Case C-792/19

Request for a preliminary ruling

Date lodged:

28 October 2019

Referring court:

Landgericht Köln (Germany)

Date of the decision to refer:

15 October 2019

Defendant and appellant:

TUIfly GmbH

Applicant and respondent:

EUflight.de GmbH

[…]

Landgericht Köln (Cologne Regional Court, Germany)

Order

In the case of

TUIfly GmbH, […] Langenhagen,

defendant and appellant,

[…]

v

EUflight.de GmbH, […] Hamburg,

applicant and respondent,

[…]

the 11th Civil Chamber of Cologne Regional Court

[…]

makes the following order:

1. The proceedings are stayed. **[Or. 2]**

2. The following questions on the interpretation of EU law are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:

   In the event of a strike, is the cancellation or long delay in the arrival of a flight caused by extraordinary circumstances within the meaning of Article 5(3) of Regulation (EC) No 261/2004 even if the flight at issue was not directly affected by the strike and could have proceeded as scheduled, but was cancelled or delayed due to measures taken by the air carrier to reorganise the flight schedule as a result of the strike (in this case, the use of the aircraft intended for the flight in order to remedy the consequences of the strike)?

   In the event that an air carrier may also be released from liability in the case of a reorganisation measure:

   Is it essential that the reorganisation measure had already been taken before the strike began, when it was not yet foreseeable which flight would ultimately be affected by the strike action, or is exculpation possible also if the flight schedule was reorganised only during or after the strike and it was already established that the flight at issue was not directly affected by the strike?

Grounds:

I.

1 The applicant, acting under assigned rights, is taking action against the defendant for payment of a total of EUR 500.00 (two instances of EUR 250.00) in compensation pursuant to 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.

The underlying facts are as follows:

The passengers booked a flight from Cologne to Palma de Mallorca for 11 October 2017 with the defendant. The flight was scheduled to **[Or. 3]** depart from Cologne at 18.55 on 11 October 2017 and to arrive in Palma de Mallorca at 21.20 on 11 October 2017. The distance between Cologne and Palma de Mallorca

is 1 308.21 km. However, the flight did not take place as scheduled, and the passengers did not land in Palma de Mallorca until 3.20 on 12 October 2017. This delay was based on the following circumstances.

The defendant had already become aware in the course of 5 and 6 October 2017 that a general strike would take place in France between 9 October 2017 (17.00 UTC) and 11 October 2017 (4.00 UTC), affecting air traffic services, air traffic control, radio communications and air traffic controllers.

The strike affected numerous flights in the defendant's flight schedule, inter alia, all flights to and from Spain, including those to and from the Balearic Islands, Morocco and Portugal. On 10 October 2017, five aircraft were unable to return to Germany from Las Palmas, Tenerife and Funchal, were postponed to the following day and were therefore not available on 11 October 2017 for the rotations beginning in Germany.

The flight at issue, from Cologne to Palma de Mallorca, which was originally supposed to proceed by means of the D-ATUF aircraft, was not itself scheduled to take place during the strike. However, as a result of the strike, the defendant reorganised the flight schedule considerably and, in that context, used the D-ATUF aircraft intended for the flight at issue to carry out rotations that were cancelled due to the strike and thus to alleviate disruptions to the flight schedule that were caused by the strike. As a result, the defendant operated the flight at issue using a different aircraft (D-ATYB), resulting in the delay referred to above.

The passengers subsequently assigned their claims arising from the flight delay to the applicant.

The defendant counters the applicant's requests for compensation by stating that the delay to the flight at issue was caused by extraordinary circumstances within the meaning of Article 5(3) of Regulation (EC) No 261/2004.

2 In accordance with the form of order sought, the Amtsgericht (Local Court) ordered the defendant to pay to the applicant EUR 500.00 plus the interest accrued at the rate of five percentage points above the relevant base rate of interest since 21 November 2017. It took the view that the delay was not caused by the general strike in France, and was therefore not caused by extraordinary circumstances. Rather, the decisive factor with respect to the delay that had occurred was the defendant's **[Or. 4]** decision to use the aircraft intended for the flight to fill gaps in the flight schedule that were attributable to the strike. The fact that exculpation was not applicable in this case was also apparent from the decision of the Court of Justice of the European Union of 4 October 2012 (C-22/11 — *Finnair*), the underlying facts of which were comparable to those in the present case. The decision of the Bundesgerichtshof (Federal Court of Justice) of 21 August 2012 […], on the other hand, related to a different set of facts, since, in that case, the air carrier had already cancelled flights in anticipation of an announced strike, and it

had therefore not yet been established whether the flight at issue would ultimately be affected by the strike.

