

Passenger rights – on-time and safe*?

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Many articles have been written and presentations given about Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and cancellation of flights and many more will be written as the proposal of the European Commission slowly makes its way through the Parliament and the Council.

However, our paper is voluntarily provocative and hopefully it will contribute to stimulate the debate surrounding Regulation 261 by including in such debate a topic that has (voluntarily or not) been avoided so far, but that is fundamental for airlines and passengers and regulators alike: safety.

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Human Systems

The entire European system is built around the acknowledgement that the safety of the aviation industry relies on the interaction and co-existence of machines and human beings and that technical failures and human errors have to be accommodated. As Professor James Reason, one of the greatest experts in risk analysis and risk management of human systems, said: “You can’t change the human condition, but you can change working conditions.”

To add further interest, regulators have started to talk about a performance-based approach to their work, which will eventually scrutinise the effectiveness of all management systems (including continuing airworthiness).

Notwithstanding years of work by the European Aviation Safety Agency (EASA), many studies on how the human reacts under stress or pressure and the general recognition that a safe environment must allow flexibility and openness, the European Union has, for many years, been asking airlines to comply with contradictory rules.

Indeed, on one hand, airlines are educated to develop transparent management systems where ‘normal’ defects and ‘human errors’ are accommodated and on the other, airlines are asked to ensure that a flight takes place on time, irrespective of any defects, or to pay compensation to all passengers on board. The interpretation that has been given of Regulation 261 allows zero or close to zero flexibility.

In this paper, we argue that the current implementation of Regulation 261 is not in line with existing EASA practices and with longstanding and reliable studies and risk management methods which link the acceptable level of risk with the means that an undertaking has to invest in order to avoid such risk. One of the basic principles of risk management is the so-called ALARP principle (as low as reasonably practicable). We argue in this paper that the Court has tried to apply these methods, without however having full knowledge of such principles of risk management and therefore resulting in a final result which is not aligned to normal standards of risk management.

The first part of this article gives a summary of the origins of Regulation 261. It then focuses on the evolution of the notion of extraordinary circumstances in the case law of the Court of the European Union. We do not deal here with the current revision procedure still ongoing at Community level.

In the second part of our article, we will focus on EASA safety regulations, aircraft certification, human factors and error management.

* An abridged version of this paper, *Play it safe*, was published in the September/October issue of *Regional International*, the magazine of the European Regions Airline Association (ERA), pages 61-62.

The legal perspective

Article 5(3) of Regulation 261, as interpreted by the Court of the European Union, provides that an operating air carrier is not obliged to pay compensation for delays or cancellations if it can prove that the cancellation or the delay is caused by extraordinary circumstances which could not have been avoided, even if all reasonable measures had been taken. However, the same Regulation provides that extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay or the cancellation of one or more flights by that aircraft, even though all reasonable measures have been taken by the air carrier concerned to avoid the delays or the cancellation.

Below, we will more clearly see how the final result of the case law of the Court on the interpretation of what is an extraordinary circumstance has brought to a final result where all reasonable measures must be adopted not to avoid the extraordinary circumstance – as the Regulation literally states – but to avoid the delay or the cancellation.

As mentioned above, the Court has tried to apply ALARP principles and re-defined the notion of 'reasonable measures' stating that these are all measures that do not lead to intolerable sacrifices in the light of the capacities of the relevant undertaking at the relevant time. We believe that the Court did not apply correctly the well-developed risk management studies and principles that are more fully explained in this paper.

Before we continue, we think that it is worth revisiting the two main cases which shaped how Regulation 261 is implemented in relation to extraordinary circumstances.

Original cases

In the first case (*Wallentin-Hermann v Alitalia* of 22 December 2008), Mrs Wallentin-Hermann and her family had bought a ticket to travel from Vienna to Brindisi via Rome, departing from Vienna at 6:45am and arriving in Brindisi at 10:30am. During the night before the flight, Alitalia had been informed of a complex engine defect in the turbine which had been discovered during a check. The repair necessitated the dispatch of spare parts and engineers and it was finally completed about ten days after the flight. The flight was cancelled and the passengers arrived at their destination at 14.45. They claimed compensation for the cancellation.

In its decision, the Court considered that only circumstances which are not 'inherent' in the normal exercise of the activity of the air carrier and are beyond its control could be considered as extraordinary. In light of this definition, any failure or event which is 'inherent' in the aviation business cannot be considered as an extraordinary circumstance.

This is therefore the case of a technical problem which came to light during maintenance. The Court continues to indicate that extraordinary circumstances would be met in the situation where, for example, the manufacturer of an aircraft type operated by the relevant airline or any competent authority would consider that that aircraft type, although already in service, is affected by a hidden manufacturing defect which impinges on flight safety. The same would apply to damage to aircraft caused by acts of sabotage or terrorism.

