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THE NEW ADR PROCEEDING FOR PASSENGER CLAIMS
SOME COMMENTS ON THE LEGALITY OF THE NEW REGULATION

The Spanish Official Gazette ("BOE") of 17 March 2022 published the Order TMA/201/2022 (the **"Order"**) that approved a new Alternative Dispute Resolution procedure (the **"ADR"**) for passenger claims in Spain.

This note summarizes the main aspects of the controversial legality of this new Order.

1. INTRODUCTION. RELEVANT REGULATORY FRAMEWORK ISSUES

Before analyzing the procedural and substantive issues that affect the viability of a possible challenge of the new ADR before the Spanish Aviation and Safety Agency ("**AESA"**), it is important to introduce some relevant aspects of the related regulatory framework.

In particular, it is worth recalling that the ultimate source from which Order TMA/201/2022 emanates is Directive 2013/11/EU.

As a provision of EU law and on the basis of the principle of primacy of Community law over the national laws of the Member States, Directive 2013/11/EU could limit the possibilities of a possible challenge of the Order before the Spanish courts. In our view, this would not be appropriate, for several reasons:

i. although it is not an undisputed question, there is legal and case-law basis to maintain that the primacy of EU law does not cover potential infringements of constitutional rights of the Member States; as we will see, in can be argued that the Order breaches the principles of equality and the right to effective judicial protection provided for in Articles 14 and 24 of the Constitution,

ii. the points that would give rise to a possible challenge are not explicitly included in the aforementioned Directive, at least in most cases, and

iii. EU Directives do not have "primacy" over national law from a technical point of view, once they have been implemented, but rather have other types of effects that would be complex and unnecessary to deal with here.

On the other hand, the Order develops the mandate foreseen in the 2nd Additional Provision of Spanish Act 7/2017, as amended by 6th Final Provision of Spanish Act 3/2020. In other words, the Order is covered by an Act of Parliament. Therefore, it could be thought that the possibilities of challenging the Order would be limited. However, this aspect should not be a real limitation of the possibilities of challenge, as such, but would only affect the way in which the challenge would have to be channeled (section 2 below).

2. MEANS OF CHALLENGE. PROCEDURAL ISSUES

In Spain, from the point of view of legal technique there are two possible mechanisms to challenge an administrative regulation such as the Order, which has a lower hierarchy than an Act of Parliament:

i. ***Direct challenge***. It would consist of filing a contentious-administrative appeal against the Order demanding that it be declared null. The deadline to do so would be **17 May 2022** (Article 46.1 LJCA).. In addition, the Act of Parliament from which this Order derives can also be challenged, to the extent necessary. The latter is carried out by requesting the contentious-administrative court to raise a question of unconstitutionality of the Act in question, for resolution by the Constitutional Court ex Art. 35 et seq. LOTC. This option is perfectly possible from a procedural point of view and has the advantage that it allows its joint monitoring -in the same process or in a separate one- by associations or entities that can justify a legitimate interest in the challenge [Art. 8.1 b) LJCA].

ii. ***Indirect challenge***. This route would be followed in the context of a specific ADR procedure initiated by a passenger. In the course of this procedure, the nullity of the rule from which the challenged act emanates would be raised. However, this procedure has several disadvantages of a strategic nature (it is not suitable since a private individual is also involved) and, above all, of a procedural nature. The Order itself establishes that the review of the decision given in a specific ADR procedure is carried out before the Commercial Courts and these courts would not be technically empowered to annul a ministerial order, but only to decide upon the non-applicability of the Order to the specific case at hand.

Taking into account the advantages and disadvantages of each alternative, in this case it is clearly more advisable to opt for a direct challenge. Moreover, as mentioned above, it is a route that can be undertaken by several operators in the industry and not only by a certain airline on its own. For example, an action carried out under the umbrella of one or more airline associations could be considered. In any case, additionally, the option of an indirect challenge could also be considered, which would be viable in specific cases in light of their own particular characteristics.

