

Newsflash two new decisions of the European Court on air passengers rights (September 2017)

The European Court has recently taken two decisions in relation to air passengers' rights.

1. Price transparency and general EU rules on unfair terms in consumers' contracts

In its judgment of 6 July 2017 the European Court has clarified that airlines have the obligation to indicate the real amounts of air taxes, airport charges and other charges, surcharges or fees in relation to the flight provided, separately from the air fare component of the ticket price.

The issue at stake was Air Berlin's practice of including considerable parts of air taxes in the air fare component, thus disclosing to the consumer air taxes lower than those paid in reality. The Court has upheld the German Bundesgerichtshof's decision, concluding that the above practice is contrary to the objectives of EU Regulation 1008/2008 on common rules for the operation of air services in the Community ("Regulation 1008"). Indeed, Regulation 1008, aims at ensuring transparent price information for air passengers. By artificially moving air taxes to the air fare component, airlines may mislead the consumer as the amount of air taxes is often decisive for the maximum amount of reimbursement due to the passenger in case of cancellation of the flight.

In the same judgement, the Court has decided that the general EU rules on unfair contract terms in consumer contracts are also applicable to contracts of carriage by air. According to its general terms and conditions, Air Berlin charged separate flat-rate handling fee of €25 if the passenger cancels or does not take his/her flight. The German Federal Union of Consumer Organisations argued that such

term unduly disadvantages consumers and thus infringes the German consumer law on unfair contract terms in consumer contracts. The airline contended that the invoked German legislation is not applicable to air transport because of the principle of pricing freedom of air services.

Although the Court does not deny the importance of this principle within the Regulation 1008, the Court concluded that this principle does not preclude the application of a national law (the German national law in this case) transposing the EU Directive on unfair terms in consumer contracts (the “Unfair Terms Directive”). According to the Court, the objective of the Unfair Terms Directive is to provide a general framework of consumer protection applicable to all economic sectors, ensuring that every contractual term not individually negotiated may be reviewed on its fairness from a consumer’s perspective. The Court furthermore considers that allowing air carriers to deviate from these rules would deprive such rules of their purpose and it will leave them meaningless. Moreover Regulation 1008 does not exclude the application of consumers’ regulations to air passengers. The Court therefore concluded that it is possible to verify the compliance of airlines’ general terms and conditions (such as the €25 handling fee of Air Berlin) with rules on unfair terms in consumers’ contracts.

2. How to calculate the distance between the airports of departure and arrival

In its judgment of 7 September 2017, the European Court has clarified the concept of ‘distance’ used by Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays (“Regulation 261”) in relation to the calculation of compensation payable to passengers in the cases provided for under Regulation 261. The Court indicates that the concept of ‘distance’ should be interpreted as the distance between the points of departure and final destination, regardless of any connection in between.

The facts of the case are as follows: after arriving in Hamburg from Rome with a total delay of almost four hours, three Brussels Airlines passengers claimed compensation on the basis of Regulation 261. The passengers claimed payment of a compensation of €400 as they considered that the total flight distance was above the 1500km threshold giving right to passengers to a higher compensation. Indeed, in consideration of the connecting flight in Brussels, the passengers added the distance from Rome to Brussels to that from Brussels to Hamburg, therefore obtaining a total distance of 1 656Km.

Brussels Airlines argued, on the other hand, that the distance to be taken into account for the determination of the compensation was the distance between Rome and Hamburg calculated on the basis of the ‘great circle’ method.

The question was referred to the Court which stated that the right to and extent of compensation for air passengers is based on the relevance of the inconvenience suffered by the passengers. According to the Court, the actual increase of the distance travelled in the case of an indirect flight, does not

exacerbate the extent of such inconvenience compared with the damage suffered by direct flight passengers. The Court therefore concluded that only the distance between the first point of departure and the final destination should be taken in account (Brussels straight to Hamburg in this case), regardless of any additional distance due to connection in between. The Court moreover notes that the provisions of Regulation 261 on compensation do not distinguish between direct and indirect flights.

By the above decision, the Court has thus clarified that the 'great circle' method for calculation of distance for the purposes of Regulation 261 is to be applied between the first departure point and the point of final arrival for any type of flight, regardless of it being direct or indirect.

For further information about our aviation and transport expertise, feel free to contact our Brussels based partner Giulia Mauri.

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