

**Case C-37/21**

**Request for a preliminary ruling**

**Date lodged:**

22 January 2021

**Referring court:**

Amtsgericht Hamburg (Germany)

**Date of the decision to refer:**

30 December 2020

**Applicant:**

flightright GmbH

**Defendant:**

Ryanair DAC, formerly Ryanair Ltd

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**Request for a preliminary ruling**

**from the Court of Justice of the European Union**

**under Article 267 TFEU**

**in Case 22 a C 22/02 of the Amtsgericht Hamburg (Local Court, Hamburg, Germany) [...]**

**1. Reason and grounds for the request for a preliminary ruling**

Time and time again, the Local Court, Hamburg, is seised of legal disputes in the context of the application of the ‘Air Passenger Rights Regulation’ (Regulation (EC) No 261/2004), in which the parties are in dispute as to whether the postponement of permission to take off by air traffic management establishes, in itself, an extraordinary circumstance within the meaning of Article 5(3), without it being relevant whether or not the reason for that postponement of authorisation to take off constitutes, for its part, an extraordinary circumstance. That question is also a point of contention, in particular, if the reason for the delay in the granting of authorisation to take off was the weather conditions prevailing at the airport, without those conditions actually being extraordinary for the region and time of

year. In view of the disputes repeatedly arising in this regard at a location such as Hamburg, the referring court assumes that these legal questions are currently also of importance in numerous proceedings at other court locations with large airports, both in the Federal Republic of Germany and throughout Europe, such that the referring court considers that it would be appropriate for the Court of Justice of the European Union to take a position on this question of the interpretation of Article 5(3) in order to create legal clarity for the future throughout Europe.

## **2. Facts of the case in the main proceedings**

### **2.1. Long delay of 4 hours and 40 minutes**

Flightright GmbH and Ryanair DAC are in dispute regarding claims brought by the passengers Sophia B. and Marvin B. under assigned rights. On the basis of a booking confirmation that had been issued to them, the passengers were scheduled to be flown by the defendant from Hamburg to Krakow on 26 October 2019, landing in Krakow at 9.45 a.m. local time. The defendant's plane did not actually arrive in Krakow until 2.25 p.m., with the result that there was a delay in arrival at the final destination of approximately 4 hours and 40 minutes, that is to say, a long delay within the meaning of settled case-law of the Court of Justice, which is equivalent to a cancellation within the meaning of Article 5(1) of Regulation (EC) No 261/2004 [Or. 2] and triggers a right to compensation pursuant to Article 5(1)(c) and Article 7(1) of that regulation.

### **2.2. Extraordinary circumstance on account of delayed clearance for take-off due to bad weather**

The defendant argues that it is released from the obligation to pay compensation pursuant to Article 5(3) of the regulation, since the long delay was attributable to an extraordinary circumstance within the meaning of that provision, which – or the delaying effects of which – could not have been avoided even if reasonable measures had been taken.

The air carrier asserts, as justification for such an extraordinary circumstance, that the flight at issue landed in Krakow with a long delay because it had already departed from Hamburg with a long delay, which, in turn, was due to the fact that the previous flight from Krakow had arrived in Hamburg with a long delay. This, in turn, was due to the fact that take-off had been delayed by 4 hours and 52 minutes in Krakow due to bad weather [...]. The bad weather consisted of fog, which had led to poor visibility, endangering flight safety.

The air carrier takes the view that an extraordinary circumstance exists because the weather conditions do not fall within the defendant's area of responsibility [...].

## **3. Provisions and legal principles applied by the referring court**

The referring court does not consider the circumstances asserted by the air carrier to be sufficient to establish conclusively an extraordinary circumstance within the meaning of Article 5(3) of the regulation.

In its interpretation of the concept of ‘extraordinary circumstance’ within the meaning of Article 5(3) of the regulation, the referring court proceeds on the basis of the following legal principles:

- 3.1.: The exception under Article 5(3) is to be interpreted narrowly, as is the case with all exceptions.
- 3.2.: Circumstances are extraordinary only if they are out of the ordinary (CJEU, NJW 2013, 921, paragraph 29). **[Or. 3]**
- 3.3.: The list in recital 14 does not automatically give rise to grounds justifying extraordinary circumstances, but always requires a case-by-case assessment (CJEU, C-549/07).
- 3.4.: ‘Outside the ordinary’ or ‘out of the ordinary’ within the meaning of the Court of Justice’s case-law is not to be equated with the terms unexpected, ‘through no fault’, unavoidable, unusual or ‘beyond the control’.
- 3.5.: A circumstance is extraordinary within the meaning of Article 5(3) of the regulation only if it is not inherent in the normal exercise of the activity of air carriers **and** is beyond their actual control on account of its nature or origin (CJEU, C-549/07; CJEU, C-257/14).
- 3.6.: Not every event that is unavoidable for the air carrier is sufficient for the assumption of an extraordinary circumstance, but rather only those that go beyond the usual and expected processes of air travel [...].
- 3.7.: Adverse weather conditions that temporarily prevent take-off are not always extraordinary circumstances; rather, they can constitute such circumstances only in individual cases [...].

