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## STRIKING A HEALTHIER BALANCE BETWEEN AIR PASSENGER RIGHTS AND AIR CARRIERS' VITAL INTERESTS IN THE LIGHT OF COVID-19

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**Abstract.** Regulation 261/2004 is a directly applicable EU legal act establishing common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellations, or long delays of flights. The 'extraordinary circumstances defence' is expressly provided by Regulation 261/2004, in favour of air carriers to justify the refusal to pay compensation to passengers. However, the concept of extraordinary circumstances is far from being clear, and continuously raises questions of interpretation. Covid-19, as an extraordinary circumstance, brings previous discussions on the weaknesses of Regulation 261/2004 back to light, particularly regarding the extent of air passengers' rights embedded in Regulation 261/2004. Accordingly, this research aims to discuss whether the Regulation ensures the proper balance between the interests of passengers and air carriers in emergencies like Covid-19. Possible developments of existing regulation, allowing for the striking of a better balance between the interests of the aviation industry and consumer rights in situations like Covid-19, and thus ensuring the sustainability of the aviation market, are discussed. The discussion focuses on the regulation surrounding vouchers as an alternative method of reimbursement in case of the cancellation of a flight, and the extent of the right to offer assistance and care to passengers awaiting another flight.

**Keywords:** aviation; air passenger rights; extraordinary circumstances; Regulation 261/2004; Covid-19

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### 1. Introduction

On 30 January 2020, the United Nations World Health Organization (hereinafter – WHO) declared the Covid-19 outbreak a 'public health emergency of international concern' (WHO, 2020a) which, on 11 March 2020, was characterised as a pandemic (WHO, 2020c). Efforts to tackle the pandemic's spread resulted in the imposition of

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travel restrictions and the suspension of flights. The United Nations World Tourism Organization reports that as of 31 May 2020, 100% of all destinations worldwide had some forms of Covid-19-related travel restrictions. As of 18 May 2020, 75% of the destinations continued to have their borders completely closed for international tourism. In 37% of all cases, travel restrictions have been in place for 10 weeks, while 24% of global destinations had restrictions in place for 14 weeks or more (United Nations World Tourism Organization, 2020).

As the Great Depression did in its time, the Great Lockdown continues to have a tremendous economic impact (International Monetary Fund, 2020), with the aviation industry hit the hardest among other sectors. The world's total passenger traffic is forecast to decrease drastically. For instance, the International Civil Aviation Organization (hereinafter – ICAO) indicates that for the full year of 2020, the impact of Covid-19 would imply an overall decrease ranging from 46% to 51% of seats offered by airlines. Concerning passengers, it foresees an overall decrease of 2.605 to 2.894 million of passengers (predictions based on the traffic data as of 19 August 2020; International Civil Aviation Organization, 2020). As a result, the pandemic has had a tremendous impact on airlines' financial situations, and the ICAO (2020) estimates approximately USD 214 billion in passenger revenue loss from January to July 2020. The pandemic has created an 'unprecedented disruption' (Partington & Partridge, 2020) in aviation, and many airlines are relying on governmental financial assistance to stay afloat. The International Air Transport Association (hereinafter – IATA) does not expect any recovery from this until 2023 (International Air Transport Association, 2020).

Alongside this, the European Commission observes that the economic impact of the crisis has also affected travellers, since their income has reduced as a result of the curtailment of economic activities (European Commission, 2020a, para. 13). 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, repealing Regulation (EEC) No 295/91* (hereinafter – Regulation 261/2004), establishes the obligations of air carriers to offer, depending on the situation, reimbursement (refund), re-routing at the earliest opportunity, or re-routing at a later date at the passenger's convenience, compensation, care, and assistance to air passengers. The Regulation foresees the concept of extraordinary circumstances (arguably such as Covid-19), where the air carrier is exempted from the obligation to pay compensation. However, no differentiation of extraordinary circumstances based on their severity is envisaged in terms of air passenger protection. Covid-19 has brought back the discussion of the imbalance between the interests of passengers and air carriers embedded in the Regulation, which was last provoked by the eruption of the Icelandic volcano Eyjafjallajökull, and was followed by scholarly reflection (Abeyratne, 2010; Correia, 2014). In the case of the pandemic, numerous cancellations of flights have led to an unsustainable cash-flow and revenue situation for air carriers (European Commission, 2020a, para. 14), since financially struggling airlines face numerous refund claims instead of travellers accepting vouchers for future flights (a relatively new practice developed by air carriers during Covid-19). Therefore, the question of the feasibility of introducing vouchers as an alternative at the discretion of the air carrier in such circumstances as Covid-19 has become of particular relevance.

