

EC Regulation 261/2004: Stopovers do not Increase Compensation, but Further Decisions are Awaited

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Regulation 261 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 Regulation 261 was extended in 2011 by the European Court of Justice (ECJ) judgment in *Sturgeon v Condor* [C 402/7 and C 432/7] so that a passenger who suffers a delay in excess of three hours is entitled to compensation under Article 7(1) Regulation 261 so that:

- For cancelled flights, denied boarding, and flights delayed by three hours or more at the point of destination, compensation is payable:
 - 250 Euros for flights, 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) Regulation 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%. Further, the right to compensation is subject to an "extraordinary circumstances" defence for the carrier so that 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.

By Article 7(4) Regulation 261 the above distances are to be measured by "the great circle route" being the shortest arc connecting two points on the surface of a sphere, but what is the position if connecting stopovers are involved in the passenger's overall journey and there is more than one flight in that journey?

Further clarification has been given as to the calculation of distance and compensation payable to the passenger in the event of delay in a recent judgment handed down by the ECJ in September 2017, and this may be particularly relevant to Gulf and other non EU carriers, as it also deals with the concept of overall journey and individual flights which make up that journey.

In *Bossen v Brussels Airlines C559/16 (Bossen)*, the ECJ has ruled that the calculation of compensation should be based on the radial distance between the airport of departure and the airport of destination, rather than the actual distance covered. Thus, any calculation of distance should ignore any stopovers taken by the passenger, and the distance should be calculated (using a regular parlance) "as the crow flies", and this should not include any additional miles incurred due to a connecting stopover.

In *Bossen*, the passengers travelled from Rome to Hamburg via a connecting flight from Brussels. The

flights were operated by the EU carrier Brussels Airlines entirely within the EU. The first leg (Rome to Brussels) was delayed so that the passengers arrived some 40 minutes late, and they therefore missed the onward flight to Hamburg. The passengers were placed on the next available flight to Hamburg, but by the time they reached destination they had suffered a delay of 3 hours and 50 minutes. The delay and right to compensation was admitted by the airline and it was also admitted that the Regulation 261 applied to the whole journey.

If the calculation of distance was based on Rome to Hamburg directly this would be a distance of 1173 km, and this would mean that the passengers would only be entitled to EUR 250 in compensation. If the calculation of distance was Rome to Brussels and then onwards to Hamburg, this would be a distance of 1656 km, and the passengers would be entitled to EUR 400.

The ECJ decided that the difference highlighted above between a journey with a connecting flight and a journey consisting of a direct flight “did not exacerbate the inconvenience suffered by passengers” and “therefore when determining the amount of compensation, account should be taken of the distance between the first point of departure and the final destination excluding any connecting flights”. Thus the passengers claim was calculated based on direct distance between Rome to Hamburg (a distance of 1173 km) and the passengers would only be entitled to EUR 250 in compensation.

Clarity is given by Bossen for flights which occurred within the EU on an airline operated by an EU community carrier, but the question remains for Gulf carriers and other non EU operators, what is the position for delay claims where connections are missed outside of the EU? Also, Bossen may have interesting consequences if a claimant seeks to argue that Regulation 261 should apply to the passengers' entire journey including outside the EU, rather than to individual component flight sectors.

As far as Gulf based carriers are concerned (and indeed any non-community carriers), it is important to look at the scope of Regulation 261 and when it will apply to them and this is set out in Article 3.1 so that:

“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 Regulation 261 if a flight is cancelled, passengers are denied boarding or delayed when leaving any EU airport. Conversely, Gulf based carriers are not Community carriers under Regulation 261, Article 3.1 (b) and, 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?

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 Regulation 261, whereas 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 (e.g. London to Dubai) and then there is a connecting flight between two non member states (e.g. Dubai to Sydney).

Further decisions are awaited which deal with these concepts, including a recent case involving a Gulf carrier in the Court of Appeal of England and Wales, whereby a final decision is soon to be handed down. The Court of Appeal of England and Wales will need to consider, among several issues in dispute, whether Regulation 261 applies to delayed flights which are operated by non EU carriers and where a second connecting flight arrives more than three hours late following departure from an airport outside Europe. The decision is eagerly awaited and we shall hopefully obtain clarification on an issue which is of immense

importance to all Gulf and non EU airline carriers.