

**Case C-353/20**

**Request for a preliminary ruling**

**Date lodged:**

31 July 2020

**Referring court:**

Tribunal de l'Entreprise du Hainaut, division de Charleroi  
(Belgium)

**Date of the decision to refer**

23 July 2020

**Applicant:**

Skeyes

**Defendant:**

Ryanair DAC

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**Tribunal de l'Entreprise du Hainaut, division de Charleroi  
(Companies Court, Hainaut, Charleroi Division)**

**Order**

**Chamber hearing applications for interim relief**

**[Or. 2]**

**IN THE MATTER OF:**

**SKEYES, an autonomous public undertaking** (formerly BELGOCONTROL),  
[...] established at [...] BRUSSELS [...];

Applicant in third party proceedings [...].

**v:**

**RYANAIR D.A.C., a company incorporated under Irish law**, established [at]  
[...] Swords [...] (Ireland) [...];

Defendant in third party proceedings [...].

[...] [procedural matters]

After deliberation, the Court gives the following decision:

### **SUBJECT MATTER OF THE DISPUTE**

1. SKEYES holds the monopoly in civil air traffic management and control services in Belgium; it is an ‘autonomous public undertaking’ within the meaning of the Law of 21 March 1991.<sup>1</sup>

Article 1 of the Law on public undertakings provides as follows:

*‘§ 1. Any public interest body which is to enjoy autonomy of management in a given industrial or commercial sector may, once its articles of association have been lawfully brought into line with the provisions of this Title, obtain such autonomy by concluding a management contract with the State in accordance with the conditions laid down in this Law. (...)*

*§ 4. The bodies classified as autonomous public undertakings are:*

*(...)*

*4° Skeyes’*

Article 170 of that Law states that:

*‘Skeyes shall have as its objects:*

*1° to ensure the safety of air navigation in the airspace for which the Belgian State is responsible [...] [Or. 3] [...]*

*[...]*’

Article 171 provides: *‘The activities referred to in Article 170(1) to (3) shall constitute public service tasks’.*

As part of the measures designed to ensure air traffic safety, SKEYES is authorised to apply a ‘zero rate’ measure, which means that no aircraft may take off or land in, or transit through, Belgian airspace or certain sectors of that airspace.

2. The tasks and objectives assigned to SKEYES by the Belgian State are defined in a management contract; at the time when the present dispute arose, the

<sup>1</sup> As amended by the Law of 16 December 2015 ‘amending the Law of 21 March 1991 reforming certain commercial public undertakings’.

management contract concluded on 11 April 2014 was in force; that contract was subsequently extended as from 24 June 2019.

3. It must further be noted that air traffic controllers who are members of SKEYES' permanent staff are engaged under the staff regulations, without prejudice to SKEYES' right to recruit staff under employment contracts.<sup>2</sup>
4. The airline RYANAIR operates in Belgium from Charleroi and Brussels airports.
5. In the past, SKEYES has experienced episodes of industrial unrest, as evidenced by the judgment of the Cour d'Appel de Bruxelles (Court of Appeal, Brussels) of 20 November 2017,<sup>3</sup> which – following an action brought by RYANAIR – held that SKEYES was in principle liable following a wildcat strike held in September 2010.
6. On several occasions between February and May 2019, SKEYES closed Belgian airspace because of a lack of available staff; the following incidents are established as having taken place:
  - Closure of the airspace between 22:00 on 12 February and 22:00 on 13 February; SKEYES staff took part in the national strike on 13 February, causing flights to and from Belgian airports to be cancelled;
  - Action aimed at the targeted closure of Belgian airports on 12 and 13 March; each airport in turn was closed for 2 hours, Brussels from 22:00 and Charleroi between 04:00 and 06:00;
  - Action by the trade union representing air traffic controllers on 20 March which caused delays to departures and arrivals; **[Or. 4]**
  - Similar action on 28 March;
  - Action during the night of 15 to 16 April 2019 which resulted in the closure of Belgian airspace between midnight and 06:00;
  - Action on 16 May which resulted in closure of the airspace between 09:30 and 13:00 (see below).

RYANAIR explains that, in the majority of cases, airlines were not informed in good time and were therefore unable to limit the negative consequences of those actions for passengers.

7. As a result of the last-mentioned action on 16 May 2019, RYANAIR lodged an application [for interim relief] on grounds of extreme urgency with this Court,

<sup>2</sup> Article 29(1)(2) of the Law of 21 March 1991.