Accordingly, the purpose of this article is to discuss whether Regulation 261/2004 ensures a proper balance between the interests of passengers and air carriers in emergencies such as Covid-19. To this end, this analysis will focus on the extent of the rights of passengers whose flights are cancelled or delayed in exceptional circumstances which have a devastating economic impact on air carriers. Based on the textual and teleological interpretation of the Regulation 261/2004, as well as the practice of the Court of Justice of the European Union (hereinafter – CJEU), this article will reconstruct the concept of extraordinary circumstances under the Regulation in relation to a specific context of Covid-19. Subsequently it will discuss the conditions activating air carriers' obligations towards air passengers in the cases of cancellation and delays. It will also consider the possible

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development of existing Regulation that would allow the striking of a better balance between the interests of the aviation industry and consumer rights in situations such as Covid-19, and thus ensure the sustainability of the aviation market.

## 2. Covid-19 as an extraordinary circumstance

Regulation 261/2004 does not define *extraordinary circumstances*; however, Recital 14 of the preamble to the Regulation hints at some relevant features of the concept. Therein, the legislator refers to the ‘circumstances which could not have been avoided even if all reasonable measures had been taken’, an expression that, excluding the preamble, is mentioned three times in the main text of the Regulation (Recital 12, Recital 15, and Article 5). Since the concept lacks clarity, it was inevitable that the circumstances in which this defence is available would become a matter of dispute (Balfour, 2009, p. 225).

Having the exclusive competence to provide binding interpretations to the unclear provisions of EU law, the CJEU has continuously assisted the aviation industry and passengers with the interpretation of the concept of extraordinary circumstances. As Pierallini aptly phrased it, the Court ‘has innovated the interpretation of Regulation 261/2004 with regards to compensation for flights’ (2013, p. 120). The case of *Friederike Wallentin-Hermann v. Alitalia* (2008) is one of the best examples of the CJEU’s active role in forming the practice of the implementation of the Regulation in using the extraordinary circumstances defence to avoid liability against passengers.

In *Friederike Wallentin-Hermann v. Alitalia*, the CJEU confirms two key aspects relevant to the concept of extraordinary circumstances embedded in the Regulation. Firstly, the statement in Recital 14 of the Regulation’s preamble contains no list of extraordinary circumstances themselves, but only the events that may produce such circumstances (*Friederike Wallentin-Hermann v. Alitalia*, 2008, para. 21). Secondly, the Regulation does not provide an exhaustive list of these events either. The examples mentioned in Recital 14 (cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings, and strikes that affect the operation of an air carrier) are regarded as events that have great potential but may not necessarily produce exceptional circumstances (*Friederike Wallentin-Hermann v. Alitalia*, 2008, para. 22). Relying on this interpretation of Recital 14, the Court establishes two cumulative conditions for characterizing an event as extraordinary: 1) the event by nature or origin must not be inherent in the normal exercise of the activity of the air carrier concerned; and 2) the event must be beyond the actual control of that carrier on account of its nature or origin (*Friederike Wallentin-Hermann v. Alitalia*, 2008, para. 23).

