ZLW

Zeitschrift für Luft- und Weltraumrecht
German Journal of Air and Space Law
Revue Allemande de Droit Aérien et Spatial

Sonderdruck

Carl Heymanns Verlag

A 'Wild Cat' Ruling by the European Court of Justice

European Court ruling on EU Regulation 261/2004:
Krüsemann (and others) *vs*. TUIfly GmbH

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Abstract

On the 17th of April 2018, the European Court of Justice ('EUCJ' or the 'Court') delivered its judgment in the Krüsemann (and others) *vs.* TUIfly GmbH case ('Krüsemann - TUIfly').[1] The case involved an illegal strike by pilots and cabin crew of TUIfly Gemany, following an announcement by the airline of a restructuring plan. There was no formal strike notice issued by a union. Instead 89% of the pilots and 62% of cabin crew 'went sick': a so-called 'wild cat strike', which is illegal under German law. As a result, TUIfly was forced to cancel hundreds of flights, leading to thousands of passengers being stranded and huge losses for the company. In its judgement, the Court held that such a strike cannot be seen as an 'extraordinary circumstance' and that the airline is therefore not released from its obligation to pay compensation to affected passengers under EU Regulation 261/2004. This ruling is yet another 'red line' crossed by the Court, all in the name of providing a high level of 'protection' of passengers' interests. Protecting the interests of passengers is of course a noble objective but must always be balanced against the interest of airlines. It must never be to the detriment of economic viability and safe operation of airlines. This ruling will further distort this balance and will have wide ranging implications for the EU aviation industry, which is already struggling to restructure in order to remain competitive.

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1 Joined Cases C-195/17, C-197/17 to C 203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17 *Helga Krüsemann* and Others *vs.* TUIfly GmbH, 17 April 2018. In this Journal, ZLW 4/2018 pp 670 *et seq*.

A. Introduction

EU Regulation 261/2004 on compensation and assistance to airline passengers ('EU261' or 'the Regulation'),[2] is one of the most controversial and certainly the most litigated pieces of European legislation in history.[3] The EU Commission's replacement for the original Denied Boarding Regulation (EU 295/91) was intended to dissuade airlines from excessive overbooking (leading to denied boarding) and cancellations for commercial reasons as these were seen to be against the interests of consumers, as well as causing serious inconvenience for those consumers.

EU261 was therefore meant to be a scheme for punishing airlines when they engaged in these types of abusive commercial practices.[4] The method of punishment being the obligation for the airline to pay high levels of compensation to passengers when they fall victim to these abusive practices. These compensation amounts[5] have no correlation to the fare actually paid by the passenger to the airline and often amount to several times what a passenger actually paid for their fare.

However, already in the draft regulation there were problems with defining its actual scope. How does one determine whether the cancellation is done for 'commercial reasons' as opposed to valid operational reasons? Here, the legislator appears to have borrowed the concept of 'extraordinary circumstances' from an existing international treaty, the Montreal Convention.[6] However, this treaty deals with **actual damages**

2 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

3 At the time of writing, there were 102 cases dealing with EU261 that have made their way from the national courts to the highest court in Europe, the EUCJ. Twenty seven of these have led to judgements by the Court, almost all of which have significantly expanded the original intended scope of the legislation; 64 have been withdrawn/settled before a judgement – presumably out of fear of the further damage the Court would do; and 11 are still pending before the Court.

4 It could be argued, however, that if the Commission was concerned about these practices they could simply have amended Regulation 295/91, increasing the penalties for denied boardings and adding commercial cancellations within the scope of the amended Regulation.

5 See Article 7 Regulation, compensation amounts varying from € 250, € 400 and € 600 depending on the distance of the flight.

6 Convention for the Unification of Certain Rules for International Carriage by Air, opened for Signature at Montreal on 28 May 1999 (ICAO Doc No 4698). See article 51. However, Article 51 refers to Articles 3, 5, 7 and 8 of the Convention, none of which deals with delays or cancellations. Article 19,

occasioned by a delay, not simply handing out compensation to passengers for the inconvenience of a cancellation. This is where things started to go wrong.

