



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 14 January 2016¹

Joined Cases C-145/15 and C-146/15

**K. Ruijsenaars,
A. Jansen (C-145/15),
J.H. Dees-Erf (C-146/15)**

v

Staatssecretaris van Infrastructuur en Milieu (Requests for a preliminary ruling from the

Raad van State (Council of State, Netherlands))

(Reference for preliminary ruling — Air transport — Regulation (EC) No 261/2004 — Compensation and assistance to passengers — Cancellation of a flight — Article 16 — National bodies responsible for the enforcement of the regulation — Rights of individuals — Role of the national bodies responsible for the enforcement of the regulation — Individual complaint — Sanctions)

1. By its question, the Raad van State (Council of State) seeks to ascertain whether Article 16 of Regulation (EC) No 261/2004² requires a national body responsible for enforcing that regulation to take enforcement action in order to compel an air carrier to pay a passenger the compensation due following a flight delay or cancellation, in accordance with Articles 5 and 7 of that regulation.

2. Article 16(1) of Regulation No 261/2004 requires Member States to designate a national body responsible for enforcing that regulation, which, where appropriate, is to take the measures necessary to ensure that the rights of passengers are respected.

3. In this Opinion, I shall explain the reasons why I consider that Article 16 of Regulation No 261/2004 is to be interpreted as meaning that a national body responsible for enforcing that regulation, before which a passenger's individual complaint has been brought, may not take enforcement action against the air carrier concerned in order to compel it to pay the compensation that may be due to that passenger under that regulation.

I – Legal framework

A – EU law

4. Recital 1 of Regulation No 261/2004 states that 'action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers'.

¹ — Original language: French.

² — Regulation 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).

5. Article 5 of that regulation is worded as follows:

‘1. In case of cancellation of a flight, the passengers concerned shall:

...

- (c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:
 - (i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or
 - (ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or
 - (iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

...

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

...

6. Article 7(1) of that regulation provides:

‘Where reference is made to this Article, passengers shall receive compensation amounting to:

- (a) EUR 250 for all flights of 1 500 kilometres or less;
- (b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;

...

7. Article 16 of Regulation No 261/2004 is worded as follows:

‘1. Each Member State shall designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected. The Member States shall inform the Commission of the body that has been designated in accordance with this paragraph.

2. Without prejudice to Article 12, each passenger may complain to any body designated under paragraph 1, or to any other competent body designated by a Member State, about an alleged infringement of this Regulation at any airport situated on the territory of a Member State or concerning any flight from a third country to an airport situated on that territory.

3. The sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate and dissuasive.’

B – *Netherlands law*

8. In order to comply with Article 16 of Regulation No 261/2004, the Kingdom of the Netherlands designated the Staatssecretaris van Infrastructuur en Milieu (Secretary of State for Infrastructure and the Environment, ‘the Staatssecretaris’) as the national body responsible for enforcing that regulation. Accordingly, under Article 11.15(b)(1) of the Law on Aviation (Wet luchtvaart) of 18 June 1992,³ in the version applicable to the main proceedings (‘the Law on Aviation’), the Staatssecretaris has the authority to require the infringer, by an order for coercive administrative action, to comply with the provisions contained in that regulation or adopted pursuant to it in order to remedy the infringement. If the infringer does not do so or does not do so within the time-limits imposed, the Staatssecretaris has the authority to remedy that infringement himself.

9. In the event of infringement of the provisions contained in Regulation No 261/2004 or adopted pursuant to it, the Staatssecretaris may, under Article 11.16(1)(e)(1) of the Law on Aviation, impose an administrative fine.

10. The national court states that that law provides a general basis for the Staatssecretaris to take enforcement action in the event of an infringement of Regulation No 261/2004 and gives the example of the air carrier which systematically refuses to meet its obligations under that regulation. On the other hand, it considers that that law does not give the Staatssecretaris the power to take enforcement action at the request of a passenger in every individual case in which an air carrier refuses to grant a request for compensation under Article 5(1)(c) and Article 7 of that regulation.

II – **Facts**

11. Mr Ruijsenaars and Mr Jansen (Case C-145/15) and Mr Dees-Erf (Case C-146/15) (‘the applicants in the main proceedings’), whose flights were cancelled and delayed by 26 hours, respectively, claimed on two occasions from the airline companies responsible for those flights, namely Royal Air Maroc (Case C-145/15) and Koninklijke Luchvaart Maatschappij NV (Case C-146/15), payment of the compensation provided for in Article 7 of Regulation No 261/2004.

12. Following the successive refusals of the two air carriers to compensate the applicants in the main proceedings, the latter requested the Staatssecretaris to take the necessary enforcement action in order to compel the carriers to remedy the infringement of Article 5(1)(c) of Regulation No 261/2004 and to pay them the compensation sought, pursuant to Article 7 of that regulation.