The CJEU has remained consistent and clear in developing its case-law regarding the air passengers’ rights. Consumer protection lies at the heart of the Regulation; therefore, any terms that may restrict air passengers’ rights must be interpreted strictly (*Friederike Wallentin-Hermann v. Alitalia*, 2008, para. 17). In this context, as Prassl (2016, p. 138) accurately concludes, the extraordinary circumstances defence must be interpreted narrowly. As demonstrated below, the well-established case-law shows that the Court strictly adheres to this rule while interpreting whether certain events qualify as extraordinary circumstances.

Among the circumstances characterized as extraordinary, the CJEU has accepted: some technical problems (*Corina van der Lans v. Koninklijke Luchtvaart Maatschappij NV*, 2015, para. 38); a collision between an aircraft and a bird (Peskova, 2017, para. 24); the behaviour of unruly passengers (*LE v. Transportes Aéreos Portugueses*

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SA, 2020, para. 48); the consequences of a volcanic eruption (*Denise McDonagh v. Ryanair Ltd*, 2013, para. 24); and damage caused by an unexpected object on the airport runway (*Germanwings GmbH v. Wolfgang Pauels*, 2019, para. 26). On the contrary, technical problems such as: a collision with mobile stairs (*Sandy Siewert and Others v. Condor Flugdienst GmbH*, 2014, para. 19); failure resulting from the inadequate maintenance of an aircraft (*A and Others v. Finnair Oyj*, 2020, para. 42); and a wildcat strike among the staff of the air carrier (*Helga Krüsemann and Others v. TUIfly GmbH*, 2018, 42) did not amount to extraordinary circumstances.

In *Friederike Wallentin-Hermann v. Alitalia* (2008, para. 25), the CJEU suggested that technical problems that came to light during aircraft maintenance or are caused by the failure to maintain an aircraft could not be regarded as extraordinary circumstances, since such a breakdown remains intrinsically linked to the operating system of the aircraft. In *Corina van der Lans v. Koninklijke Luchtvaart Maatschappij NV* (2015, para. 14, 18), as was expected due to the lack of clarity in the Court's ruling in *Friederike Wallentin-Hermann v. Alitalia* (Croon, 2015, p. 335), the Luxembourg court did not accept KLM's arguments that spontaneous technical problems, as opposed to technical issues discovered during routine maintenance checks of the aircraft, constitute an extraordinary circumstance. In line with the principle of a strict interpretation of consumer rights limitations, the Court elaborated in para. 38 and 40 that technical problems might constitute extraordinary circumstances if 'not only that specific aircraft but also others in the fleet had been affected by a hidden manufacturing defect affecting the safety of flights'.

Contrary to the suggestions of Advocate General Bots (2016, para. 42), a collision between an aircraft and a bird, as well as any damage caused by that collision, was also recognized as 'out of the ordinary' and 'out of control' in *Marcela Pešková and Jiří Peška v. Travel Service a.s.* (2017, para. 24). The Court classified such a collision as extraordinary circumstances, clearly linking its finding with the non-existence of the 'intrinsic linkage' of the event to the operating system of the aircraft (2017, para. 24).

In the most recent case of *LE v. Transportes Aéreos Portugueses SA*, the Court accepted that 'unruly behaviour of such gravity as to justify the pilot in command diverting the flight concerned is not inherent in the normal exercise of the activity of the operating air carrier concerned' (2020, para. 41). The Court established the standards of a responsible passenger, who normally complies with all orders issued by the commander to ensure safety on board and ensures that they do not themselves jeopardize the proper performance of the contract of carriage between themselves and the operating air carrier concerned (2020, para. 42). As to the second condition, the CJEU gave instructions for assessing if the behaviour of such a passenger is out of the control of the air carrier concerned. In such cases, one has to ascertain the contribution of the air carrier to the occurrence of the unruly behaviour of the passenger, or the possibility to anticipate unruly behaviour and take appropriate measures at a time when it was possible to do so without any significant consequence for the operation of the flight concerned based on the warning signs of such behaviour (2020, para. 45).

