

Case C-127/20

Request for a preliminary ruling

Date lodged:

5 March 2020

Referring court:

Sąd Rejonowy w Gliwicach (Poland)

Date of the decision to refer:

18 February 2020

Applicant:

D. Spółka Akcyjna

Defendant:

W. Zrt

[...]

ORDER

18 February 2020

The Sąd Rejonowy w Gliwicach — VII Wydział Gospodarczy (District Court, Gliwice — 7th Commercial Division), [...]

[...]

having examined on 18 February 2020 in Gliwice

during an in camera hearing

the action brought by D. Spółka Akcyjna, established in W.,

against W. Zrt., established in B. (Hungary),

concerning payment,

makes the following order:

the following question of law is referred to the Court of Justice of the European Union:

Must Article 5(3) of 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 (OJ 2004 L 46, p. 1), be interpreted as meaning that an air carrier whose aircraft has suffered a bird strike is obliged, as part of the reasonable measures that it must take, to provide, in its rotation-based flight planning system, for sufficient reserve time for a required safety check to be made?

and, in the event that this question is answered in the negative:

Must Article 5(3) of 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 (OJ 2004 L 46, p. 1), be interpreted as meaning that an air carrier whose aircraft has suffered a bird strike is obliged, as part of the reasonable measures that it must take, to establish crew rosters or staffing levels in such a way that crews are ready for flight duties immediately after a required safety check is made, regardless of the limits on flight time and duty time and the rest period requirements laid down in Annex III to Commission Regulation (EU) No 965/2012 of 5 October 2012 [Or. 2] laying down technical requirements and administrative procedures related to air operations (OJ 2012 L 296, p. 1)?

[...]

[Or. 3] GROUNDS

SUBJECT MATTER OF THE DISPUTE, RELEVANT FACTS

1. The applicant — D. Spółka Akcyjna, established in W[., —] brought an action requesting that the defendant — W. Zrt., established in B.[, —] be ordered to pay the sum of EUR 250 plus statutory interest for late payment by way of compensation for a delayed flight, the right to which had been acquired under an assignment of claims agreement from a passenger on Flight W6 1752, operated by the defendant air carrier.
2. It is not disputed that the initial creditor, B.K., concluded an air transport contract with W., on the basis of which, on 4 October 2017, he was to take a flight on the Turku-Gdańsk service (Flight No: W6 1752, route: TKU-GDN). That flight took off more than 10 hours after the scheduled time of departure (STD).
3. The initial reason for the delay was a bird strike on the aircraft designated to operate the flight (Registration No: HA-LXK). That aircraft was being used by the

air carrier to operate flights using a rotation-based system. The bird strike occurred during Flight W6 1751 (route: GDN-TKU) immediately preceding the aforementioned Flight W6 1752. The rotation-based system used by the carrier provided that 35 minutes would allow sufficient time between Flight W6 1751 and Flight W6 1752 to prepare the aircraft for its next departure (TAT — turnaround time), this being the time difference between the scheduled arrival time of Flight W6 1751 (09:30 UTC) and the scheduled departure time of Flight W6 1752 (10:05 UTC).

4. The bird strike made it necessary to carry out a safety check (technical inspection) to detect any potential damage to the aircraft and to make sure that, despite the incident, the aircraft was technically fit to operate the next flight. During the delay resulting from the bird strike and the subsequent technical inspection of the aircraft, the flight crew reached the limit of their permitted flight duty time. Before returning to duty, they had to take a 10-hour rest period. During that rest period, the aircraft, having undergone inspection, was passed as technically fit to fly. The delayed flight departed only after the crew had completed their rest period.
5. One of the many arguments the defendant carrier put forward in disputing the grounds for its liability was that the delay to the flight was caused by extraordinary circumstances which it could not have avoided even if all reasonable measures had been taken. In that connection, the dispute between the parties centred on [Or. 4] an assessment of whether the reasonable measures that an air carrier must take in order to prevent the occurrence or the effects of extraordinary circumstances may include predicting potential or foreseeable incidents and adjusting the air carrier's normal activities accordingly.

RELEVANT PROVISIONS OF NATIONAL AND EU LEGISLATION

6. 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 (OJ 2004 L 46, p. 1):

Article 5

Cancellation

1. In case of cancellation of a flight, the passengers concerned shall:

...