13. The requests and claims of the applicants in the main proceedings were rejected by the Staatssecretaris. Therefore, Mr Ruijsenaars and Mr Jansen brought an action before the Rechtbank Oost-Brabant (District Court, East Brabant) against the decision of the Staatssecretaris rejecting their requests and Mr Dees-Erf brought an action before the Rechtbank Den Haag (District Court, The Hague) against the decision of the Staatssecretaris rejecting his request. Those courts both dismissed the actions as unfounded. The applicants in the main proceedings then decided to bring an appeal before the Raad van State (Council of State).

14. In each of these cases, the Raad van State has doubts regarding the competence of the Staatssecretaris to take administrative enforcement action in respect of air carriers in each individual case of infringement of Article 5(1)(c) and Article 7 of Regulation No 261/2004.

³ — Stb. 1992, No 368.

15. That court considers that, since the relationship between an air carrier and a passenger is governed by civil law, the failure of the carrier to fulfil its obligations falls within the jurisdiction of the civil courts. To accept that the Staatssecretaris has such power would, in that court's view, undermine the division of judicial functions in the Netherlands. Moreover, according to the parliamentary documents relating to the Law on Aviation, it is not the responsibility of the administrative authority to claim compensation from the air carrier on behalf of passengers.

16. It was in that context that the Raad van State decided to stay proceedings in both cases and to refer the following question to the court for a preliminary ruling:

'Given that Netherlands law provides access to the civil courts to protect the rights which passengers may derive under EU law from Article 5(1)(c) and Article 7 of Regulation No 261/2004, does Article 16 of that regulation oblige the national authorities to take implementing measures which form the basis for administrative enforcement action through the bodies designated under Article 16 separately in each individual case in which Article 5(1)(c) and Article 7 of the regulation are infringed, in order to be able to guarantee a passenger's right to compensation separately in each individual case?'

III – My analysis

17. By its question, the national court seeks to ascertain, in essence, whether Article 16 of Regulation No 261/2004 is to be interpreted as meaning that a national body responsible for enforcing that regulation, to which an individual complaint has been referred by a passenger, is required to take enforcement action against the air carrier concerned in order to compel it to pay the compensation which may be due to that passenger under the regulation.

18. In fact, the question raised in these cases is what is the extent of the role conferred on the national bodies responsible for enforcing Regulation No 261/2004 under the regulation.

19. Article 16 of Regulation No 261/2004 has not yet been interpreted by the Court. At most, it has been mentioned in the cases leading to the judgments in *Commission v Luxembourg* (C-264/06, EU:C:2007:240); *Commission v Sweden* (C-333/06, EU:C:2007:351); and *McDonagh* (C-12/11, EU:C:2013:43) without, however, the question submitted in this case being addressed.

20. According to the applicants in the main proceedings, that article requires the national body responsible for enforcing Regulation No 261/2004 to take enforcement action against air carriers in order to compel them to pay to the passengers concerned the compensation owing under Articles 5 and 7 of the regulation. The applicants in the main proceedings therefore consider that it is necessary to draw a distinction between, on the one hand, damages resulting from failure to fulfil contractual obligations, which must be claimed before the civil courts, and, on the other hand, the obligation to pay compensation which derives directly from Regulation No 261/2004 and must be imposed by the national body responsible for enforcing that regulation.⁴

21. I disagree with that view for the following reasons.

22. Article 16(1) of Regulation No 261/2004 provides that 'each Member State shall designate a body responsible for the enforcement of this Regulation ... Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected'. Article 16(2) states that 'each passenger may complain to any body designated under paragraph 1, or to any other competent

⁴ — Paragraph 20 of the written observations in Case C-145/15.

body designated by a Member State, about an alleged infringement of this Regulation at any airport situated on the territory of a Member State or concerning any flight from a third country to an airport situated on that territory'. Finally, Article 16(3) provides that 'the sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate and dissuasive'.

23. The task of the national body responsible for enforcing Regulation No 261/2004 may therefore be twofold. Its primary task, which is mandatory, is to ensure the enforcement of the regulation. The second, which is not necessarily conferred on that body and may be entrusted to another body, is to deal with the complaints of air passengers.

24. Nothing in the wording of Article 16 of Regulation No 261/2004 supports the conclusion that the national body responsible for enforcing the regulation is required to take enforcement action against air carriers in order to compel them to pay to the passengers concerned the compensation owing under Articles 5 and 7 of the regulation.