In *Sandy Siewert and Others v. Condor Flugdienst GmbH* (2014), the CJEU noted that mobile stairs or gangways could be regarded as indispensable to air passenger transport, and air carriers were regularly faced with situations arising from the use of such equipment. The use of equipment that enables passengers to enter or leave the aircraft, in the Court's view, falls within normal airport services (2014, para. 19), and thus may not be regarded as an extraordinary circumstance. Likewise, in *Helga Krüsemann and Others v. TUIfly GmbH*, the Court did not accept that a wildcat strike among the staff of the air carrier might constitute extraordinary circumstances, since the restructuring and reorganization of undertakings, which the wildcat strike followed in *TUIfly* case, are part of the normal management of legal entities (2018, para. 40, 42).

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The case-law, as mentioned earlier, demonstrates that the decisive factor governing a certain circumstance's characterization as extraordinary is its attribution to the factors lacking intrinsic linkage with the operating system of the aircraft or the usual management of airlines. Whether the factor is internal or external to the aircraft or airlines is not an important factor for this determination.

As regards the Covid-19 pandemic, the European Commission considers that the measures intended to contain the Covid-19 pandemic taken by public authorities are by their nature and origin not inherent in the normal exercise of the activity of carriers, and are outside of their actual control (European Commission, 2020a, para. 3.4). To justify this statement, it is necessary to discuss if a spreading disease meets the above-mentioned cumulative criteria.

Pandemic, epidemic, endemic, and outbreak are often misused terms (Dietz & Black, 2012, p. xxvii; Grennan, 2019). These terms are commonly used to describe infections; however, they are primarily based on how many cases of a condition there are compared with the expected number of cases over a given time, and the geographical spreading of the cases (Grennan, 2019). Diseases that are constantly present in a population within a particular geographic region are called endemic diseases (**Grennan, 2019**). For example, malaria is endemic to some regions of the Amazon Brazil, in South and Central America, Africa, and Asia; dengue is common in the Caribbean, Central and South America, Southeast Asia, and the Pacific Islands (Felman, 2020). The terms *outbreak* and *epidemic* are quite often used similarly, and are defined as the occurrence of more cases of disease than expected in a given area or among a specific group of people over a particular period of time (Parthasarathy, 2013, p. 444). An outbreak usually indicates less intensity, and the differentiation is based on the number of cases per number of inhabitants, the percentage of overall deaths caused by the disease, etc. (Parthasarathy, 2013, p. 444). Examples of epidemics include the Zika virus, starting in Brazil in 2014 and spreading to most of Latin America and the Caribbean; or the 2014–2016 Ebola outbreak in West Africa (Grennan, 2019). The WHO defines a pandemic as the worldwide spread of a new disease (WHO, 2010). While an epidemic remains limited to one city, region, or country, a pandemic spreads beyond national borders and possibly worldwide (Felman, 2020). Rare examples of pandemics include the Spanish Flu of 1918, which killed roughly 50 million people worldwide, and the H1N1 virus in 2009 (Felman, 2020).

When Covid-19, which originated in Wuhan, China, was characterized as a pandemic, the disease was widely spread across the world – there were more than 118,000 cases in 114 countries and 4,291 deaths. As of 22 August 2020, 213 countries and territories around the world have reported a total of 23,144,577 confirmed cases of Covid-19 and 803,634 deaths (Worldometer, 2020). Considering the characteristics mentioned above, the Covid-19 pandemic neither by nature nor origin is inherent in the normal exercise of the activity of the air carrier concerned. Owing to its nature or origin this event clearly goes beyond the actual control of air carriers.

However, one must observe that the majority of pandemics or epidemics satisfy the cumulative conditions established in the case-law of the CJEU, since airlines are not linked with their appearance and have no control over them. Abeyratne (2012, p. 115) pays attention to the rule that the extraordinary circumstances defence is not an absolute one; it must be accompanied by the fact that the extraordinary circumstances 'could not have been avoided although the airlines took all reasonable measures. Thus, proving two cumulative conditions for the event to be classified as extraordinary is not enough for the purpose of avoiding liability to pay compensation to passengers. As the European Commission accurately points out, in order to be exempt from the payment of compensation the carrier must simultaneously prove two additional conditions: 1) the causal link between the extraordinary circumstances and the delay or the cancellation; and 2) the fact of inability to avoid the delay or cancellation in spite of all reasonable measures taken (European Commission, 2016, para. 5.1).