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

...

3. *An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.*

...

Article 7

Right to compensation

1. *Where reference is made to this Article, passengers shall receive compensation amounting to:*

(a) EUR 250 for all flights of 1 500 kilometres or less;

...

7. Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 (OJ 2018 L 212, p. 1):

Article 32

Delegated powers

[Or. 5] 1. *For the operation of aircraft referred to in point (b) of Article 2(1), other than unmanned aircraft, the Commission is empowered to adopt delegated acts, in accordance with Article 128, laying down detailed rules with regard to:*

(a) the conditions to be met by the operators referred to in Article 30(1) and their aircrew members with regard to flight and duty time limitations, as well as rest requirements for aircrew members;

...

8. [Annex III to] Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ 2012 L 296, p. 1):

ORO.FTL.100

Scope

This Subpart establishes the requirements to be met by an operator and its crew members with regard to flight and duty time limitations and rest requirements for crew members.

ORO.FTL.105

Definitions

For the purpose of this Subpart, the following definitions shall apply:

...

(11) 'duty period' means a period which starts when a crew member is required by an operator to report for or to commence a duty and ends when that person is free of all duties, including post-flight duty;

(12) 'flight duty period ("FDP")' means a period that commences when a crew member is required to report for duty, which includes a sector or a series of sectors, and finishes when the aircraft finally comes to rest and the engines are shut down, at the end of the last sector on which the crew member acts as an operating crew member;

...

(21) 'rest period' means a continuous, uninterrupted and defined period of time, following duty or prior to duty, during which a crew member is free of all duties, standby and reserve;

...

(25) 'standby' means a pre-notified and defined period of time during which a crew member is required by the operator to be available to receive an assignment for a flight, positioning or other duty without an intervening rest period;

...

ORO.FTL.110

[Or. 6] Operator responsibilities

An operator shall:

...

(b) ensure that flight duty periods are planned in a way that enables crew members to remain sufficiently free from fatigue so that they can operate to a satisfactory level of safety under all circumstances;

...

(g) provide rest periods of sufficient time to enable crew members to overcome the effects of the previous duties and to be rested by the start of the following flight duty period;

...

(i) plan flight duties in order to be completed within the allowable flight duty period taking into account the time necessary for pre-flight duties, the sector and turnaround times;

...

LEGAL UNCERTAINTIES AND THEIR RELEVANCE FOR THE RESOLUTION OF THE CASE

9. In its judgment of 23 October 2012 [in *Nelson and Others*] (Joined Cases C-581/10 and C-629/10, ECLI:EU:C:2012:657), the Court of Justice of the European Union gave an interpretation of Articles 5, 6 and 7 of Regulation (EC) No 261/2004 to the effect that passengers whose flights are delayed are entitled to compensation under Article 7 [of that regulation] where they suffer, on account of such flights, a loss of time equal to or in excess of 3 hours, that is, where they reach their final destination 3 hours or more after the arrival time originally scheduled by the air carrier.
10. In subsequent rulings on references for a preliminary ruling, the Court of Justice of the European Union held that an air carrier may avoid liability where it can demonstrate that a technical problem in an aircraft stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control (see, for example, judgment of the Court of Justice of the European Union of 19 November 2009, [*Sturgeon and Others*,] C-402/07 and C-432/07, ECLI:EU:C:2009:716; judgment of the Court of Justice of 22 December 2008, [*Wallentin-Hermann*,] C-549/07, ECLI:EU:C:2008:771).
11. It has also already been explained that the relevant provisions of Community law must be interpreted as meaning that an event consisting of a collision between an aircraft and a bird which results in the need for a technical inspection of the aircraft is classified under the concept of ‘*extraordinary circumstances*’ within the meaning of Article 5(3) of Regulation (EC) No 261/2004, whether or not it actually resulted in damage to the aircraft (judgment of the Court of Justice of the European Union of 4 May 2017, [*Pešková and Peška*,] C-315/15, ECLI:EU:C:2017:342). [Or. 7]
12. In the last of the cases cited, the national court referred a series of questions to the Court of Justice for a preliminary ruling in order, inter alia, to resolve an uncertainty that has frequently arisen in the case-law, namely whether an air carrier is obliged, as part of the reasonable measures which it must take, to

provide, in its rotation-based flight planning, for sufficient reserve time for the required safety checks to be made (paragraph 55 of the grounds of the judgment). However, in view of the factual circumstances of that case (the delay to the flight was caused by factors other than merely the rotation-based flight planning system), the resolution of that issue was not ultimately relevant to the judgment to be given in that case and the Court therefore refused to give an answer to that particular question (paragraphs 56 and 57 of the grounds of the judgment).