According to Article 5 (3) of the Regulation, there is no entitlement for compensation in case the cancellation was due to "extraordinary circumstances, which could not be avoided even if all reasonable measures had been taken". Extraordinary circumstances is however not a defined term in the Regulation. Thus, any event, depending on the specific facts and circumstances, could comprise an 'extraordinary circumstance'. This is therefore potentially a very broad concept, whereas the original intention of the legislator was only to address abusive commercial practices, *i.e.*, denied boarding or cancelling a flight for pure commercial reasons by the operating carrier.

There then followed the inevitable litany of cases from national courts seeking clarity as to whether something should be considered 'extraordinary' or not. Quite early on, the Court considered this issue in the Wallentin-Hermann case,[7] which provided the much-criticized test for determining whether a technical issue rises to the level of extraordinary circumstances as per Article 5 (3) of the Regulation, *i.e.*, whether an airline has to pay compensation for something that is effectively a safety issue. In this case, the Court essentially re-wrote article 5 (3) Regulation[8] and held that:

> "[A] technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of [Article 5 (3)], unless that problem stems from events which, by their nature or origin, **are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.**"[9] (Emphasis added).

which deals with damages occasioned by delays states that "The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. **Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures"** (Emphasis added). There is no reference to 'extraordinary circumstances' in Article 19.

7 Case C-549/07, *Wallentin-Hermann*, 22 December 2008.

8 See *Croon*, "Placing Wallentin-Hermann in line with continuing airworthiness", Air & Space Law, 36, no.1 (2011):1-6.

9 *Ibid*., para. 34.

This two-pronged test, namely an event that (i) is not 'inherent' in the normal activity of the air carrier concerned; and (ii) is beyond the airline's actual control, has thereafter been used in almost all of the Court's subsequent decisions, *i.e.*, not only those pertaining to technical issues, and is responsible for a huge broadening of the scope of the Regulation. If the answer to the first prong is negative, then the second prong as to whether it was within the airline's control to avoid the occurrence is no longer relevant. Hence, if a judge (either at the EUCJ or the national level, both of whom have no technical experience in the field of aviation) consider an event as being 'inherent to the normal activity of an airline', then the passenger is entitled to compensation. This is how the EUCJ has converted a regulation that was originally designed to punish airlines for abusive commercial practices into a strict liability for airlines to pay in almost every event of cancellation (and in later decisions delays over three hours).

This new 'inherency test' created by the EUCJ, which was originally meant to apply to technical problems or unexpected flight safety shortcomings, was subsequently embraced by national courts within the EU. It now applies in every possible occurrence or event, often to the detriment of airlines. Article 5(3) is therefore almost completely irrelevant and is essentially being disregarded by national courts (following the example of the EUCJ).

Also important to note is that the word 'inherent' results from a faulty translation from the original language of the decision[10]. The language of Wallentin-Hermann is German and this is the only legally binding language. According to the original German language version, the event should be:

> "… nicht **Teil** der normalen Ausübung der Tätigkeit des betroffenen Luftfahrtunternehmens ist."[11] (Emphasis added).

10 See *Croon*, "If You Do Not Know Where You Going, You Will End Up Somewhere Else": Update on the Continuing Discussion on Technical Problems and Passenger Rights', Air & Space Law 40, no. 4&5 (2015):331-340.

11 Translation into English: "is not **part of** the normal exercising of the activity of the airline company concerned".

Clearly 'inherent in' has a very different connotation than 'part of'.[12] Proper and timely maintenance is 'part of' the normal exercise of the activity of an air carrier. Thus, if it can be shown that an airline has not properly followed the necessary maintenance procedures and this has led to a cancellation (or long delay of the flight), then the airline should be held accountable to compensate the passenger. However, if the airline has properly performed its maintenance obligations and nevertheless a technical issue arises, which leads to the cancellation (or long delay) of the flight, then this is an 'extraordinary circumstance' as it is not 'part of' the normal exercise of an air carrier, *i.e.*, a carrier does not plan or intend to have an unexpected safety short coming - something they are then required by law to address in the interest of continuous airworthiness and a safe operation of the flight.

