**Case C-388/22**

**Request for a preliminary ruling**

**Date lodged:**

14 June 2022

**Referring court:**

Amtsgericht Frankfurt am Main (Germany)

**Date of the decision to refer:**

3 June 2022

**Applicant:**

flightright GmbH

**Defendant:**

Transportes Aéreos Portugueses SA (TAP)

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**Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main)**

Frankfurt am Main, 3 June 2022

[…]

**Order**

In the case of

Flightright GmbH, […]

applicant

[…] v

TAP S.A. Dpt. Fale Connosco […]

defendant

[…] the court **ordered** as follows:

**I. The proceedings are stayed.**

**II. The following questions on the interpretation of Article 5 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, are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:**

1. **Do extraordinary circumstances within the meaning of Article 5(3) of the Regulation exist where meteorological conditions occur which are incompatible with the operation of a flight, irrespective of their specific nature?**

2. **If the answer to Question 1 is in the negative, can the extraordinary nature of the meteorological conditions be determined by reference to their regional and seasonal frequency at the place and time at which they occur?**

3. **Do extraordinary circumstances within the meaning of Article 5(3) of the Regulation 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, irrespective of the reason for that decision?**

4. **If the answer to Question 3 is in the negative, must the reason for the decision also be extraordinary, such that it need not be expected?**

## Grounds

### I.

The applicant, acting under rights assigned to it by a passenger, is seeking compensation from the defendant under the Regulation.

The assignor reserved a confirmed flight with the defendant as the operating air carrier. Flight TP118 from Porto Alegre to Lisbon, with an onward flight – LH1167 – to Frankfurt am Main, was scheduled to depart at 9.10 p.m. on 9 March 2017. The connecting flight was scheduled to depart at 12.05 p.m. and arrive at 4.10 p.m. on 10 March 2017. Flight TP118 was cancelled. The assignor was carried on another flight on 10-11 March 2017 and reached Frankfurt am Main over 27 hours later than scheduled.

The defendant contends that the cancellation was due to the fact that the aircraft intended for the flight at issue – flight TP118 – had not been able to land in Porto Alegre. According to the defendant, the reason for this was that a storm on 9 March 2017 had made it impossible to land and the aircraft had to be diverted to

Curitiba. In the first attempt to execute the final approach, there were storm clouds directly on the approach path to the runway; in the second attempt, the aircraft was not even given clearance to approach. Given that their working hours had been exceeded as a result, the crew did not complete the flight to Porto Alegre until the next day. The defendant did not have a replacement aircraft available in Porto Alegre. The assignor was rebooked onto the earliest and fastest possible connection – a fact disputed by the applicant on the basis of lack of knowledge.

The applicant claims that the aircraft could have been landed from 11 p.m. UTC onwards.

**II.**

Judgment depends on whether extraordinary circumstances within the meaning of Article 5 of the Regulation referred to above should be assumed, as argued by the defendant.

The action is well-founded if the defendant's submissions alone do not describe an extraordinary circumstance.

1. Article 5 of the Regulation does not oblige an operating air carrier to pay compensation if it can prove that cancellation was due to extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

a) Extraordinary circumstances are circumstances which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond the actual control of that carrier on account of their nature or origin (judgment of 22 December 2008, C-549/07, […], [paragraph] 23), that is to say, rather than arising in the normal course of events, they fall outside what is or may generally be involved in air passenger transport operations […]. In practice, as in this case, airlines regularly cite meteorological conditions and/or air traffic management decisions as extraordinary circumstances.

b) It is true that, according to the legislature, meteorological conditions that are incompatible with the operation of a flight are of themselves capable of constituting extraordinary circumstances (recital 14). As a starting point, it therefore suffices initially that the meteorological conditions prevent a flight from being operated. That would appear to be reasonable in principle, as the weather is beyond the air carrier's control. It is hard to see why an air carrier should be held liable for circumstances which it is in no position to influence, regardless of fault, as it has not been negligent in terms of the operation of the flight in such circumstances. Moreover, the mere existence of extraordinary circumstances still does not exempt the air carrier from liability for compensation, as it is also required to take reasonable measures to avoid the consequences of extraordinary circumstances (see Article 5(3) of the Regulation).

The same applies to the air traffic management decisions referred to in recital 15. The air carrier is required to comply with air traffic management instructions.

c) On the other hand, the fact that exposure to the elements and the impact of air traffic management decisions is inherent in aviation cannot be overlooked.

The former is inherent in the very nature of the business. Weather influences are always present; they change constantly and sometimes in such a way that a flight cannot or can no longer be (safely) operated. The latter follows from civil aviation regulations. Flights are subject to constant regulation and are only operated if a decision is taken in their favour. Disruptions to flight schedules caused by air traffic management decisions, whether due to the weather, malfunctions, etc., are par for the course.

Such circumstances are a regular occurrence and must, as a rule, be expected. The court therefore has doubts as to whether the fact that meteorological conditions disrupted a scheduled flight or air traffic management adopted a decision regarding a flight suffices in general. However, the wording of Article 5(3) of the Regulation suggests that meteorological conditions and decisions are to be regarded as extraordinary circumstances.

For example, it is not clear why an air carrier should be exonerated where it schedules a flight to Funchal in Madeira, an airport where wind shear is known to occur frequently, as it is knowingly operating a flight exposed to an increased risk of meteorological conditions which are incompatible with the operation of a flight, for example where an irregularity actually occurs in the operation of the flight due to such wind shear.

