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BRIEFING

# AVIATION UPDATE

MAY 2018

- 'WILDCAT STRIKES' WILL NOT ALWAYS 'CONSTITUTE EXTRAORDINARY CIRCUMSTANCES' EXCLUDING AIR CARRIERS FROM LIABILITY TO PAY COMPENSATION TO PASSENGERS FOR DELAYED OR CANCELLED FLIGHTS
- SUPREME COURT REJECTS EMIRATES APPLICATION TO APPEAL THE CA'S DECISION IN *GAHAN V EMIRATES*
- GUIDANCE FOR AIR CARRIERS IN RELATION TO THE GDPR

In our latest Aviation Update, we discuss a recent decision of the Court of Justice of the European Union (the "CJEU") relating to industrial action as an 'extraordinary circumstance' for the purpose of Regulation (EC) 261/2004 ("EC 261/2004");[1] the English Supreme Court's refusal of Emirates' application for permission to appeal the decision of the Court of Appeal (the "CA") in *Gahan v Emirates and Buckley & Ors v Emirates*[2]; and provide some guidance for air carriers in relation to the imminent coming into force of the EU General Data Protection Regulation 679/2016 (the "GDPR").

## Industrial action as an extraordinary circumstance under EC 261/2004

In a decision that will be of particular interest to community and non-community Carriers alike the CJEU has decided industrial action such as 'wildcat strikes' will not always constitute extraordinary circumstances excluding air carriers from liability to pay compensation to passengers for delayed or cancelled flights pursuant to EC 261/2004. The CJEU's decision is in response to requests by various German courts for a preliminary ruling in relation to a number of flight delay and cancellation claims by passengers against TUIfly GmbH (the "TUIfly Claims").

[1] *Helga Krüsemann and Others v TUIfly GmbH* (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).
[2] [2017] EWCA Civ 1530.

## Background

The TUIfly Claims were brought by passengers who had reservations for TUIfly flights between 3 and 8 October 2016. On 30 September 2016, TUIfly's management notified the carrier's staff of its restructuring plans. In response to this announcement a significant proportion of TUIfly's staff took part in unofficial industrial action by way of mass sick leave. Between 1 and 10 October 2016, TUIfly's staff illness levels went from an average of 10% to 89% for cockpit crew and 62% for cabin crew. Disruption to TUIfly's flights started on 3 October 2016 and escalated over the following days until TUIfly was forced to cancel all flights departing from Germany. By the evening of 7 October 2016, TUIfly's management was forced to reach an agreement with staff representatives.

"THE CJEU'S DECISION IN THIS CASE WILL BE QUITE ALARMING FOR AIR CARRIERS."

TUIfly argued that it was not liable to pay compensation pursuant to Articles 5(1) and 7 of EC 261/2004 to affected passengers because the wildcat strikes constituted an extraordinary circumstance under Article 5(3). Article 5(3) exempts carriers from paying compensation to passengers where it is able to prove that the disruption was caused by "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken". Recital 14 of EC 261/2004 states that strikes that affect the operation of the air carrier may constitute extraordinary circumstances.

## The decision

The CJEU highlighted that it had already decided that circumstances listed in Recital 14 are not automatically grounds for excluding liability to pay compensation pursuant to Article 5(1).[3] Rather, the courts must assess on a case by case basis whether the relevant circumstances fulfil two cumulative conditions: (1) whether by their nature, or origin, they are not inherent in the normal exercise of the activity of the air carrier; and (2) are beyond the air carrier's actual control.

The CJEU, rather alarmingly, distinguished the 'wildcat strikes' on the basis that they were not called by staff representatives or union officials but by the staff themselves. Further, the CJEU placed importance on the fact that the industrial action was precipitated by the announcement, by TUIfly's management, of restructuring plans which were part of the normal management of TUIfly. Thus the CJEU found that the 'wildcat strikes' were both inherent in the normal activity of TUIfly and were within the actual control of the air carrier. Thus the industrial action did not constitute extraordinary circumstances.

