and that was also not detected during routine maintenance checks, does not fall within the definition of 'extraordinary circumstances' (Case C-257/14 Van der Lans v KLM [2015] ECR).

For all the above reasons, as far as Gulf-based carriers are concerned (and indeed any non-EC carriers), it is important to look at the scope of EC 261 and when it will apply to the carrier. This is set out in Article 3.1, which states:

This Regulation shall apply:

- To passengers departing from an airport located in the territory of a Member State to which the [EC] treaty applies
- To passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the [EC] treaty applies, unless they received benefits or compensation and were given assistance in that third country if the operating air carrier of the flight concerned is a community carrier.

Thus, Gulf-based carriers are potentially liable under EC 261 if a flight is delayed or cancelled, or passengers are denied boarding, when leaving any EU airport. Conversely, Gulf-based carriers are not 'community carriers' under Article 3.1(b) and therefore they are not liable for flights delayed when the flight starts from a country outside of the EU.

But what about connecting flights where the flight starts from an EU airport?

Many operators within the Gulf region are successful, highly organized, new clean sheet business plan model airlines with hub routes providing a worldwide network of connecting flights. Logic would say that, if there is a delay on a flight that starts in the EU and that delay is compensated by the airline in accordance with the EU legislation within the EU, there should not be any consequential effect to connecting flights.

It is not unusual for a journey starting in the EU and operated by a Gulf carrier to comprise of two or

more flights, the first from any EU member state to a non member state (eg London to UAE) and then there is a connecting flight between two non member states (eg UAE to India). Using the example London-UAE-India, it may be the case that a first flight is delayed at the EU airport for long enough for the passenger to miss their connection to India in the UAE, but for a shorter period than their requisite three-hour delay to engage a right to compensation. However, when the passenger eventually reaches the ultimate destination in India, it may be the case that the knock on effect of the original delay gives a delay in the arrival at the final destination of more than three hours.

Gulf carriers have tended to argue that each flight is a separate unit of their transport and needs to be considered separately for the purposes of compensation under EC 261, whereas the claimant often argues that their journey at all times departed from the Member State in question and that the Regulation applies to the entire journey.

Case C-173/07 *Emirates Airlines, Direktion fur Deutschland v Schenkel* [2009] 1 Lloyd's Rep.1 CJEU and *Sanghvi v Cathay Pacific Airways* [2012] 1 Lloyd's Rep 46 ChD support the view that the non EU carrier should only be responsible for the sector which is delayed and which leaves from an EU airport, and is not liable for any subsequent knock-on effect delay at destination. However, there is conflicting case law on this approach and there have been many cases (particularly in the UK) which take the opposite view.

The Guidelines now address the question of connecting flights specifically, and state that compensation under EC 261 does apply in case of a passenger missing a connection outside the EU with a flight departing from an airport situated within the EU, and where the passengers arrive at their final destination more than three hours late.

In the Guidelines there is a section entitled 'Compensation for late arrival in the case of connecting flights'. The Guidelines indicate that the Regulation must apply to the whole journey including connecting flights and set out the following:

the Court takes the view that a delay must be assessed for the purposes of the compensation provided for under Article 7 of the regulation, in relation to the scheduled time of arrival the passenger's final destination as defined in Article 2 [h] of the regulation which in the case of directly connecting flights must be understood as the destination of the last flight taken by the passenger.

In accordance with Article 3[1] [a] EC 261, passengers who missed the connection within the EU, or outside the EU with a flight coming from an airport situated in the territory of a Member State, should be entitled to compensation if they arrived at final destination with the delay of more than three hours. Whether the carrier operating the connecting flight is an EU carrier or a non EU carrier is not relevant.

Clearly, the interpretation as set out in the Guidelines is a concern for Gulf-based airlines operating connecting flights, and the EC view is that compensation does apply in case of a passenger missing a connection outside the EU when the original flight departs from an airport situated within the EU, and the passenger arrives at their final destination more than three hours late.

Thus whilst the Guidelines provide helpful clarification on many issues, for delay claims airlines need to be aware of the fact that it is being suggested that connecting flights and accumulated journey delay may be compensatable under EC 261. This could mean a spate of claims by delayed passengers for Euro 600 per passenger in the event of an 'accumulated delay' at the final destination if the journey commences in the EU.

The status of the Guidelines is really to assist National Enforcement bodies interpret the legislation. They are not intended to substitute the role of the national and EU court systems, but are there to give guidance. They are viewed as persuasive to the interpretation of EC 261 and should be read accordingly.

Although the Guidelines have been welcomed by aviation industry bodies, they are seen as a stop gap measure and it is important to note that a new Regulation to replace EC 261 was proposed by the EC in 2013 in order to address both industry and passenger concerns. We await implementation of that new substitutive Regulation in due course but, in the meantime, Gulf carriers should be aware of the new developments. Given that many of the reported cases on EC 261 emanate from the UK, all parties await the practical implications of the 'Brexit' vote by the UK, and whether, as a result, the UK will continue to be bound by EU court decisions in the future. Gulf carriers will await developments with interest.