3 The defendant lodged an appeal against the judgment of the Local Court, for which leave was given by that court, and is pursuing its claim for dismissal of the application by way of that appeal. It asserts that the decision of the Federal Court of Justice of 21 August 2012 […] should also be applicable to the present set of facts, while the case-law of the Court of Justice of the European Union did not preclude exculpation.

II.

The decision on the appeal requires a preliminary ruling by the Court of Justice of the European Union on the question referred.

1.

The question is material to the decision:

In the event that, in the present case, extraordinary circumstances within the meaning of Article 5(3) of Regulation (EC) No 261/2004 are not applicable to the flight at issue so as to release the air carrier from liability, the appeal will not succeed because the applicant is then entitled to compensation under assigned rights.

If, on the other hand, an extraordinary circumstance were to have an exculpatory effect with regard to the flight at issue as a result of the strike, the appeal would be successful, since the defendant has submitted in sufficiently concrete terms that the D-ATUF aircraft was used to alleviate the effects of the strike.

2. **[Or. 5]**

The question whether the delay was caused by extraordinary circumstances within the meaning of Article 5(3) of Regulation (EC) No 261/2004 is a question of interpretation of the provision — in this case, of the term ‘cause’ and the related questions of causality — which, in cases of doubt, is a matter reserved for the Court of Justice of the European Union.

3.

In accordance with the view taken by the Chamber up to this point, the long delay in arrival in the present case was caused by an extraordinary circumstance within the meaning of Article 5(3) Regulation (EC) No 261/2004.

a) By judgment of 21 August 2012 […], the Federal Court of Justice assumed exculpation pursuant to Article 5(3) of Regulation (EC) No 261/2004 if the air carrier reorganises the flight schedule and cancels flights in anticipation of a strike. The Federal Court of Justice stated the following in this connection:

'If extraordinary circumstances give cause for concern that the air carrier will not have a significant proportion of its pilots available to it in the near future, the explanation of the reasons why a particular flight has been cancelled cannot be subject to onerous requirements; in such a situation, the air carrier is faced with the task of having to reorganise its operational process accordingly as soon as possible in advance. In so doing, as has already been stated, the air carrier's main objective must be to reduce, as far as possible, disturbances for all passengers and to ensure that it can return to a normal operating situation as soon as possible after those disturbances cease. Should the air carrier exhaust to the extent necessary the resources at its disposal when complying with those requirements, the non-operation of a single flight generally cannot be considered to have been avoidable simply because another flight could have been cancelled in its place. Given the complexity of the situation at issue, in which a number of flights and the connections between them must be taken into consideration, the air carrier ought rather to be granted the necessary discretion for assessing the appropriate measures to be taken. A corresponding reduction of consumer rights should be of no concern as it is not least in the air carrier's own economic interests to limit the effects of the strike and strike-related disturbances for passengers.' **[Or. 6]**

Referring to the case-law of the Federal Court of Justice, the Landgericht Frankfurt (Frankfurt Regional Court) also considered the cancellation of a flight before the strike to be exculpatory […].

b) In some of the case-law of the lower courts involving rescheduling measures, on the other hand, the courts have found that the air carrier is not exonerated, since the cancellation or delay in such cases is no longer based on the extraordinary circumstance but on a business decision […]. In such cases, reference has generally been made to the decision of the Court of Justice of the European Union of 4 October 2012 (C-22/11 — *Finnair*) […]. In some cases, the requirement of direct causality between the extraordinary circumstance and the degree to which the flight at issue is affected has also been derived from recital 15 of Regulation (EC) No 261/2004 […].

Some of the views taken in the literature also expressly reject exculpation in the case of rescheduling measures brought about by a strike […].

c) The Court of Justice has not yet ruled on the question referred. Most recently, the question was left open in Case C-195/17 (*TUIfly*), since the existence of an extraordinary circumstance had already been ruled out. In those proceedings, the Advocate General at the Court of Justice — likewise referring to the decision of the Court of Justice of 4 October 2012 (C-22/11 — *Finnair*) — took the view that extraordinary circumstances did not extend to new flight schedules drawn up in the light of the extraordinary circumstances (Opinion of 12 April 2018). **[Or. 7]**

d) In its case-law to date, the Chamber has followed the view taken by the Federal Court of Justice and considers that the stipulations in that case-law are

also transferable to the present case of a flight operated with a delay after the end of a strike as a result of the reorganisation of the flight schedule due to the strike.