25. Although it is true that Article 16 of Regulation No 261/2004 refers to 'measures necessary' and 'sanctions', those terms in fact relate to the primary role of the national body responsible for enforcing the regulation, which is to ensure proper general compliance with the regulation.

26. Article 16 should be read in conjunction with recital 22 of Regulation No 261/2004. That recital states that 'Member States should ensure and *supervise general compliance* by their air carriers with this Regulation and designate an appropriate body *to carry out such enforcement tasks*. The supervision should not affect the rights of passengers and air carriers to seek legal redress from courts under procedures of national law'.⁵

27. It is apparent from a combined reading of those two provisions that the primary (mandatory) task of the national body responsible for enforcing Regulation No 261/2004 is to ensure, overall, that air carriers meet their obligations under that regulation. For example, that body must ensure that passengers are properly informed, by the air carriers, of their rights or that they know to whom they must apply if they consider that their rights have not been respected.⁶ They must also identify possible infringements by air carriers of their obligations under that regulation and remedy them.

28. In the event of infringement of those obligations, the national body responsible for enforcing Regulation No 261/2004 is to take the measures necessary to ensure that the rights of passengers are respected, including sanctions against air carriers.⁷ The use of the word 'sanctions', in Article 16(3) of that regulation, leaves no room for any doubt. In no case may those sanctions take the place of compensation for a passenger whose rights have not been respected. Indeed, those sanctions are imposed only in the event of failure by air carriers to meet their obligations under Regulation No 261/2004, not for infringement of the individual rights enjoyed by passengers under that regulation in consequence of a contract concluded with an air carrier. In fact, the national body responsible for enforcing that regulation, as its primary task, protects the collective interests of passengers.

5 — Emphasis added.

6 — See paragraphs 3.3 and 3.4 of the Communication from the Commission to the European Parliament and the Council on the application of Regulation No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (COM(2011) 174 final).

7 — See Article 16(1) and (3) of that regulation.

29. That interpretation is confirmed by the preparatory works currently in progress for the purpose of amending Regulation No 261/2004. Thus, the Commission, while pointing out that the regulation ‘requires Member States to establish National Enforcement Bodies ... to ensure [its] correct application’,⁸ states that it is necessary to clarify the role of those bodies by clearly allocating to them the role of general enforcement and to ensure that they will adopt a more proactive monitoring policy than they do currently.⁹

30. The Member States have some latitude in the designation of those bodies and, above all, in the allocation of the powers they intend to confer on them. In that regard, there is a certain institutional disparity. Some Member States have chosen to designate their national civil aviation authority as the national body responsible for enforcing Regulation No 261/2004, whereas others have preferred to designate their national consumer protection authority.¹⁰ Similarly, although some Member States (in fact, the large majority) have designated that body as competent to handle individual complaints for the purpose of Article 16(2) of that regulation, others have entrusted another body with that task.¹¹

31. What is the position when the national body responsible for enforcing Regulation No 261/2004 is also responsible for handling individual complaints? Is it required to take enforcement action in order to compel the air carrier to compensate the passenger? I think not.

32. As has been seen, the national body responsible for enforcing Regulation No 261/2004 may, under Article 16(2) of the regulation, also be responsible for handling complaints. Nothing in the wording of that provision indicates that it is required to act on a complaint from a passenger regarding the infringement of his rights under the regulation. In my view, the Member States have, in that regard, some latitude concerning the extent of the powers to be conferred on that body. The latter may, therefore, take the form of a body responsible for the out-of-court settlement of disputes between air carriers and passengers and play the role of mediator or its role may be limited to providing information to a passenger who has referred a complaint to it, *inter alia*, in order to ascertain what steps to take and how to lodge a complaint with the air carrier, or to direct him to the European standard form.¹²

33. While there is no obligation, on the part of the national body responsible for enforcing Regulation No 261/2004 which deals with complaints, to act on an individual complaint, the number of complaints referred to it may nonetheless be a sound indicator of a repeated infringement of the obligations of the air carrier and may therefore lead the body to take enforcement action against it.¹³

34. Such an interpretation cannot undermine the objectives which Regulation No 261/2004 seeks to attain, namely to ensure a high level of protection for passengers and to take full account of the requirements of consumer protection in general.¹⁴ Quite the contrary.

8 — See paragraph 1.1 of the Proposal for a Regulation of the European Parliament and of the Council amending Regulation No 261/2004, and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (COM(2013) 130 final).

9 — See paragraph 3.3.1.2 of that proposal.

10 — See the Commission’s document available on the website:
http://ec.europa.eu/transport/themes/passengers/air/doc/2004_261_national_enforcement_bodies.pdf.

11 — *Idem*. That is the case, *inter alia*, with Hungary, the Republic of Finland and the Kingdom of Sweden.