However, what is not 'part of' the normal exercise of an airline are events like a handler backing a set of air stairs into the wing of an aircraft, which renders it inoperable or, in the current case, a wild cat strike illegally called by employees of the airline. In other words, the air carrier does not require or intend for these events to occur – they are not 'part of' the normal exercise of its activities.

The other case that has vastly broadened the scope of the Regulation is the Sturgeon case,[13] where the Court held that delays of over three hours should also be compensated by airlines under Article 7.

> "[The Regulation] must be interpreted as meaning that passengers whose flights are **delayed** may be treated, for purposes of the application of the **right to compensation**, as passengers whose flights are cancelled."[14] (Emphasis added).

This expansion was an unexpected shock for the industry and for any followers of the *Montesquieu* doctrine.[15] In the Regulation delays where specifically excluded from the

12 'Inherent' is defined as "existing in something; as a permanent or characteristic attribute." Oxford English Dictionary.

13 Case C-402/07.

14 Joined Cases C-402/07 and C-432/07 *Sturgeon* and Others, at para. 73(2). 19 November 2009.

15 In his seminal treatise, Spirit of the Laws (1748), French Enlightenment political philosopher, *Baron de Montesquieu*, wrote that "[I]n every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the judiciary in regard to matters that depend on the civil law." He also warned that "[W]hen the legislative and executive powers

obligation to compensate passengers.[16] By extending this entitlement for compensation to passengers whose flights are delayed by more than 3 hours, the EUCJ took on the role of the legislator and the judiciary, which is an unacceptable position, particularly given the complexities of the airline industry and the need for proper process in legislating it. The fact that the executive and legislative branches, *i.e.*, the EU Commission, the Council and European Parliament, specifically excluded delays from the Regulation, means that the EUCJ massively overstepped its position in subsequently rewriting the legislation.

The reason for excluding delays from the scope of the Regulation by the EU legislators is pretty obvious – airlines do not intentionally delay their flights as, unlike denied boarding and cancellation, there is no commercial gain involved as they lose money if the aircraft is sitting on the ground. The interests of the airline and the passenger are therefore completely aligned in these circumstances. Moreover, there are a huge number of factors that lead to flight delays, including air traffic congestion, weather, handling delays, technical and safety issues, etc., most of which are completely beyond the control of the airlines. Punishing airlines by making delays compensable is therefore completely unjustified and does nothing for 'consumer protection'.

The compensation amounts are also often several times what the passenger has actually paid the airline for the flight in the first place.[17] This was clearly not in line with the basic purpose of the Regulation and is causing serious issues for the industry, both in terms of the financial stability of airlines and flight safety,[18] as well as for the con-

are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." The Spirit of the Laws, Book XI.

16 The *Sturgeon* ruling went against the explicit decision of the European Commission not to include delays. See *para* 23 of the Explanatory Memorandum for the Regulation, Com 2001/784 final, dated 21.12.2001).

17 The fixed levels of compensation in the Regulation are not linked to the actual fare paid by the passenger. In no other industry is there a requirement for a company to pay 'compensation' to their customer which is more than what the customer actually paid for the service in question, and the customer still receives the service they paid for. It is little wonder many air carriers are in such precarious financial situations.

18 See, *e.g.*, an earlier article by the authors, entitled 'Punctuality or a Safe Flight: Which Should Have Priority?', Air & Space Law, Volume 43, Issue 1, 53. See also *Croon*, "Wallentin-Hermann" and a Safe Flight - In Aviation there are No Minimum Rules on Maintenance, ZLW 2012, pp. 609 - 617.

sumers themselves in the long run. More airlines will go bankrupt[19] due to ongoing financial pressures and airline fares will increase to balance out the losses caused by this unfair application of the Regulation.

B. The Ruling in Krüsemann-TUIfly

In a group of 30 joined cases from two German courts, the EUCJ ruled on the issue of whether a series of illegal 'wildcat strikes' by a large proportion of TUIfly's cabin and cockpit crews in Germany, should be considered as 'extraordinary circumstances' under Article 5 (3) of the Regulation for the purpose of requiring the airline to pay compensation to passengers whose flights were cancelled or delayed for more than three hours as a result of these illegal strikes.