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As to the causal link, not all pandemics or epidemics lead to a lockdown or restrictions on air transportation. For example, in early 2015 an outbreak of Zika fever in Brazil, caused by the Zika virus, spread to other parts of South and North America, several islands in the Pacific, and Southeast Asia (Sikka et al., 2016). Since the virus was transmitted predominately via mosquito vectors and, possibly, other modes including blood transfusion and sexual intercourse (Sikka et al., 2016), the WHO did not recommend any general restrictions on travel to and from the countries, areas, and/or territories of Zika virus transmission (WHO, 2016). Contrarily, the virus that causes Covid-19 spreads very easily and sustainably between people and from contact with contaminated objects and surfaces, and is particularly dangerous to older people and people with some pre-existing health conditions. Despite the WHO consistently recommending against restrictions on international travel (WHO, 2020b), almost every country in the world implemented some type of mandatory restrictions contrary to the WHO advice (von Tigerstrom & Wilson, 2020).

Therefore, the main reasons for the cancellation of the flights were the border closures of the countries, as implicitly observed by the European Commission in its guidelines (European Commission, 2020a, para. 3.4). These restrictions left no place to manoeuvre for the airlines, and so were the main reason for the cancellation of the flights. Since the CJEU requires a direct causal link between the extraordinary circumstances and the cancellation of the flight (*LE v. Transportes Aéreos Portugueses SA*, 2020, para. 54), one might wonder whether the direct causality may be established only between national bans on international travel and the cancellation of a flight, rather than between cancellations and Covid-19 itself, since despite the ongoing pandemic some airlines have continued to transport passengers where there are no restrictions to air transportation imposed as recommended by the WHO. In the author's view, both factors (Covid-19 itself and national legal measures) are eligible for establishing a direct causal link. State legal measures of a general nature (non-specific to particular air carriers), in particular banning air transportation activities, are widely accepted as extraordinary circumstances due to airlines' inability to impact them. Therefore, airlines may rely on the national legal measures as a direct reason for the cancellation of a flight. On the other hand, airlines may opt not to operate a flight due to the occurrence of Covid-19 itself, even if there are no travel restrictions. As mentioned above, Covid-19 is a pandemic threatening public health worldwide, the virus causing the disease is being transmitted via contaminated surfaces and easily spreading from person to person. Therefore, the virus may pose a risk not only to passengers but also to airline staff, and as such if an airline decides to cancel a flight in the absence of flight bans to a particular country, there still exists a direct causal link between Covid-19 and the cancellation.

The other condition to satisfy exemption from the responsibility to pay compensation is the obligation to take all reasonable measures to avoid extraordinary circumstances. In explaining the scope and extent of reasonable measures, the Court placed emphasis on the balance between the interests of air passengers and air carriers in a number of cases. The Court 'established an individualized and flexible concept of 'reasonable measures', leaving to the national court the task of assessing whether, in the circumstances of the particular case, the air carrier could be regarded as having taken measures appropriate to the situation' (*Andrejs Eglītis and Edvards Ratnieks v. Latvijas Republikas Ekonomikas ministrija*, 2011, para. 30; *Marcela Pešková and Jiří Peška v. Travel Service a.s.*, 2017, para. 30). The CJEU clarified that in order to meet this condition, an air carrier must demonstrate that 'even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able, unless it had 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 or its delay equal to or in excess of three hours in arrival' (*Christopher Sturgeon and Others*, 2009, para. 61; *Andrejs Eglītis and Edvards Ratnieks v. Latvijas Republikas Ekonomikas ministrija*, 2011,

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para. 25; *Germanwings GmbH v. Wolfgang Pauels*, 2019, para. 19; *LE v. Transportes Aéreos Portugueses SA*, 2020, para. 36).