The CJEU also set out two further observations which will concern air carriers: (1) that because the 'wildcat strikes' ended once TUIfly reached settlement with its staff's representatives those strikes were within its control because it could have reached agreement earlier; and (2) that the classification of the industrial action as 'wildcat strikes' under German social legislation, as they were not formally initiated by a trade union, was irrelevant when assessing whether they constituted extraordinary circumstances (the CJEU reasoned that reference to the legality of strikes under national law to determine whether they should be classed as extraordinary circumstances would make the right to compensation dependent on the legislation of individual Member States).

[3] Wallentin-Hermann v Alitalia (C-549/07), paragraph 22.

### Impact

The CJEU's decision in this case will be quite alarming for air carriers operating within the EU and thus with potential liability pursuant to EC 261/2004.

Firstly, rather than providing a clear and certain basis on which to categorise industrial action as an extraordinary circumstance which would have provided certainty to the industry, the CJEU has decided to emphasise that the circumstances of the case will determine the outcome. Thus it will have to be decided on a case by case basis whether the industrial action in question and the effect it has on an air carrier's schedule will, on the specific circumstances of the case, constitute extraordinary circumstances. Such a requirement will place an enormous burden on air carriers in an industry where industrial action in the EU is relatively commonplace. The air carriers are likely to always argue that an occurrence of industrial action constitutes extraordinary circumstances whereas the passengers will always argue the opposite. As such, this will mean that all claims arising out of delay or cancellation resulting from industrial action will have to be resolved by recourse to the national courts. The cost of defending such claims by air carriers is usually greater than the claim value. Moreover, in jurisdictions such as England and Wales where County Court judges are not bound by previous decisions of the County Court and where conflicting decisions are common the burden of defending every claim under EC 261/2004 relating to industrial action, to the hearing stage will be considerable and will greatly inflate the cost of industrial action for air carriers.

"NON-COMMUNITY CARRIERS WILL NOW NEED TO MONITOR THE PERFORMANCE OF THEIR EC SERVICE PROVIDERS AND IN ANY DISRUPTION OR INDUSTRIAL DISPUTE, ASSESS THE EXTENT TO WHICH THIS CAN BE FOUND TO BE WITHIN THEIR ACTUAL CONTROL."

Secondly, the CJEU's statement that an air carrier's failure to reach an agreement with staff representatives as early as possible in order to avoid industrial action places the circumstances giving rise to delay or cancellation within the control of the air carrier is extremely uncommercial. The result is that staff representatives and trade unions have been handed a significant strengthening of their negotiating position in any disputes with the management of air carriers that operate within the EU. Not only does it mean that an air carrier's cost of industrial action will be substantially inflated by compensation claims from passengers but it also sends a message from the CJEU that it sees industrial disputes as the fault of the air carrier with no responsibility placed on the trade unions or staff representatives.

Non-community carriers already have to deal with issues and complications arising from industrial action affecting their flights to, from and over the EU. Industrial action, including 'wildcat strikes' by their ground handlers and other service providers in the EU, raises issues about the extent to which a non-community carrier would be considered to exercise the same level of control as TUIfly and unable to assert that such disruption constituted extraordinary circumstances.

The CJEU cited and applied, rather than distinguished, its previous decision in Pešková and Peška in which it clarified that events, which are beyond an air carrier's actual control, are more likely to constitute extraordinary circumstances.[4] Provided a non-community carrier can show that the prevention and resolution of such strikes and disruption is outside their actual control, there should be a good case for asserting that such strikes constitute extraordinary circumstances in accordance with Pešková and Peška. Ultimately, this will depend on the extent to which the applicable

[4] See our previous briefing note, July 2017: http://www.wfw.com/wp-content/uploads/2017/07/WFW-Briefing-Flightdelays-July2017.pdf

national court prioritizes and focuses on the objective in Recital 1 of EC 261/2004, of ensuring a high level of protection for passengers.

