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ELFAA Disappointed at European Court's failure to overturn discriminatory passenger compensation legislation

Luxembourg – 10th January 2006 – the European Low Fares Airline Association (ELFAA) expressed disappointment at the European Court of Justice's failure to overturn the unfair and discriminatory Regulation 261/2004 on compensation to passengers in cases of denied boarding, cancellations and long delay of flights. Both ELFAA and IATA, together representing the vast majority of European Airlines, had challenged this Regulation on the basis that it is discriminatory and limits consumer choice. The Regulation also does nothing to ameliorate delays and cancellations in air transport, as the vast majority of these are beyond the control of the airlines for example adverse weather and ATC delays. Under the Regulation, low fares airlines are forced to pay compensation and 'assistance' that is often several times the amount of the fare paid by the consumer.

The Court failed to take into consideration the fact that the legislation is clearly discriminatory as it does not apply equally to competing forms of transport such as rail and ferries and compensation levels are not related to the fare paid. This places low fares airlines at a particular competitive disadvantage. The legislation is also unnecessary and indeed contrary to international law as the Montreal Convention already enables passengers to seek compensation in cases where an airline is at fault for a delay. The Court's failure to annul the Regulation on grounds of legislative irregularities in the course of the adoption of the Regulation creates a dangerous precedent for the democratic process of the EU.

Commenting on the Court's decision, ELFAA's Secretary General, Jan Skeels, said:

"We fully support passenger rights legislation which makes sense. However, it is very disappointing that the Court has failed to overturn what is clearly a bad piece of legislation that does nothing for consumers and seriously undermines the competitiveness of the European air transport industry. Although overbooking of flights is a commercial practice of some airlines which should rightly be punished, delays and cancellations are usually beyond the control of the airlines and this legislation only makes the problem worse by creating the expectation among passengers that they are entitled to ridiculous amounts of compensation.

Having successfully liberalized the air transport industry, the European Commission now appears determined to destroy that success by over regulating it. This Regulation, which was not subjected to any form of economic impact assessment to determine whether it was actually necessary and what the cost to industry would be, is an example



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of bad legislation and is in direct conflict with the Commission's stated objective of improving European competitiveness and job creation.

It is a pity that the Court chose not to send a clear signal to the Commission that this kind of bad regulation is not acceptable."

NOTE TO THE EDITORS:

Airlines party to the ELFAA case include: Air Berlin, Flybe, Hapag-Lloyd Express, Ryanair, Sky Europe, Sverigeflyg, Transavia and Wizzair.

ELFAA current members include: easyJet, Flybe, Hapag-Lloyd Express, Norwegian, Ryanair, Sky Europe, Sterling, Sverigeflyg, Transavia, and Wizzair.

Low fares services in Europe currently account for approximately 30% of scheduled air services with ELFAA members carrying approximately 100 million passengers to over 400 destinations.

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ELFAA's LEGAL APPEAL TO THE COURT

1. ELFAA's case was referred to the European Court of Justice by the High Court in London
2. IATA's case was also referred to the European Court of Justice by the High Court in London. ELFAA filed a separate case because although several of the points are similar, ELFAA's case argues on facts particular to its members and also on additional points. The two cases were heard at the same time.
3. The legal arguments in ELFAA's case were:

a. The legislative procedure that led to the adoption of the regulation infringed the EC Treaty's procedural requirements with respect to the provisions on cancellation. The Council's common position included provisions stating that air carriers should have the defense of extraordinary circumstances in relation to claims for reimbursement, re-routing and assistance. The European Parliament did not make any amendments to these provisions in its second reading. The Conciliation Committee exceeded its jurisdiction by removing these provisions at the last hour of the conciliation discussions. ELFAA submits that this is a violation of the basic procedural requirements of the EC Treaty that are intended to ensure that EC legislation is adopted in a democratic manner.

b. The requirements of the regulation do not meet the standards of the fundamental principle of proportionality. The requirements do not bear any relationship to the price of the flight tickets. As a matter of fact, the regulation

risks putting in jeopardy the low fares airlines model that has made it possible for many European passengers to travel by air. The regulation could have ensured the



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protection of passengers by allowing them to choose whether they want to purchase insurance to cover the risks of flight cancellation or delay.

c.. The regulation discriminates unduly against low fares airlines in comparison with other airlines and other competing modes of passenger transport, such as

rail, ferries and bus/coach. The regulation unduly imposes the same requirements on low fares airlines as on traditional airlines even where the average prices of low fares airlines are much lower than those of traditional airlines and passenger expectations are not the same.

d. The regulation is in contravention with the Montreal Convention, which provides that airlines are not held liable for delay if they prove that they took all measures that could reasonably be required to avoid the delay, or it was impossible for them to take such measures. The European Community is legally bound by the convention as it has signed and adopted it.

e. The regulation lacks any reasoning and fails to provide any legal certainty to low fares airlines and their customers. The recitals of the regulation and its legislative history provide no reasoning that adequately explains how the requirements of the Regulation can meet the goal of protecting air passengers. In addition, the requirements of the regulation are in contradiction with its recitals and with other EC legislation.

4. ELFAA won a referral to the ECJ from the High Court in London after a successful hearing there on 14 July 2004

5. ELFAA was represented in the ECJ by Georg Berrisch and Candido Garcia Molyneux Covington & Burling, Brussels.