The Court made some attempt to create a link between the level of the reasonable measures to be adopted and the financial impact that such measures would have on the relevant airline. The Court therefore states that the airline may avoid paying compensation if it proves that, in order to avoid the extraordinary circumstance, it has adopted all reasonable measures which are technically and economically viable for the air carrier concerned.

The precedent created by the *Wallentin-Hermann* case law has been followed by the Court in the *Eglitis-Ratnieks* case (judgment of the Court of 12 May 2011). Mr Eglitis and Mr Ratnieks were meant to fly with Air Baltic from Copenhagen-Riga on 14.07.2006 at 20:35. The Swedish airspace in the Malmö region was closed from 20:30 until 22:45 of that day. The flight was cancelled. Mr Eglitis and Mr Ratnieks claimed payment of compensation indicating that the flight had not been annulled because of the closure of the airspace, but because of the expiry of the permitted working hours for the crew of that flight.

The Court of the European Union applied to this case the same reasoning followed in *Wallentin-Hermann*. It decided that, in order to be exempted from its obligation to pay compensation in case of extraordinary circumstances, an air carrier must establish that, even if it had deployed all its resources in terms of staff or equipment and had the financial means at its disposal, it would clearly not have been able, unless it made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time, to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight.

Case law criticisms

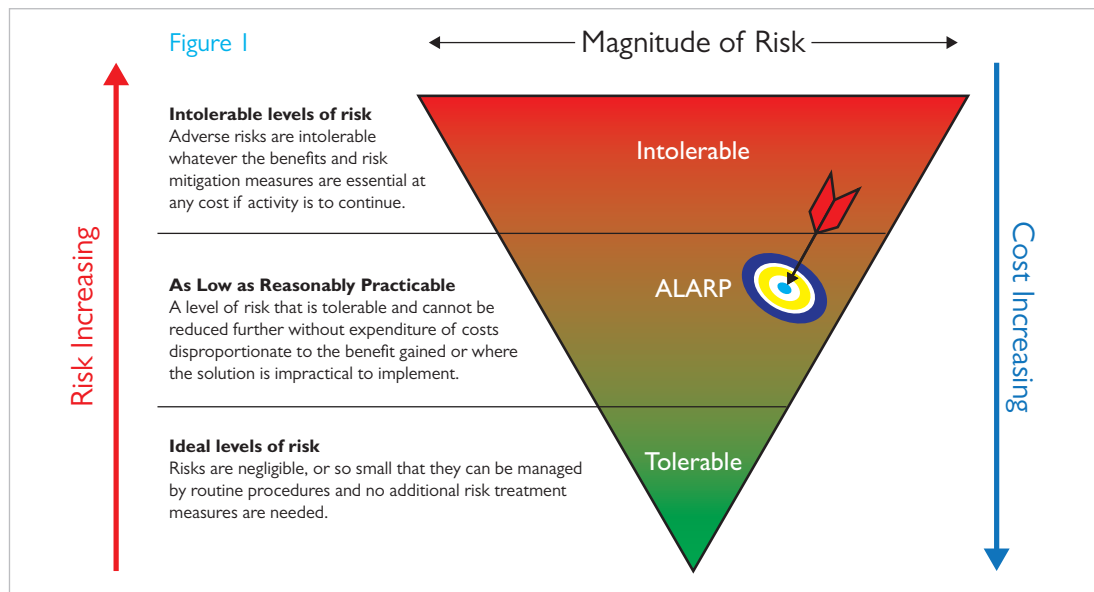
The case law of the Court on passengers' rights has already been severely criticised on different occasions. In as far as we are concerned, we see two major problems that create a complete disconnection between the case law on Regulation 261 and the EASA approach.

On one hand, the Court has moved from the wording of the Regulation. This required the airline concerned to adopt all reasonable measures to avoid the extraordinary circumstance, to a situation where all reasonable

measures must be adopted to avoid the delay or the cancellation therefore putting an increasing pressure on the person in charge to make the final call and to decide whether to ground the aircraft or to take off.

On the other hand, even though the Court has tried to balance such obligation with the economic burden that such obligation imposes on the airline, the result is quite worrying as the Court indicates that the costs of the measures adopted should not be 'intolerable' in relation to the financial capacity of the airline concerned. Does this mean that different standards would apply depending on the financial stability of the airline concerned? Does this mean that, confronted with the same extraordinary circumstance, a healthier airline should take certain measures while a quasi-insolvent airline would be exempted from adopting such measures?

Figure 1 (below) shows the level at which ALARP methods would place compliance by the airline with applicable safety regulations. As you can see, the level of compliance required by the Court to avoid paying compensation is much higher and, if the case law of the Court were to be applied literally, potentially uneven as better performing airlines will have to adopt more measures to avoid the delay or the cancellation than less financially viable airlines.