<sup>3</sup> [...] [references]; The judgment is the subject of an appeal before the Cour de cassation (Court of Cassation) on which judgment has not yet been given.

along with other applications lodged in Brussels and Liège; these applications to the courts were made within the context described below.

8. In a press release issued on Friday 10 May 2019, SKEYES announced that a labour agreement had been signed which ‘the management will be implementing (...) in full and as soon as possible, in the interests of the business and the colleagues concerned’; following that agreement, several information sessions intended to update staff without disrupting air traffic control services were scheduled for 16 May 2019.
9. However, on 16 May, SKEYES was once again forced to close Belgian airspace because many air traffic controllers were not a work, in circumstances described in the press release issued on the same day by SKEYES’ management:

*‘The industrial action at Skeyes is unjustified. The information sessions on the labour agreement at Skeyes are no reason for halting the operation.*

*Skeyes’ management had invited the air traffic controllers to meetings today to explain to them the labour agreement that was concluded last Friday, 10 May. They were allowed to attend the meetings during their breaks at any time between 10:00 and 19:00, so as to give everyone the opportunity to receive the necessary explanations at the most appropriate time and to avoid the need to halt the operation in order to do so.*

*When the management found out that action had been taken to disrupt air traffic services on account of those information sessions, it was forced to cancel the meetings.*

*Any further action will be deemed to be a wildcat strike.*

[...]

10. Having suffered the impact of that impromptu closure of airspace, RYANAIR, at approximately 10:00 on 16 May 2019 itself, lodged a unilateral application [for interim relief] on grounds of extreme urgency under Article 584 of the Judicial Code, which this Court granted on the same day in the form of an order requiring SKEYES: ‘to provide the service over which it has a monopoly so that air traffic may operate normally, failure to do so being punishable by a financial penalty of EUR 250 000 for each hour that Belgian airspace remains closed on account of the strike by air traffic controllers’.

The effects of that order were limited to the period from 16 to 24 May 2019.

11. RYANAIR received the Court’s order by e-mail sent to it at 15:38 on 16 May itself, shortly after the airspace had been re-opened to air traffic; it served the order on SKEYES on 21 May 2019. As at 24 May 2019, no further disruption had been recorded. By the time the order ceased to be effective, therefore, no financial penalties had been imposed. **[Or. 5]**

12. By application, served by bailiff, of 21 June 2019, SKEYES brought third party proceedings against the order of 16 May 2019; that application sought:
- principally, a declaration from the court that it lacked jurisdiction to hear and determine the original application and, consequently, an order quashing the order under appeal;
  - in the alternative, a declaration from the court that it lacked jurisdiction to hear and determine the original application and an order referring the case to the President of the Tribunal de première instance francophone de Bruxelles (Court of First Instance (French-speaking), Brussels), or, in the alternative, to the President of the Tribunal de première instance du Hainaut – division Charleroi (Court of First Instance, Hainaut – Charleroi division), or, in the further alternative, to the Tribunal francophone de l’entreprise de Bruxelles (Companies Court (French-speaking), Brussels);
  - in the further alternative, a declaration that the original application was unfounded and, consequently, an order quashing the order under appeal;
  - in the further alternative, a declaration that the original application was unfounded inasmuch as it seeks the imposition of financial penalties in addition to the principal form of order sought and, consequently, an order quashing the order under appeal to that extent.

### DISCUSSION

- 13 [...]
   
14 [...] <sup>4</sup> [Or. 6] [...] <sup>5</sup>
  
15 [...] [Admissibility of the third party proceedings brought by Skeyes]
   
16. With a view to having the order of 16 May 2019 quashed, SKEYES raises two arguments alleging lack of jurisdiction.

It submits first that this Court lacked jurisdiction to hear an application concerning its function as controller of Belgian airspace.

In the alternative, SKEYES submits that, as a company governed by public law, it cannot fall within the jurisdiction of the Tribunal de l’Entreprise (Business Court).

17. In the first place, SKEYES argues that this Court lacked jurisdiction to hear and determine RYANAIR’s application for an order requiring the air traffic control operator to re-open Belgian airspace.

<sup>4</sup> [...]

<sup>5</sup> [...]

In SKEYES' view, RYANAIR has no subjective right permitting it to make such an application; it recalls that the regulation of Belgian airspace comes under SKEYES' discretionary power as an autonomous public undertaking which is alone in a position to assess the conditions under which that airspace is to be regulated.