3. GROUNDS FOR CHALLENGE. SUBSTANTIVE ISSUES

The basic reasons that would support a challenge of the new Order are based on the fact that the ADR procedure might violate the principle of equality of all citizens before the law and the right of airlines to an effective judicial protection under the terms of Articles 14 and 24 of the Spanish Constitution.

3.1. Preliminary aspects

As a preliminary matter, we must point out that the ADR established in the Order has been approved within the framework of a consumer protection policy established both at Community and national level. To give just a few examples, we refer to Recitals (3) and (7) of Directive 2013/11/EU, and to the Preamble of the Spanish Act 7/2017.

It is within this general policy framework that the possibilities of challenge analyzed here must be assessed. In particular, it must be assumed that the Spanish legislator and government are following a mandate already imposed by the European legislator that allows them to approve and implement a procedure in which there is no equal treatment between the parties and the principle of equality of procedural arms is not necessarily applied. To this extent, it would be an approach of "ordinary legality" that would be excluded from constitutional review, in the same way as it happens in other areas of the legal system (e.g. labour regulations or gender equality regulations).

Notwithstanding the above, the protective nature of a given regulation is also limited by the due respect to the right of all parties to an effective judicial defense provided for in Article 24 of the Constitution and the principles of proportionality and the prohibition of arbitrariness of the public authorities enshrined in its Article 9.3. In other words, it is not possible to contemplate an unlimited action by the public authorities in any particular area of life; rather, the regulations governing public action must always respect and guarantee that all parties are entitled to defend their position in a reasonable and sufficient manner.

Based on the foregoing, it must be concluded that a general challenge of the Order as such would not be viable, since it is favorable and beneficial to one of the parties. However, specific grounds of challenge can be deemed as feasible, based on particular aspects of the new ADR procedure, which exceed the admissible limits and which represent a real impairment of the right of the parties to effective judicial protection and an infringement of the principle of equality, as will be explained in the following points.

3.2. Specific grounds for challenge

Two groups of grounds for challenge can be analyzed separately, firstly at the organic level (related to the body in charge of the new ADR proceeding) and then at the procedural level (related to the rules of the proceeding).

3.2.1. Grounds for challenging the body in charge of the new ADR proceeding

One of the most controversial aspects of the new regulations is the granting of sole competence to AESA to resolve passenger claims covered by the new ADR procedure.

The relevant issue on this point is that the same authority that resolves disputes between independent (private) parties, AESA, is, in turn, the national enforcement body designated by Spain to verify compliance with Regulation 261/2004.

In this regard, what is important to analyze is not only that AESA plays both roles, which might be acceptable in line with some other EU jurisdictions, but the fact that certain Spanish national regulations governing AESA's powers to act as NEB grant this agency very broad powers of inspection, supervision and sanction, on the same subject matter and on the same facts (the same flights) that will be subject to a resolution through the new ADR.

At this point, it is especially relevant that AESA has been granted inspection powers that allow it to issue binding requests to airlines, which have the correlative duty to cooperate, as established in Articles 25.4 and 33.3 of Spanish Act 21/2003, of July 7, 2003, on Aviation Safety.

Failure to comply with this duty of cooperation gives rise to significant penalties, ranging from 4,500 to 70,000 Euro.

The practical consequence of these provisions is that it places AESA in a position that allows it to have information and documentation on the details of any flight and any air incident, without any limitation. In fact, this authority has been used in an extremely intense way by AESA in the last years, so that this institution has collected and has at its disposal a wide range of information on a great number of delays and cancellations as provided by the companies in compliance with the requests for information received from AESA.

In our opinion, this is not compatible with the most elementary procedural guarantees that should be recognized to airlines to defend themselves adequately in any case followed against them through the ADR. In these proceedings, AESA may (and probably will) previously have at its disposal all the information and documentation that it may have requested from the operator that is a party to the proceedings, with the corresponding effect on the legitimate right of the operator to decide the approach it adopts in the dispute, the procedural strategy it follows, the means of defense it proposes and, above all, the documentation it uses. These possibilities would be quite limited, for practical purposes, if the decision-making body, AESA, already has the documentation and information of the incident under analysis, which it would have obtained from the airline itself. To us, this looks like a clear breach of the principle of prohibition of self-incrimination.