In *Marcela Pešková and Jiří Peška v. Travel Service a.s.* (2017), for example, the Court was not persuaded that the airlines took all of the reasonable measures to avoid the extraordinary circumstances. The CJEU observed that the air carriers were free to use the experts of their choice to carry out the checks necessitated by a collision with a bird. However, when a check had already been carried out after such a collision by an expert authorised to do so under the applicable rules, a second check inevitably leading to a delay equal to or in excess of three hours to the arrival of the flight was not reasonable (2017, para. 37).

The case-law of the CJEU demonstrates that despite the gravity of the situation, which is characterized as extraordinary, air carriers must ensure that all reasonable measures in their hands are deployed to avoid the circumstances and thus mitigate their negative effect. Regarding Covid-19, it is clear that airlines can do nothing to avoid the pandemic, however, they can mitigate the negative impact on passengers by applying the rule established in Article 5(c)(i) of the Regulation which *de jure* exempts them from their liability to pay damages. Under Article 5(c)(i), air carriers do not have to pay compensation if they inform the passengers of the cancellation at least two weeks before the scheduled time of departure. Considering that the current case-law of the CJEU is strictly oriented towards consumer protection, the assessment of the measures deployed to make use of this possibility may be a relevant factor for deciding if the air carrier has the obligation to pay compensation, in particular in the situations where the air carrier knows well in advance that the flight will be cancelled due to the closure of the airspace.

### **3. The extent of passenger rights in the case of Covid-19**

Independently from the cause of the cancellation, Article 5 of Regulation 261/2004 obliges the operating air carrier to offer the passengers the following choices: reimbursement (refund), re-routing at the earliest opportunity, or re-routing at a later date at the passenger's convenience. The European Commission, in its Interpretative Guidelines, guides passengers on the implementation of the above-mentioned rights (European Commission, 2016). If the outbound flight and the return flight are part of the same booking, even if operated by different air carriers, passengers should be offered two options if the outbound flight is cancelled: to be reimbursed for the whole ticket (i.e. both flights), or to be re-routed onto another flight for the outbound flight (European Commission, 2016, Point 4.2). As regards re-routing, 'the earliest opportunity' may imply considerable delay under the circumstances of the Covid-19 outbreak, and the same may apply to the availability of concrete information on such an opportunity given the high level of uncertainty affecting air travel. However, at any rate passengers should be informed about the delays and uncertainties linked to them choosing a re-routing instead of reimbursement. Should a passenger nonetheless choose re-routing at the earliest opportunity, the carrier should be considered as having fulfilled its information obligation towards the passenger if it communicated the flight available for re-routing on its own initiative, as soon as possible, and in good time (European Commission, 2020a, para. 3.2).

Regarding the form of the reimbursement, it is important to mention that Article 7(3) lists possible forms of reimbursement. Travel vouchers are explicitly mentioned among those forms, however, as the European Commission accurately mentions in its guidelines, the offer of a voucher by the airlines cannot affect the passenger's right instead to opt for cash by electronic bank transfer, bank orders, or bank cheques (European Commission, 2020a, para. 2.2.).

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The rationale behind this regulation is clear from the perspective of a passenger. First of all, the trip on the other date may lose its purpose to a particular passenger or limit their opportunities to choose a cheaper option in the market when buying a ticket in the future. Additionally, a situation such as Covid-19 creates the risk of an air carrier becoming insolvent, which could eliminate the passenger's possibilities to make use of a voucher. On the other hand, as the European Commission aptly observes in its recommendation on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the Covid-19 pandemic (2020a, Recital 14), 'if organisers or carriers become insolvent, there is a risk that many travellers and passengers would not receive any refund at all, as their claims against organisers and carriers are not protected'. Thus, it is in the interest of the better protection of passengers as a whole to ease the liquidity problems of carriers and make sure that once the sky is open again, the air transportation business is viable and competitive.