18. The Court's position: Courts and tribunals hear and determine applications based on a subjective right; a subjective right entails the existence of a precise legal obligation which a rule of objective law imposes directly on another person and which the applicant has a personal interest in having enforced.<sup>6</sup>

19. RYANAIR's unilateral application was based on the existence of subjective rights on its part; in that application, RYANAIR thus stated the following [...]:

*'In the context of fine weather and the approaching summer holidays, these repeated strikes and this wildcat strike in particular expose RYANAIR – like other airlines – to [Or. 7] serious and irreparable damage arising from flight cancellations or delays, operational disruption, traveller dissatisfaction and the significant obligations incumbent on RYANAIR under Article 9 of Regulation (EC) No 261/2004 (...). For, although the air traffic controllers' strike is an extraordinary circumstance enabling the carrier not to pay the compensation provided for in the event of flight delays or cancellations, it is still required to take care of and assist passengers, including, where appropriate, by providing them with hotel accommodation, which comes at an extremely high cost'.*

20. The Court notes that these arguments are underpinned by a claim as to the following subjective rights:

- as a corollary of the freedom to conduct business, recognised by the Court of Justice of the European Union as a general principle of EU law,<sup>7</sup> RYANAIR's right not to be disproportionately hampered in the pursuit of its airline business by decisions taken by the public authority the consequence of which is that: the airline is faced with extraordinary levels of expenditure, human resource management issues and uncontrollable damage to its image and reputation some of which will be difficult to remedy;
- in the case of breaches attributable to SKEYES, the right to bring against that company an action for damages similar to that already brought by RYANAIR against SKEYES, which resulted in the judgment of 7 November 2017 [...] by which the Cour d'appel de Bruxelles (Court of Appeal, Brussels) upheld the order by which the court of first instance ordered SKEYES – pursuant to the third subparagraph of Article 1384 of the Civil Code – to make good the damage suffered by RYANAIR as a result of a 24-hour wildcat strike called by

<sup>6</sup> [...] [references to national case-law]

<sup>7</sup> [...] [references to legal literature]

SKEYES' teams on 28 September 2010 (SKEYES has lodged an appeal in cassation against that judgment);

- as a corollary of the right to reparation, the right to limit the damage suffered, in this particular case by seeking, by application, an order prohibiting SKEYES, under penalty of a fine, from closing the airspace once again because of internal problems.

21. Is it the case, contrary to what SKEYES maintains, that the subjective rights thus claimed provide grounds for users (air carriers) to seek their protection before the ordinary courts?

SKEYES is an autonomous public undertaking governed by Belgian law whose activities, by definition, have cross-border aspects; consequently, the rules of European law are necessarily relevant in determining what rights users enjoy in relation to such an entity.

This is the purport of recital 24 of Regulation (EC) No 549/2004 (see the full citation below): *'(...) the objective of this Regulation, namely the creation of the single European sky, cannot be sufficiently achieved by the Member States, by reason of the transnational scale of the action, and can therefore be better achieved at Community level, while allowing for detailed implementing rules that take account of specific local conditions (...)'*

22. At European level, the following texts must therefore be taken into account: [Or. 8]

**Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky (the framework Regulation)**

*Article 4*

*National supervisory authorities*

*1. Member States shall jointly or individually either nominate or establish a body or bodies as their national supervisory authority in order to assume the tasks assigned to such authority under this Regulation and under the measures referred to in Article 3.*

**Regulation (EC) No 550/2004 of the European Parliament and of the Council of 10 March 2004 on the provision of air navigation services in the single European sky (the service provision Regulation)**

*Preamble*

(5) *The provision of air traffic services, as envisaged by this Regulation, is connected with the exercise of the powers of a public authority, which are not of an economic nature justifying the application of the Treaty rules of competition.*

(6) *Member States are responsible for monitoring the safe and efficient provision of air navigation services and for the control of compliance by air navigation service providers with the common requirements established at Community level.*

(13) *The provision of communication, navigation and surveillance services, as well as aeronautical information services, should be organised under market conditions whilst taking into account the special features of such services and maintaining a high level of safety.*

#### Article 8

##### *Designation of air traffic service providers*

1. *Member States shall ensure the provision of air traffic services on an exclusive basis within specific airspace blocks in respect of the airspace under their responsibility. For this purpose, Member States shall designate an air traffic service provider holding a valid certificate in the Community.*

3. *Member States shall define the rights and obligations to be met by the designated air traffic service providers. The obligations may include conditions for the timely supply of relevant information enabling all aircraft movements in the airspace under their responsibility to be identified.*

4. *Member States shall have discretionary powers in choosing an air traffic service provider, on condition that the latter fulfils the requirements and conditions referred to in Articles 6 and 7.*

23. SKEYES states that, owing to its status as ‘air traffic services provider’ for Belgium and the discretionary power conferred upon it, it falls outside the scope of any judicial review with respect to any breaches of which it might be accused in the exercise of its prerogatives.