Non-community carriers will now need to monitor the performance of their EC service providers and in any disruption or industrial dispute, assess the extent to which this can be found to be within their actual control. This is particularly in the context of outsourced services such as baggage handling and crew, where a withdrawal of the services can result in a disruption to flights and claims pursuant to EC 261/2004.

### Supreme Court rejects Emirates application to appeal the CA's decision in *Gahan v Emirates*

"DATA PROCESSING IS LAWFUL ONLY IF AND TO THE EXTENT THE CONTROLLER HAS A LAWFUL BASIS FOR IT."

In January 2018, we issued a briefing note commenting on the English CA's decision in *Gahan v Emirates*,[5] in which it was held that delay in arriving at a final destination, rather than delay to the first leg of a flight to a connecting airport, is what counts for the purposes of compensation under the Regulation.

In March 2018, Emirates' application for permission to appeal that decision was rejected. As a result, where passengers on a non-community carrier's flight departing from an EU country are delayed more than three hours as a result of a missed connection, compensation will be available under the EC 261/2004. The Supreme Court did not consider that the appeal raised an arguable point of law because it agreed with the CA's finding that the CJEU had already decided on the issue. By refusing Emirates' application for permission to appeal, the Supreme Court has turned down what would likely have become its first opportunity to consider the extent to which it must apply or is able to diverge from CJEU decisions. If permission to appeal had been granted it is entirely possible that the matter would have not been listed until after the UK's formal exit from the EU in March 2019. Given that the primary reasoning given by the CA for reaching the decision it did was that it is bound by the CJEU's previous clear decisions on the missed connection issue, it may be surprising to some that the Supreme Court did not want to seize the opportunity to explore the continued applicability of CJEU decisions post-March 2019.

### Protection under the General Data Protection Regulation 679/2016

The GDPR comes into force on 25 May 2018, creating a harmonised data privacy regime across the EU, with application to businesses outside it and greatly enhanced penalties for breach. Consequently, both community and non-community air carriers must ensure they comply and can demonstrate they comply, not just now at the changing of the legal regime, but on a continuous basis.

### Lawful basis for processing personal data

The core of air carriers' data protection compliance obligation is this: they need a lawful basis for processing the personal data of their passengers. This is not a new obligation, but one that has higher enforcement stakes because of the new regime.

[5] http://www.wfw.com/wp-content/uploads/2018/01/WFWBriefing-EC261.pdf.

Article 6 of the GDPR sets out the six possibilities. Relevant bases here might include: first, where processing is necessary for compliance with a legal obligation to which the controller is subject, secondly, where processing is necessary for the performance of a contract, or thirdly, where processing is necessary for the purposes of the legitimate interests pursued by the controller or a third party, except where such interests are overridden by the interests or the fundamental rights and freedoms of the data subject which require protection of personal data.

Since air carriers will wish to retain records of passenger manifests/other passenger information for delayed flights for six years – as we have previously recommended, this will help carriers verify or defend alleged claims for compensation under EU 261 – they must consider and document the lawful basis for keeping these data for that period.

In addition, the privacy notice for passengers must state clearly what that lawful basis for processing is, as well as its purposes. Airlines must be both accountable and transparent for their data processing activities.

### Data protection compliance: brief recommendations

Consequently, we recommend air carriers, both now and on an ongoing basis and as part of their overall GDPR compliance activity:

- keep under review the lawful bases for processing their passengers' data;
- review and update privacy notices given to passengers; and
- if relying on legitimate interests as the lawful basis for processing in relation to EU 261, ensure a full assessment of the legitimate interests has been carried out and documented, showing not only what the air carrier's legitimate interest is, but the necessity of the processing and why the air carrier's interests in processing the data are not overridden by the interests or fundamental rights and freedoms of individuals. This analysis will also prove useful if the data subject objects to the processing of their data in this way, since the air carrier may demonstrate it has compelling legitimate grounds which override that right to object - i.e. to evidence or to refute passenger claims.

# FOR MORE INFORMATION

**Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.**


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Publication code number: Europe\62186543v5