It must be taken into account, at this point, that AESA has powers that allow a very active participation in the ADR procedure. Under the Order, AESA can even promote and agree to the practice of evidence not requested by the parties, *ex officio*. And this without the possibility of any appeal, as the Order itself explicitly states.

On the other hand, it is important to remember that AESA does not act in this type of proceedings as a judicial instance but only as an administrative body. The Order allows airlines to challenge AESA's decisions before the Commercial Courts. Therefore, no direct damage to the right to an effective judicial protection would be predicted from AESA's actions -especially when the subsequent access to justice is expressly recognized-. However, what is relevant is the transcendental effect that the intervention of AESA as the body that resolves the ADR has on the subsequent judicial process, which is already flawed precisely by the fact that it has been AESA, with its particular authority as NEB and supervisor, who has instructed and resolved the ADR between the passengers and the company.

Additionally, where an airline does not voluntarily comply with the decision given by AESA in an ADR procedure within one month, the Order expressly contemplates the imposition of an economic fine. Thus, even where the operator has good grounds to challenge a decision of AESA before the Commercial Courts, it is compelled to comply with such decision to avoid such additional penalties.

Based on the foregoing, from our point of view, the coincidence in the same body, AESA, of both the powers of an NEB and ruler in the ADR proceeding represents an inadmissible disturbance to the right of defense of the airlines that could lead to the nullity of the Order.

3.2.2. Procedural grounds of challenge

On the other hand, we believe that there are grounds to challenge the procedure established by the new Order based on its procedural particularities.

Generally speaking, the very different treatment of passengers and airlines in terms of the voluntary and compulsory nature of the ADR procedure and the legal effects of the ADR decision for each of them is highly controversial. It is certainly unusual that the procedure is voluntary for the passengers and compulsory for the airlines and that the decision is binding on one of the parties and not on the other depending on the outcome of the procedure - if the operator loses, the result is binding and it must pay; if the operator wins and the passenger claim is therefore proved to be unfounded, the result is no longer binding and the passenger is not obliged to pay anything, not even the procedural costs or expenses.

This different treatment may give rise to a possible challenge for violation of the principle of equality enshrined in Article 14 of the Constitution if one considers that the discrimination between the two parties to the procedure lacks due justification. On this point, one could oppose the necessary protection that passengers deserve and the position of weakness in which they find themselves vis-à-vis the airlines. This approach is debatable, in our opinion, and, on the other hand, lacks consistency in the light of other provisions of the Order: for example, the Order provides that AESA's decision in an ADR procedure is not binding upon airport operators (Art. 7.2.d). One wonders what the reasons for this different treatment of airlines and airport operators might be.

In any case, we consider that the greatest imbalance would occur in the legal approach established in the subsequent judicial instance. According to the Order, if the airline challenges AESA's decision in court, the passenger is exempted from the burden of appearing in the judicial proceedings. This creates two serious disturbances to the company's right to an effective judicial protection.

Firstly, we understand that it is not at all clear that the result of the judicial proceeding followed without the presence of the passenger can generate a binding decision against the passenger, since it has been followed in his -legitimate- absence. That is to say, it is doubtful that, in case the airline wins the judicial process, it can then invoke the *res judicata* principle against the passenger if the latter has not appeared in the court proceedings and such non-appearance was authorized by the Order. In this sense, Article 222.3 of the Civil Procedure Act restricts the effects of the *res judicata* to the parties of the process and their heirs and assignees, as a general rule.

In favor of this option could be invoked the fact that Spanish Act 7/2017 comes to say that the passenger will be satisfied with the outcome of the lawsuit if he does not appear in it (vid. D.A. 2ª, paragraph 3, which contemplates the right of the passenger not to appear in the proceedings and presupposing that it is referred to the decision of the entity) but it must be taken into account that this last provision no longer appears in the approved Ministerial Order (Art. 18.3 Order TMA/201/2022). It could be considered that the Order does not reiterate this last nuance because it considers it unnecessary, but it is a matter of great importance that leaves room for obvious doubts.