Such an interpretation is supported by the wording of Article 5(3) of Regulation (EC) No 261/2004, since, in that respect, it is merely required that the cancellation (in this case: the long delay in arrival) is 'caused' by extraordinary circumstances, which covers indirect effects — as a result of the fact that the aircraft scheduled for the flight is not available due to the necessary reorganisation. It is not clear from the wording that a flight must be directly affected by the extraordinary circumstance — that is to say, in the event of a strike, all or some of the personnel scheduled for the flight cannot be deployed to operate the flight […].

From this perspective, recital 15 of Regulation (EC) No 261/2004 also militates in favour of, and not against, the Chamber's understanding. According to that recital, extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft. Accordingly, pursuant to that recital, effects for subsequent flights are also covered […], and this applies also to flights in respect of which the extraordinary circumstance gives rise to a delay of up to one day after the occurrence of the extraordinary circumstance. It is true that, in this situation, the connection between extraordinary circumstances and cancellation/delay is closer in so far as the same aircraft is affected. Nevertheless, it is clear that the legislature did not intend to limit the exculpation to situations in which the cancelled/delayed flight is directly affected, nor did it intend to make it a requirement that the effects of the extraordinary circumstance arise at the same time or on the same day; rather, it is merely important that the extraordinary circumstance actually continues to have an effect. In any event, it is not apparent from recital 15 that the legislature intended that, in general, only cases involving direct causality would be covered by Article 5(3) of Regulation (EC) No 261/2004 […]. **[Or. 8]** Rather, recital 15 merely states — in positive terms — that the air carrier is released from liability in a specific situation (air traffic management decision).

The Chamber takes the view that the causal link to the extraordinary circumstance of the strike is also not broken by the fact that the circumstance of the flight not being operated as scheduled is (also) based on a business decision of the air carrier. The cancellation of several flights as a result of a strike will inevitably give rise to practical constraints with regard to the re-routing of passengers affected by the cancellation to their destination. In order to do that, the air carrier is forced to operate with aircraft, crew members, etc. that are available or can be sourced at short notice, and this generally rules out compensating for the consequences of strike action while simultaneously handling regular flight operations. The reorganisation of the flight schedule is therefore subject to practical constraints, in view of which it is also reasonable to assume in that respect that the cancellation or delay in arrival is caused by the extraordinary circumstance of the strike.

According to the assessment of the Chamber, the point in time at which the flight schedule is reorganised is not decisive. Although, in the case of a subsequent reorganisation, it is already clear whether or not an individual flight was affected by the strike, the practical constraint of having to react to the extraordinary circumstance of the strike and the resulting disruptions to the flight schedule by means of reorganisation measures is the same. In terms of causality, therefore, the timing of the reorganisation changes nothing.

e) The Chamber takes the view that the decision of the Court of Justice in the judgment of 4 October 2012 (C-22/11 — *Finnair*) does not give rise to any binding requirements for the purpose of answering the questions referred. First, the decision related to a case of denied boarding. However, it should be noted at the outset that the exception under Article 5(3) of Regulation (EC) No 261/2004 does not apply to such cases. In that respect, the Court of Justice did not have to examine the scope of that provision in a manner material to the decision. Secondly, Case C-22/11 was based on a set of facts in which the flight at issue was not actually cancelled or delayed because of a rescheduling measure. Rather, the flight was actually operated, and it was only passengers who — like the applicant in that case **[Or. 9],** Mr Lassooy — had booked the flight and presented themselves for boarding on time that were denied boarding because other passengers had been re-routed on that flight after the flight which they had booked had had to be cancelled due to a strike by staff at Barcelona Airport.

f) On the basis of the view set out in b) above and which has increasingly been adopted in recent times, and which deems there to be no exculpation in the case of reorganisation measures, with reference generally being made to the decision of the Court of Justice in the judgment of 4 October 2012 (C-22/11 — *Finnair*) — a view which is clearly also shared by the Advocate General of the Court of Justice — the Chamber considers the reference for a preliminary ruling to be appropriate.

[…]