The relevant question posed by the referring court was:

> "whether Article 5 (3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that the spontaneous absence of a significant part of flight crew staff members ('wildcat strike'), such as that at issue in the main proceedings, is covered by the concept of 'extraordinary circumstances' within the meaning of that provision."[20]

In order to decide whether the requirement of extraordinary circumstances have been met, the Court then goes on to wrongly refer to the two-prong test it devised in the *Wallentin-Hermann* case, noted above.[21]

Although the Court correctly noted that Recital 14 of the Regulation states that extraordinary circumstances may occur, in particular, in cases of strikes that affect the operation of an operating air carrier,[22] it then states that the objective of Regulation is a high level of protection for passengers. The Court also remarks that Article 5(3) of

19 See note where the authors refer to recent bankruptcies of European airlines.

20 *Krüsemann* and Others v TUIfly, para. 29.

21 Strangely the Court cites to the judgment of 4 May 2017 in C-315/15 *Pešková* and *Peška*, which then links to the relevant precedents that devises and then perpetuated this unfair and unreasonable test, including C-549/07 *Wallentin-Hermann*; Case C-12/11 *McDonagh*, and Case C-257/14 *Van der Lans*.

22 *Ibid*., at *para* 33.

the Regulation, which derogates from the principle of the right to compensation for passengers, must be strictly interpreted.[23]

The Court continues to further flesh out this 'strict interpretation' by essentially blaming TUIfly management for the illegal action of their employees, stating that the strike:

> "has its origins in the carrier's **surprise announcement** of a corporate restructuring process. That announcement led, for a period of approximately one week, to a particularly high rate of flight staff absenteeism as a result of a call relayed not by staff representatives of the undertaking, but spontaneously by the workers themselves who placed themselves on sick leave."[24] (Emphasis added).

> "Thus, it is not disputed that the 'wildcat strike' was triggered by the staff of TUIfly in order for it to set out its claims, in this case relating to the restructuring measures announced by the management of that air carrier."[25]

The Court therefore takes the position that somehow the airline was at fault by issuing a "surprise announcement" of its restructuring plans – although it is not clear why they characterise it as a 'surprise' or why this should be relevant in any case. For example, if an airline makes the announcement in a 'non-surprising fashion', would that be relevant in a future determination? How should a company ensure that their staff are not 'surprised' by the need to restructure? The Court's observation in this respect displays an extreme level of ignorance of the realities and challenges faced by airlines (and businesses in general).

On the other hand, the Court draws no negative inference from the fact that the action of the individual employees was entirely illegal[26] and that they took this illegal action as a result of a strike notice not being formally issued by their trade union. The

23 *Ibid*., at *para* 36, referring to *Wallentin-Hermann*, *para* 20.

24 *Ibid*., at *para* 38.

25 *Ibid*., at *para* 39.

26 According to German law, there are certain requirements for a strike organised by a union to be considered lawful by the labour courts. Strikes are inadmissible during the term of a collective agreement. In addition, case law regularly demands that a strike must be proportionate and only used as a last resort in a specific case. When the previously obligatory negotiations between the parties (employer and union) have been unsuccessful and are described as having failed, then the

strike was therefore not covered by the freedom of association and should not have gone ahead.[27] After this ruling, is it now acceptable for employees to take matters into their own hands and organise wild cat strikes whenever they please and without any form of official strike notice being provided by their union representatives? What sort of chaos will this cause in an industry already racked by strikes of airline employees, air traffic controllers, airport staff, handlers, etc.?

The Court refers to an observation made by the European Commission that

> "restructuring and reorganisation of undertakings are part of the **normal management** of those entities".[28] (Emphasis added).