13. The issue described above, the context for which the Court of Justice of the European Union has fairly clearly defined (but not definitively adjudicated upon), as well as other, related points of legal uncertainty, have come up in litigation once again, thus providing grounds for making a request for a preliminary ruling on the [questions] set out above in the first paragraph of this order.
14. The national court has doubts as to the extent of the obligation imposed on the air carrier by the Community legislature to take, in the event of extraordinary circumstances (a bird strike), measures which, at the time those circumstances arise, satisfy conditions which are technically and economically viable for the air carrier concerned. In the situation in the main proceedings, that would entail factoring into the rotation-based flight planning system an appropriate time reserve that would allow safety checks to be carried out on the aircraft following the bird strike and avert any adverse effects on passengers as a result of an excessive delay to the flight.
15. In an attempt, also apparent from the second question referred, to look at the aforementioned issue from a broader perspective, the national court is therefore asking the Court of Justice of the European Union to give an interpretation of the provisions of EU law referred to above and to clarify the extent to which an air carrier, when planning its activities, must take account of secondary but foreseeable and potentially quantifiable factors, as opposed to unforeseeable, extraordinary circumstances which cannot be avoided.
16. Although the findings of the Court of Justice to date do provide general principles suitable for assessing an air carrier's ability to deploy financial and technical measures to prevent flight delays (judgment of the Court of Justice of the European Union of 12 May 2011, [Or. 8] [*Eglītis and Ratnieks*], C-294/10, ECLI:EU:C:2011:303; judgment of the Court of Justice of the European Union of 22 December 2008, [*Wallentin-Hermann*], C-549/07, ECLI:EU:C:2008:771), they have not sufficiently resolved the uncertainties present in this field.
17. Moreover, in the present case, the national court is particularly uncertain about the requirement set out (but not further elaborated on) in Community case-law that an air carrier must deploy all the human resources at its disposal, albeit without making intolerable sacrifices in the light of the capacities of its business, to ensure that any extraordinary circumstances with which it is confronted do not cause excessive delay to a flight. Adopting a restrictive interpretation, as advocated by the applicant during the proceedings, would have the immediate effect of making

it impossible for the air carrier to rely on the flight crew rest period, where this is cited as one of the causes of the extraordinary circumstances and exacerbates the delay to the flight. It would then be legitimate to argue that, since the permitted limits on duty time and flight time are set by universally binding provisions of law, of which the air carrier was obliged to take account when drawing up its crew rosters, the air carrier ought also to provide for reserve personnel in the event of potential delays to its flights, since flight delays, whatever their cause, are *per se* possible to foresee when planning and organising air services. The risk of failing to take account of that factor would then be borne by the carrier. However, it seems that the law also permits a different view, as advocated by the defendant, to the effect that the air carrier is under no obligation to keep a reserve crew on standby. Otherwise, the obligation imposed on carriers would all but require them to keep additional personnel able to take over the duties of crews on delayed flights at every airport from which they operate, an approach which might still prove insufficient if there were to be a build-up of delayed flights in the same place and at much the same time as a result of extraordinary circumstances.

18. It must be pointed out that the aforementioned uncertainties identified in both questions referred for a preliminary ruling have not been uniformly resolved in the case-law of the national courts. In similar factual circumstances, the national courts, at individual court and even individual division level, have made mutually exclusive legal assessments resulting in disparate decisions in factually and legally similar cases [...] [references to rulings by the Polish courts]. **[Or. 9]**
19. The uncertainties described above and the divergences in the case-law in that connection point to the need for the Court of Justice of the European Union to give an interpretation of EU law in order to provide certainty within the legal system and to ensure that the law is applied uniformly by the national courts of the individual Member States of the European Union.

[...]