On the other hand, this provision allowing passengers not to show up in the judicial proceedings is disproportionately burdensome for the airline insofar as it involves a long (and dangerous) judicial pilgrimage for the operator to be able to effectively assert its legitimate rights. The fact that the passenger does not appear (*rectius,* may not appear) in the judicial proceeding forces the IRLINE to follow, in such case, a further judicial proceeding against the passenger to claim the amount that the passenger received from the airline under AESA's decision. This represents an extraordinary delay with uncertain results, since the company would have to follow two consecutive judicial proceedings to get the decision issued by AESA, which would have been proven incorrect, annulled.

In fact, this would be a delay and a complexity so great that, for practical purposes, it would prevent, *de facto*, that the courts of justice could effectively review the decisions of AESA proven to be against the terms of Regulation 261, however unfortunate or incorrect they may be; the more so when, in addition, the airline is not at all assured that in this last judicial proceeding to be followed against the passenger, the res judicata of the previous judicial proceeding in which the passenger would not have been a party would be applied.

On the other hand, this would entail an extremely dangerous delay. For practical purposes, it could well be the case that at the time of the final judicial decision allowing the recovery of the amount initially paid (at the end of the second judicial proceeding) the passenger is no longer solvent or there is no longer an effective way to obtain the restitution of the amount initially paid by the airline quite some time before.

On this point, the fact that the sums paid by the company must be immediately delivered to the passengers is very worrying, even though the ADR resolution can be reviewed in the judicial instance. This is a kind of provisional enforcement, which is perfectly admissible in our procedural system, but with the very important particularity that the passenger is already disregarded from the subsequent instances in court and thus the potential reversal of the initial decision is greatly hindered. There is an enormous difference between this regime and the general regime provided for in Article 532 et seq. of the Civil Proceedings Act regarding the reversal of provisional enforcement).

The situation of imbalance becomes evident if we compare it, for example, with the legal regime provided by Articles 44 and 45 of Spanish Arbitration Act 60/2003, for cases of concurrence of the exercise of actions for the enforcement of an arbitral award (by the favored party) with the exercise of an action for annulment of the award (by the losing party): specifically, even on the basis of the voluntary acceptance of arbitration, and the limitations of an action for annulment of the award, the party against enforcement is sought may request the court to suspend the enforcement, if it has brought an action for annulment and offers security for the value of the award plus any damages that may arise from the delay in the enforcement of the arbitral award.

This, undoubtedly, is a more balanced and conciliatory regime with the right to an effective judicial protection than the one stipulated by the new legal provisions; which not only do not contemplate the possibility for airlines to request the suspension of the enforceability of AESA's decision while its judicial challenge is being resolved, but also exposes airlines to face the payment of administrative penalties imposed by AESA for the mere fact of not voluntarily complying with its decision within one month.

In the same line, it is not possible to consider the option of ending up claiming the liability of AESA in the event that it becomes impossible to recover the funds from the passengers, after a court decision upholding the challenge to the decision of AESA. It remains to be seen whether AESA can refuse such a liability when there is a third party -the passenger-, who is the one who has benefitted from the airline's payment of a compensation. And, furthermore, it would be, in any case, a new judicial litigation (the fourth process, third trial), which is completely unfeasible both in general terms and, above all, in the particular case of this type of small claims.

4. CONCLUSIONS

Based on the foregoing, we consider that there are substantive arguments that would allow the challenge of the new Order (and of the Laws that it develops) both on the basis of the body designated to resolve the new ADR procedure and on certain procedural aspects that have been explained above.

At a procedural level, we consider that it is preferrable to request the nullity of the Order through the so-called direct challenge, the deadline for the exercise of which would end on **May 17, 2022**. This action starts with a very simple notice of appeal against the new Order. Of course, such a challenge would be more forceful if launched by a group of operators or industry associations rather than by airlines individually.

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