The question of introducing the option of a voucher as an alternative at the discretion of the air carrier rather than the passenger in exceptional circumstances that threaten the liquidity of air carriers has not been discussed in the latest Proposal for a Regulation of the European Parliament and of the Council amending Regulation 261/2004 (Council of European Union, 2020). Nor was it reviewed in the Proposal for a Regulation of the European Parliament and of the Council amending Regulation 261/2004 (European Commission, 2013), which was widely discussed by different stakeholders without reaching a compromise in the end. The European Commission already aims to encourage the acceptance of vouchers by guiding air carriers towards implementing a set of recommended characteristics to make vouchers an attractive and reliable alternative to monetary reimbursement. Thus, the introduction of a voucher as an equal alternative form of reimbursement upon the choice of the carrier in certain circumstances, combined with all the guarantees afforded to this form of reimbursement, may be worth discussing in seeking to strike a better balance between the sustainability of business and the protection of air passengers as a whole.

#### **4. Care in extraordinary circumstances**

Articles 8 and 9 of Regulation 261/2004 include the right of passengers to receive information, meals and refreshments, telephone calls, and accommodation if necessary, as well as transportation to the place of accommodation and back. The right to care begins when a passenger chooses re-routing at a later date at the passenger's convenience (Article 5(1)(b) in conjunction with Article 8(1)(c); European Commission, 2020a, para. 3.3.). Accordingly, airlines do not have the obligation to assist the passengers in the way described in Article 9 if a passenger opts for reimbursement of the full cost of the ticket.

Article 9 seeks that the needs of passengers waiting for their return flight or re-routing are adequately addressed (European Commission, 2020a, para. 3.3.). The European Commission observes that the extent of adequate care is assessed on a case-by-case basis, taking into consideration the needs of air passengers in the circumstances and the principle of proportionality according to the waiting time (European Commission, 2020a, para. 4.3.2.).

The European Commission accepts that the Regulation has no provision allowing airlines to decline to offer care when the cancellation of a flight is caused by circumstances which could not have been avoided even if all reasonable measures had been taken (European Commission, 2020a, para. 4.3.2.). The closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano in 2010 provoked the question of the extent of care in the circumstances where, depending on their origin and the scale of the situation, passengers waited for their return flights for weeks.

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In this regard, Jones observes that the idea of ‘super extraordinary circumstances’ was dismissed based on the argument that a full range of extraordinary circumstances had been intended to fall under the term (2016, p. 232). Indeed, the CJEU explained that there was no separate category of ‘particularly extraordinary’ events, which would exempt the air carrier from offering care to the passengers (*Denise McDonagh v. Ryanair Ltd*, 2013, para. 30). Wijngaart argues that the way the CJEU interprets the extraordinary defence is not in line with the legislator’s intent behind the Regulation, and is pessimistic about changing the case-law in the future with this argument (2016, p. 62). In the author’s view, the present practice of the Court’s may be modified if the relevant changes are introduced in the Regulation text. The CJEU does not ban the possibility of differentiating between extraordinary circumstances based on their gravity in general. Since efforts to revise the Regulation have recently been heightened, there is a chance to revisit the concept of extraordinary circumstances by establishing a special regime for super-extraordinary circumstance (e.g., epidemics, pandemics).

The situation materializing due to Covid-19 has again brought to light the weaknesses of the Regulation. Although the European Commission urges air carries to inform passengers of all the risks associated with the choice of re-routing instead of reimbursement, it does not release them from the obligation of providing care and assistance to passengers waiting at their destination for an undetermined period of time before they can return home, even if they unilaterally assumed the risk of facing an airspace closure. Pinpointing the legislator’s choice, the CJEU takes the consumer-oriented approach by stating in *Denise McDonagh v. Ryanair Ltd* that there is no limitation, ‘whether temporal or monetary, of the obligation to provide care to passengers in extraordinary circumstances’ (2013, para. 40) for the whole period during which the passengers concerned must await their re-routing (para. 41). The Court emphasizes that the importance of the objective of consumer protection, which includes the protection of air passengers, may justify even substantial negative economic consequences for certain economic operators (para. 48), and the consequences as a result of extraordinary circumstances, such as the eruption of a volcano, cannot be considered disproportionate to the aim of ensuring a high level of protection for passengers (para. 50).