What would be the impact of these decisions on safety and aren't the obligations currently imposed by Regulation 261 in clear contrast with the performance-based approach adopted by EASA?

This is what we will review in the following section.

The airworthiness and safety perspectives

So here's the conundrum. EASA expects competent people to be managed within certified organisations, in such a way as to enable them to make safe judgements every day. It expects that people will make a no-fly decision when an aircraft is deemed to be un-airworthy or when the perceived cumulative risk is intolerable. Clearly, some decisions are simple and binary – comparing something with a defined pass/fail criteria. An example would be a 'go/no go' check on an electronic system or a flat tyre. Another would be a seriously ill captain. These issues cannot be ignored without someone committing a reckless violation.

The picture becomes more complex when people are relied upon to apply professional judgement. A maintenance engineer dealing with a marginal defect during a visual inspection is an example. Where previously the person would err on the side of safety, his or her judgement threshold could be influenced in certain situations, by the knowledge that recording a defect will potentially incur great cost to his or her employer, particularly if he or she is aware that the business is not doing well. Consider also, the crew that is nearing the end of a particularly tiring duty period and is faced with the decision of whether to use discretion to operate the last sector of the day, maybe in marginal weather conditions.

Investigation of real 'events', similar to the above examples, has at times seen individuals blame 'commercial pressure' as a contributory factor. Could a new '261 pressure' category be added to the causal factor taxonomy? I jest, however, the pressure people feel is a human response, driven by an instinct of self preservation and wanting to belong to a group, typically, it's not a direct management message.

Maintenance argument

We now consider the inadequate maintenance argument. The position taken by the courts when interpreting EU261 is, in essence, that any defect occurring on an in-service aircraft is either preventable or should be able to be rectified within the three-hour window EU261 'allows'. This position is fundamentally flawed. Aircraft

are currently not required to be designed or built in a way that guarantees 100 per cent system reliability for their whole lives and the safe repair or replacement of the majority of components within a couple of hours is impossible. Some smart positioning of spares, maintenance staff, tools and equipment and availability of appropriate facilities can help. However, some tasks just take longer to complete.

We should also remember that the initial establishment of maintenance tasks to detect or prevent aircraft system failure assesses the cost of such tasks and, whilst the analysis would not allow a perceived safety fault to remain unaddressed, affordability is integral to the decision-making. Undertaking more preventative maintenance can only be effective to a point, but the old British adage, 'if it aint broke, don't fix it' reflects the risks associated with maintenance. Humans will make errors, therefore doing more is not necessarily the safest thing to do and, of course, additional cost is incurred that will, ultimately, have to be paid for by the travelling public.

So what about the performance-based environment approach to organisation management systems? EASA's Air Operations regulations already require an Accountable Manager to implement an effective management system (ORO.GEN.210(a)). In its simplest form, with relevance to this subject, this regulation means that an operator must ensure that aircraft are delayed or flights cancelled when a safety threat is perceived, or by definition, a safety regulation non-compliance exists. Creating a culture and the systems to proactively and predictively manage both human and machine failures is the key. EU 261 makes no allowance for operators that operate an effective management system, including a performing Continuing Airworthiness Management Organisation (CAMO).

In conclusion

We argue that EASA's expectation that aircraft should be delayed for safety reasons vs, the EU261 expectation that aircraft should not, for regularity of passenger travel reasons, are at odds with each other.

We argue that if a national Aviation Safety Authority finds an operator's management system to be performing effectively, it should be accepted that occasional delays are inevitable and should not be penalised.

We also believe that there is a risk that human decision-making could be affected by the perceived financial threat that EU261 creates and that over the coming years this could increase and that if the citizens of the European Union want affordable air transport, the cost of aircraft and their safe operation have to be accommodated.

Finally, we believe that passenger's rights to safe travel should override their right to arrive on time and those airlines which are striving to deliver on both of these criteria, enabled by a performing management system, should be allowed an occasional delay in the interests of safety. EU261 should therefore be amended to align with the proven philosophies of the 'EASA rules'. Leave the effective management of human and machine factors to performing management systems and allow the authorities to put their effort into creating a performance-based environment.

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About Pierstone

Pierstone is an international network of full service law firms recognised by their commanding reputation in Technology, Media and Telecommunications Law.

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Giulia has more than 15 years' experience in advising national and international clients on all aspects of aviation and transport related transactions, including asset-finance and leasing, regulatory issues, carrier's liability and litigation matters.

She is the Chairman of the Aviation Lawyers Committee of the European Business Aviation Association and an active member of the Industry Affairs Group of the European Regions Airline Association. She is a member of the Management Committee of the Rail Working Group on the Rail Protocol of the Cape Town Convention, as well as their Brussels Representative.