Interestingly, this seems to imply yet another standard by which the Court considers whether something is 'extraordinary' or not, *i.e.*, whether it is part of the 'normal management' of an airline. Because restructuring and reorganisations will usually lead to disagreement or conflicts with employees, it is held by the Court that the risks arising from the social consequences that go with such measures must be regarded as "inherent in the normal exercise of the activity of the air carrier concerned."[29]

The Court then deals with the question of 'control', which is unnecessary under the Court's precedents because the Court already found the event to be 'inherent'. Its finding on 'control' is nevertheless equally simplistic and worrying. The Court found that:

> "the 'wildcat strike' at issue in the main proceedings cannot be regarded as beyond the actual control of the air carrier concerned."[30]

> "Apart from the fact that the 'wildcat strike' stems from a decision taken by the air carrier, **it should be noted that, despite the high rate of absenteeism mentioned by the referring court, that 'wildcat strike' ceased following**

union, and only the union as such, may call for a strike. A strike that takes place without a prior notice being issued by the union is illegal, since it is not led by any party with the right to negotiate.

27 *Supra* note 26.

28 *Ibid*., at *para* 40.

29 *Ibid*, at *para* 42.

30 *Ibid*., at *para* 43.

> **an agreement that it concluded with the staff representatives.**[31] (Emphasis added).

In the Court's view the strike would not have occurred, if the airline had simply not announced the restructuring in the first place, or if it had 'caved in' to union demands before they illegally went on strike. Therefore, the situation was entirely within the control of airline management and the wild cat strike could not be considered as "an extraordinary circumstance within the meaning of Article 5 (3) of the Regulation."[32]

The Court seems to justify its decision by claiming that it would be too difficult for passengers facing different social legislation in different Member States to determine whether they have a claim or not when airline unions go on strike.[33] The more logical approach would have been to declare that **all** internal airline strikes are considered to be extraordinary circumstances within the meaning of article 5 (3) and therefore not compensable by the airlines. After all, a strike is not part of an airline's normal activity and is beyond its control, *i.e.*, it is a decision of the union (or in this case by individual employees – clearly acting illegally). The Court's position that the strike is within the airline's control as they can simply award the union or wild cat strikers with what they are seeking displays an extraordinary level of ignorance for industrial relations. Moreover, the right to go on strike is seen as a fundamental (human) right of the employee. There are no reasonable measures available for an employer to withhold this right from employees, and an employer should not be punished further by being forced to pay unreasonable levels of compensation to its passengers as a result of such strikes.

This ruling yet again broadens the scope of the Regulation far beyond the original intent of the legislator and forces airlines to pay punitive compensation to their passengers for something that is not part of their normal activities and clearly not within their control, *i.e.*, an illegal strike by their employees. TUIfly was trying to introduce restructuring measures in order to remain competitive (and keep their workers employed!) in a highly challenging industry. It is beyond cavalier for the Court to say that a wild cat strike is 'within the control' of an airline, and even to imply somehow that TUIfly was at fault for the illegal action of its employees by announcing these restructuring measures.

31 *Ibid.*, at *para* 44.

32 *Ibid.*, at *para* 45.

33 *Ibid.*, see *para* 47.

Even in the context of other poor rulings by the Court in this area, this decision is 'extraordinary'. Rewarding employees or unions for illegally taking matters into their own hands will have far reaching implications for this industry.

C. Wider Implications of this Ruling

This case has obvious and serious consequences for all airlines dealing with internal strikes, irrespective of whether they are legal or (as in this case) illegal. It remains to be seen how this EUCJ ruling will land at the national courts in the EU but there is a risk that these courts will use the illogical reasoning of the EUCJ to force airlines to pay compensation in **all** internal strikes. The matter would then have to go back up to the EUCJ for yet another decision in this ongoing saga.

It has been clear for some time that the EUCJ has no concept of the realities of the airline industry but rewarding unions not only for 'bad behavior' but also for **illegal** behavior is obviously something that should never be countenanced by the highest court in Europe. Now airlines not only have to deal with the huge direct costs of wild cat strikes, but this judgement also requires them to pay punitive levels of compensation to affected passengers. The total cost to TUIfly of this illegal strike by its employees is likely to have been several tens (if not hundreds) of millions of euro.