12 — That form is available on the website: http://ec.europa.eu/transport/themes/passengers/air/doc/complain_form/eu_complaint_form_en.pdf.

13 — Moreover, the Commission, in its proposal for a regulation mentioned in footnote 8, urges greater coordination between the national body responsible for enforcing Regulation No 261/2004 and the body responsible for handling individual complaints, in order to facilitate the identification of failures to meet obligations under that regulation and, accordingly, to sanction, if appropriate, the infringing air carrier (see Articles 16 and 16a).

14 — See recital 1 of that regulation.

35. I should point out that the aim of Regulation No 261/2004 is to ensure a high level of protection for passengers by granting them minimum rights in the event of denied boarding, cancellation or significant delay of a flight.¹⁵ If they consider that their rights have been infringed, and that alternative dispute resolution has been unsuccessful, passengers may still have recourse to traditional legal remedies. They may therefore bring an action before the competent court. In most of the Member States there is a simplified procedure for disputes in which the amount claimed does not exceed a certain threshold, thus making it easier for passengers to have access to justice.¹⁶ In that regard, the national court states that that threshold in the Netherlands is EUR 25 000 and that representation by a lawyer is not obligatory.

36. As regards cross-border disputes, I would draw attention to the fact that there is a European small claims procedure, established by Regulation (EC) No 861/2007¹⁷ which applies to disputes in which the value of the claim does not exceed EUR 2 000 and which also does not require representation by a lawyer.¹⁸

37. Those procedures therefore provide passengers with a simple legal remedy against the professionals, the airline companies.

38. Moreover, the relationship between and the identification of the respective roles of the national bodies responsible for enforcing Regulation No 261/2004, the bodies responsible for handling complaints, where appropriate, and the national courts, as set out in my analysis, are indeed the only ones capable of ensuring the protection of air passengers and of consumers in general.

39. Indeed, if it were left to the national bodies responsible for enforcing Regulation No 261/2004 to enforce the individual rights which passengers derive from that regulation and to compel air carriers to pay the compensation due under the provisions of that regulation, it would inevitably lead to differences of interpretation of EU law, which would give rise to legal uncertainty for passengers. It may therefore very well be imagined that a national body responsible for enforcing that regulation, to which an individual complaint has been referred, may consider that the cancellation of a flight is not the result of extraordinary circumstances and accordingly grant the request made by the passenger by compelling the air carrier to pay compensation, whereas the competent court hearing the case at the same time or subsequently may consider that those circumstances are established and that such compensation is therefore not payable.

40. Furthermore, the question necessarily arises as to whether a national body responsible for enforcing Regulation No 261/2004 may be described as a ‘court or tribunal’ within the meaning of the Court’s case law, thus giving it access to the preliminary ruling procedure. In my view, such a body cannot be so described.¹⁹ Therefore, if it is accepted that that body may take enforcement action against an air carrier in order to compel it to pay compensation to a passenger, that may, in the event of doubt as to the interpretation to be given to the relevant provisions of Regulation No 261/2004, give

15 — See Article 1(1) of that regulation.

16 — See the European Parliament document entitled ‘European Small Claims Procedure — Legal analysis of the Commission’s proposal to remedy weaknesses in the current system’, available on the website:
[http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542137/EPRS_IDA\(20542137_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/542137/EPRS_IDA(20542137_REV1_EN.pdf).

17 — Regulation of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ 2007 L 199, p. 1).

18 — See Article 2(1) and Article 10 of that regulation.

19 — I should point out that, ‘according to settled case-law of the Court, in order to determine whether a body making a reference is a “court or tribunal” within the meaning of Article 267 TFEU, a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent ... In addition, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature’ (see judgment in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, EU:C:2014:1754, paragraph 23).

rise to different interpretations of those provisions by the different national bodies responsible for enforcing that regulation and, accordingly, undermine the uniform interpretation and application of EU law, in disputes of a kind which appear frequently before the Court, since those provisions are the source of many difficulties.

41. Having regard to all the above considerations, I take the view that Article 16 of Regulation No 261/2004 is to be interpreted as meaning that a national body responsible for enforcing that regulation, to which an individual complaint has been referred by a passenger, cannot take enforcement action against the air carrier concerned in order to compel it to pay the compensation which may be due to that passenger under the regulation.

IV – Conclusion

42. In the light of the foregoing considerations, I propose that the Court should reply to the question referred by the Raad van State (Council of State) as follows: Article 16 of 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 is to be interpreted as meaning that a national body responsible for enforcing Regulation No 261/2004, to which an individual complaint has been referred by a passenger, may not take enforcement action against the air carrier concerned in order to compel it to pay the compensation which may be due to that passenger under the regulation.