The court likewise has doubts as to whether air traffic management decisions are to be regarded as extraordinary circumstances where, for example, slot allocations are affected by overall capacity constraints. Capacity constraints on a route can be seen as a ‘normal’ disruption to aviation operations that is generally to be expected, like a traffic jam on a motorway, at least in airspace as densely congested as the airspace over, for example, Europe in pre-coronavirus times. By the same token, nor would control measures based on ordinary meteorological phenomena constitute extraordinary circumstances.

In terms of control measures, it is even possible to envisage cases in which they originated with the affected air carrier itself. For example, an air carrier’s aircraft may need to return to its airport of departure due to a technical fault and the emergency landing may cause airport operations to be closed temporarily to other flights and thus also to another flight operated by the same air carrier which is delayed as a result. In that case, notwithstanding the external instruction of air traffic management with regard to the delayed flight, that gives rise to circumstances for which the operating air carrier is responsible under the case-law of the Court (see judgment of 22 December 2008, C-549/07, […].

That is similar to the situation in the present case. It has neither been demonstrated nor is it evident that storms in Porto Alegre in March and air traffic management decisions taken in relation to them are extraordinary in nature; that begs the question as to whether the weather conditions and the refusal of clearance to land were extraordinary in nature and whether it is not more likely that an air carrier such as the defendant in the situation in the present case was required to prepare for such eventualities.

d) The court considers that a narrow interpretation is required.

aa) It cannot be taken as a given that the legislature has classified meteorological conditions that are incompatible with flight operations as extraordinary circumstances in general in recital 14. On the contrary, that recital states that such circumstances *may* occur in such meteorological conditions, and recital 15 states that extraordinary circumstances *should* be deemed to exist in the case of an air traffic management decision. Thus, they cannot necessarily be assumed to exist. That supports or, in any event, does not preclude a narrow interpretation in keeping with the legislature's objective of ensuring a high level of protection for passengers (recital 1).

Based on the definition of extraordinary circumstances, the two criteria referred to above, that is control and the normal exercise of the activity of the air carrier, may not be fulfilled. Although the former may not apply, the latter certainly does, assuming that exposure to the weather is inherent in the normal exercise of the activity of the air carrier. Even the fact that flight operations by air carriers are necessarily and constantly subject to official regulation might be qualified as being inherent in the normal exercise of the activity of the air carrier concerned.

In that regard, Article 5(3) of the Regulation suggests a narrow understanding. By definition, the word 'extraordinary' indicates a rare occurrence. Something that occurs regularly cannot be extraordinary. It would appear to be appropriate, in the interests of a high level of protection for passengers, to examine what is inherent in the normal exercise of the activity of the air carrier concerned based on the actual circumstances of each individual case.

The legal approach would be similar to that taken to technical problems. In its judgment of 22 December 2008 in Case C-549/07 […], the Court held that the courts must ascertain whether the technical problems cited by the air carrier stemmed from events which are not inherent in the normal exercise of its activity and were beyond its actual control (see [paragraphs] 26 and 27). The resolution of a technical problem caused by failure to maintain an aircraft must be regarded as inherent in the normal exercise of an air carrier's activity ([paragraph] 24). That would not be the case, for example, where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism ([paragraph] 26). The

Court also held in that judgment that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded ([paragraph] 36).

Therefore, it might be necessary to ascertain in the present case whether the meteorological conditions or the air traffic management decisions relied on by the air carrier stemmed from events which are beyond its actual control and – this being a matter to be clarified by way of the request for a preliminary ruling – are not inherent in the normal exercise of its activity.

bb) Criteria also exist for distinguishing between extraordinary and ordinary circumstances in such cases.

It might be possible to establish if meteorological conditions are extraordinary based on worldwide variations in regional and seasonal climatic conditions. Where certain meteorological conditions occur more frequently at certain times than elsewhere, they cease to be extraordinary. Air carriers which operate flights in regions or at times of particular weather phenomena then run the risk of being affected by what are then ordinary circumstances […].

In the case of air traffic management decisions, it may depend on the reason for them, that is whether the reason for the control measure was of an extraordinary nature […]. For example, decisions which need not be expected, because they fall outside normal operations, such as diversions due to accident, terrorist attack, political events or unusually extreme weather, might qualify as extraordinary, whereas general capacity constraints, unspecified meteorological conditions and suchlike might not.

cc) Such an interpretation would not impose an unreasonable burden on air carriers.

The Advocate General raised similar considerations with regard to Article 17 of Regulation (EC) No 1371/2007 in his Opinion of 14 March 2013 in Case C-509/11, point 40 (https://curia.europa.eu/juris/document/document.jsf?text=&docid= 135004&page ln-dex= 0&doclang=EN&mode=lst&dir=&occ=first&part= 1&cid= 4238944; retrieved on 1 December 2021): 'In the context of railway passenger transport contracts, the most usual causes of *force majeure*, namely difficult weather conditions, railway infrastructure damages, and labour market conflicts, in fact have a foreseeable statistical frequency even if their individual instances cannot be predicted with certainty. This means that the prospect of them occurring is known to railway undertakings in advance. This also means, therefore, that they can be taken into account when calculating ticket pricing.'

Similarly, air carriers can also take account, in their ticket pricing, of weather- and control-related events which in fact have a foreseeable statistical frequency and may give rise to flight disruptions for which compensation is payable, where the

financial burden of compensation payments due to weather and control-related circumstances might exceed what is reasonable.

2. Since, as already stated, it has neither been demonstrated nor is it evident that storms in Porto Alegre in March and air traffic management decisions taken in relation to them are extraordinary in nature, the defendant can consequently make a meaningful claim of extraordinary circumstances within the meaning of Article 5(3) of the Regulation only if those factors are not decisive.

[…]