#### **4. Referring court’s conclusions in respect of the interpretation of the concept of ‘extraordinary circumstance’ in the case of delayed clearance for take-off due to bad weather**

The referring court derives the following further legal principles from those applicable to the interpretation of the concept of ‘extraordinary circumstance’ cited in point 3 above:

##### 4.1.:

Delayed take-off clearance by air traffic management does not constitute an extraordinary circumstance per se, since delays in take-off clearance by air traffic management, referred to as ‘slot delays’, do not constitute an occurrence that is

‘out of the ordinary’ in air transport, but rather an occurrence that is part of the usual and expected processes and basic conditions of international air transport. It is an occurrence inherent in the normal exercise of the activity of air carriers. [Or. 4]

In the judicial practice of the courts of first instance, legal disputes in which air carriers invoke slot delays by air traffic management are not out of the ordinary and do not stand out as events occurring outside the ordinary, but rather they are regularly and frequently invoked, with the result that it can be assumed that the circumstance that such slot delays are not out of the ordinary is known to the courts.

If the circumstance that slot delays by air traffic management are indeed ordinary, usual and to be expected cannot be assumed to be known to the courts, it would be necessary in the dispute to take evidence in that regard by obtaining expert opinions. A circumstance that occurs not extremely rarely in international air traffic, but rather on a regular basis, cannot be a circumstance that is out of the ordinary.

4.2.:

Slot delays by air traffic management can be regarded as an extraordinary circumstance within the meaning of Article 5(3) of Regulation (EC) No 261/2004 only if they themselves are due to circumstances that can be characterised as extraordinary within the meaning of Article 5(3). If a slot delay is due, for example, to an accident involving an aircraft at the airport in question, as a result of which a runway has to be closed for hours, or to a terrorist threat making it necessary to cease flight operations for hours, then that slot delay is due to an extraordinary circumstance. If the slot delay is due to a circumstance that is not extraordinary in itself, such as a build-up of ice on the runway or wings due to sub-zero temperatures on a winter morning in Hamburg, this does not constitute an extraordinary circumstance.

4.3.:

Adverse weather as a cause for a slot delay constitutes an extraordinary circumstance within the meaning of Article 5(3) of Regulation (EC) No 261/2004 only if, in itself, the adverse weather constitutes an extraordinary circumstance and if, in itself, the adverse weather at the place in question and at the time in question is ‘out of the ordinary’, and, in itself, is not typical of the ‘usual [Or. 5] weather conditions to be expected’ at the place in question and at the time in question, but ‘goes beyond them’. Adverse weather conditions that are not out of the ordinary at a specific place at a specific time and do not go beyond the usual weather conditions to be expected at a specific place at a specific time are events inherent in the normal exercise of the activity of air carriers and in the normal basic conditions of air transport.

## **5. Questions put to the Court of Justice in this reference**

In the light of the referring court's interpretations arising from point 4, which are regularly contested by air carriers as not being well founded, thus giving rise to legal questions in that connection throughout Europe, the following questions for the Court of Justice arise in the referring court's view:

5.1.:

Does delayed take-off clearance by air traffic management constitute per se an extraordinary circumstance within the meaning of Article 5(3) of the Air Passenger Rights Regulation, or must that question be answered in the negative since delays in take-off clearance by air traffic management, referred to as 'slot delays', do not represent an occurrence that is 'out of the ordinary' in air transport, but rather an occurrence that is part of the usual and expected processes and basic conditions of international air transport, because it is inherent in the normal exercise of the activity of air carriers?

5.2.

Is it to be assumed that it is already known to the courts that 'slot delays' by air traffic management in international air transport are not circumstances that are out of the ordinary within the meaning of the case-law of the Court of Justice, but rather ordinary, usual and expected concomitants of air transport, or is it necessary in the dispute to take evidence in that regard by obtaining expert reports, whereby such evidence would be provided only if slot delays occur extremely rarely in international air transport and not on a regular basis?

5.3.:

Are slot delays by air traffic management to be regarded as an extraordinary circumstance within the meaning of Article 5(3) of Regulation (EC) No 261/2004 only if they themselves are due to circumstances that can be characterised as extraordinary within the meaning of Article 5(3), such as an accident or a terrorist threat, but not [Or. 6] to weather conditions which are customary for the time and place of the event and which temporarily affect air traffic?

5.4.:

Does adverse weather as a reason for a slot delay constitute an extraordinary circumstance within the meaning of Article 5(3) of Regulation (EC) No 261/2004 only if, in itself, the adverse weather constitutes an extraordinary circumstance and if, in itself, the adverse weather at the place in question and at the time in question is 'out of the ordinary', and, in itself, is not typical of the 'usual weather conditions to be expected' at the place in question and at the time in question, but 'goes beyond them'?

Are adverse weather conditions that are not out of the ordinary at a specific place at a specific time and do not go beyond the usual weather conditions to be expected at a specific place at a specific time events inherent in the normal

exercise of the activity of air carriers and in the normal basic conditions of air transport within the meaning of the Court of Justice's interpretation of Article 5(3) of the Air Passenger Rights Regulation?

[...]

WORKING DOCUMENT