Airline trade unions are already very aware that their strike actions cause severe economic consequences for their employer's. This provides them with significant bargaining power to achieve unreasonable concessions from these companies, which eventually lead to financial instability and the need for restructuring or bankruptcy. By broadening the scope of EU261 to cover (illegal) strikes by unions, the Court has handed unions another weapon to use in their negotiations with management. Not only does the wildcat strike ruling cause further and substantial financial damage to airlines but the unions now do not even require a legal mandate to strike, they can simply execute a wild cat strike – the EUCJ in the Krüsemann-TUIfly ruling has as good as sanctioned such practices.

One problem with wild cat strikes is that, by their very nature, they are unpredictable and therefore impossible to have a contingency plan for. In the Krüsemann-TUIfly case, the employees simply called in sick without any warning and the airline was unable to inform passengers in advance or try to cover these flights with leased-in

aircraft/crews.[34] They are therefore highly damaging to the (travelling) public, which is one of the reasons they are considered illegal in many jurisdictions. The right to strike is a fundamental right but one that still requires certain rules to be followed.

Other airlines will now be faced with the prospect of paying huge compensation bills on top of the already hideous costs of strikes.[35]

Claims management companies ('CMCs') will also have a field day with this judgement and are already encouraging passengers to go back in time[36] and claim for previous delays/cancellations due to strikes over the past number of years.[37]

D. Conclusion

This decision is another horrendous example of the Court's breach of *Montesquieu*'s principles on the separation of powers and a further setback for the competitiveness of the EU aviation industry, under the banner of 'consumer protection'. It also puts the financial stability of EU carriers at further risk. The three recent airline bankruptcies of Airberlin, Alitalia and Monarch are very likely to be followed by others. Airlines

34 This is a further indication that the airline has 'no control' over the situation and should not be required to pay compensation. If the airline had adequate notice of the strike, they could have either had contingency plans to try to nevertheless operate the flights or cancelled them with sufficient time to avoid compensation under the regulation. See Article 5(1)(c).

35 Air France, with its recent and ongoing strikes by employees will now be faced with the prospect of having to pay up to €600 per passenger (on a one way ticket) to every passenger affected by these strikes, on top of the already high costs caused by these strikes. Air France management announced that each day of strikes is costing the company some €20 million. Thus far, with the most recent strike action, the company estimates some €300 million in losses. This on top of limitless 'care and assistance' under Article 9 of the Regulation (whereby airlines are also required to put passengers up in hotels, pay for all of their meals, telephone calls, transportation to and from hotels, etc.).

36 In Cuadrench (Case C-139/11), the Court further broadened the scope of the Regulation, where instead of adopting the Montreal Convention statute of limitation of 2 years for filing a claim, the Court ruled that it should be the Statute of Limitation of the relevant Member State, which can be 10 years in some cases (*e.g.*, Latvia, Sweden and Luxembourg).

37 For example, British Airways was faced with a 16-day strike by cabin crew in July 2017, which was then extended for a further two weeks into August 2017, which affected more than 60,000 passengers at Heathrow. Bott and Co, a law firm in the UK and a major beneficiary of EU261 (given that they take over a third of the compensation they extract from airlines) estimates that this strike alone is worth £25 million in compensation to passengers.

are now truly stuck 'between a rock and a hard place' - restructure and face the risk of higher costs from striking employees; or don't restructure and eventually go bankrupt.

Each successive decision coming out of this expansionist Court builds on the bad precedent of previous cases, which has essentially transformed a piece of legislation designed to punish airlines for abusive commercial practices into one that makes the airline the insurer of last resort for anything that goes wrong in the industry, whether it is the fault of the airline or not.

With a court completely out of touch with the realities of the airline industry and clearly impeding on the legislator's realm, it is now time for the European legislator to take this situation in hand and proceed with its intended revision of the Regulation, before the European Court does terminal damage to the industry.

Given the huge churn in the courts (both EU and national) around what the scope of this Regulation should be, the European legislator now needs to specifically state what is intended to be compensated for and what is not, in order to ensure transparency and legal certainty. Clearly issues that are safety related or outside the control of the airline should be out of scope. The original intention was to punish airlines for abusive commercial practices, not for almost every 'inconvenience' to passengers for availing of this highly complex and generally very convenient and safe form of transport.