Noticing the imbalance between the interests of passengers and air carriers, numerous scholars have continuously requested to pay some consideration to the protection of the interests of airlines, in particular, in face of the circumstances that cause interruptions to business (Correia, 2014, p. 249). Attempts have already been made to limit the obligation to offer assistance and care to air passengers, both in the recent proposal of 2020 to change the Regulation and in the one discussed in 2013. In particular, the proposals for changing the Regulation focused on the establishment of a flat rate for accommodation and the limitation of accommodation provision to a maximum of three (3) nights.

In this regard, it is also essential to observe that it was consistently claimed that assistance for passengers affected by long delays or cancellation was often not provided as envisaged by the Regulation (European Consumer Centres Network, n.d., p. 4). Therefore, it is not clear to what extent the airlines are suffering financial losses due to the implementation of this obligation during Covid-19. Partially, the insufficiency of adequacy and quality, or even absence, of assistance may be the result of: the unclear provisions of Article 9; the absence of the definitions of *snacks*, *meals*, or *refreshments*; or a broad discretion left to the air carrier in the implementation of this Article (European Court of Auditors, 2018, p. 11). Therefore, the proposed changes to the Regulation, clarifying the scope of the obligation to care and assist, are welcome not only in the context of super-extraordinary circumstances but also for the enhancement of air passengers’ protection in general.

Since the above-mentioned proposals are not yet accepted, the right to care remains limited only through the application of the principle of proportionality, which, if argued well, may reduce the burden on air carriers. As

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mentioned above, the Court has accepted the possible negative consequences of the economic operators who have the obligation to ensure the protection of air passengers (*Denise McDonagh v. Ryanair Ltd*, 2013, para. 48). However, the situation in the *McDonagh* case, although serious enough to deprive different air carriers of part of the fruits of their labour and of their investments, did not threaten their existence nor the stability of international air transportation as a whole. This might shift the axis of the balance in favour of the protection of the interests of air carriers in the assessment of the extent of care to be provided during the pandemic for those awaiting another flight, as well as the amount of compensation to be paid if a passenger was not assisted. However, since the consumer-oriented approach has been constantly followed in recent years by both the legislator and the CJEU (Correia, 2014, p. 249), a significant shift in practice can only be made by changing the Regulation – tackling the present asymmetry via the differentiation of extraordinary circumstances.

## 5. Conclusions

The majority of epidemics and pandemics, including Covid-19, satisfy the cumulative conditions for characterising their events as extraordinary circumstances established in the case-law of the CJEU, since these events by nature or origin are not inherent in the normal exercise of the activity of air carriers and they go beyond the actual control of that carrier on account of their nature or origin. However, not all of these events may result in exemption from paying compensation to air passengers if the result of such events is the cancellation of a flight. It is necessary to establish the causal link between the extraordinary circumstances and the delay or the cancellation, and to take all reasonable measures to avoid the delay or cancellation or its negative consequences. The same requirements are applicable to Covid-19, since Regulation 261/2004 does not foresee a special group of extraordinary circumstances.

To strike a better balance between the interests of air passengers and air carriers, it is recommended to rethink the concept of extraordinary circumstances and differentiate the extent of the protection afforded to both groups based on the gravity of the situation. The introduction of vouchers as an equal alternative form of reimbursement upon the choice of the carrier in certain circumstances, combined with all the guarantees afforded to this form of reimbursement, may be worth discussing in seeking to strike a better balance between the sustainability of business and the protection of air passengers as a whole. The restriction of the obligation to provide accommodation, limiting it in time and amount considering the relevant circumstances and the principle of proportionality, might not only help to tackle asymmetry between the protection of vital interests in situations such as Covid-19, but also enhance consumer protection, affording more clarity and thus more awareness and willingness on behalf of air carriers to comply with the obligation.

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