That position appears to contradict European Union law. **[Or. 9]**

After all, although – in accordance with the provisions of EU law – the national authorities define the rights and obligations of organisations such as SKEYES, the fact remains that those authorities appear to be required, when defining those rights and obligations, to ensure that users have an effective remedy against any breaches on the part of the public undertaking.

This Court must therefore ascertain whether, despite the discretionary power vested in SKEYES, the effect of which is to make that company the sole arbiter – from the point of view of the public interest – of whether its decisions are

appropriate, the subjective rights which RYANAIR seeks to have protected are capable of allowing it to compel SKEYES to account for the conditions under which that discretionary power is exercised; that question is described as ‘moot’ in legal literature.<sup>8</sup>

24. In several decisions, the Cour de cassation (Court of Cassation) has recognised that an applicant may have recourse to the ordinary courts, even if the administrative authority’s right to act is discretionary. It is not inconceivable, after all, that the authority might commit a wrongful act by infringing a subjective right or, even in the absence of such a right, by not exercising its discretionary power as a normally prudent administrative authority would have done in the same circumstances.

Thus, in a landmark judgment of 26 March 2009,<sup>9</sup> the Cour de cassation (Court of Cassation) stated the following:

*‘An administrative authority which takes a decision by virtue of its discretionary power enjoys a discretion which allows it, within the limits of the law, to determine itself the ways in which it will exercise its competence and to choose the solution it considers most appropriate. The ordinary courts have jurisdiction to prevent or make good any wrongful infringement of a subjective right by an administrative authority in the exercise of its discretionary power’.*<sup>10</sup>

It follows from that case-law that the important factor in an examination of whether the ordinary courts have jurisdiction is the right relied on by the applicant. If the right relied on is a subjective right (and the applicant has an immediate, real and current interest in relying on it), the application falls within the jurisdiction of the ordinary courts. Whether the application is well-founded is another matter the resolution of which will have to take into account the particular status of the administrative authority.

25. This Court notes that the judgments in which the Cour de cassation (Court of Cassation) examines the boundaries of an administrative authority’s discretionary power are concerned with the law on foreign nationals, the rules of which are essentially national.

The dispute in the case at issue has to do with the very European rules which were described above and with which each Member State of the European Union must comply as a matter of priority.

Consequently, in order to determine what, if any, limits are attached to the discretionary power granted to European sky operators, the Court considers itself

<sup>8</sup> [...] [references to legal literature]

<sup>9</sup> [...] [references]

<sup>10</sup> [...] [references to case-law]

bound to refer to the Court of Justice of the European Union the questions set out in the operative part of this judgment. **[Or. 10]**

### **ON THOSE GROUNDS**

**I, [...]President of the Tribunal de l'Entreprise du Hainaut (Companies Court, Hainaut), [...]**

[...] [procedural matters, admissibility of the third party proceedings, need for a reference for a preliminary ruling]

**Therefore refer the following questions to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the EU:**

1.

Must Regulation No 550/2004, in particular Article 8 thereof, be interpreted as meaning that it authorises the Member States to remove from review by the courts of that Member State any alleged failures to fulfil the obligation to provide services by the air traffic services provider, or must the provisions of that regulation be interpreted as meaning that they require the Member States to provide an effective remedy against any such alleged breaches, account being taken of the nature of the services to be provided?

2.

Must Regulation No 550/2004, inasmuch as it states that *'the provision of air traffic services, as envisaged by this Regulation, is connected with the exercise of the powers of a public authority, which are not of an economic nature justifying the application of the Treaty rules on competition'*, be interpreted as precluding not only the rules on competition *per se*, but also any other rules applicable to public undertakings active on a market for goods and services which have an indirect effect on competition, such as those prohibiting hindrances to the freedom to conduct business and to provide services ?

[...] [stay of proceedings, provisional enforcement, procedural matters]

**This decision was delivered at the extraordinary public hearing of the TWENTY THIRD OF JULY TWO THOUSAND AND TWENTY, in the Chamber hearing applications for interim relief.**

[...] [signatures]