Anonymised version

Case C-545/22

Request for a preliminary ruling

Date lodged:

15 August 2022

Referring court:

Landgericht Düsseldorf (Germany)

Date of the decision to refer:

9 August 2022

Defendant and appellant:

Air Europa Lineas Aereas

Applicants and respondents:

VO

GR

[…]

[…]

Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany)

Order

[of 9 August 2022]

In the case of

Air Europa Lineas Aereas, […] Frankfurt,

defendant and appellant,

[…]

v

1. VO, […] Bremen,

2. GR, […] Bremen,

applicants and respondents,

[…]

the 22nd Civil Chamber of the Regional Court, Düsseldorf […]

ordered as follows:

The proceedings are stayed.

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of EU law pursuant to the first paragraph, point (b), and the third paragraph of Article 267 TFEU:

> Must Article 5(3) of Regulation (EC) No 261/2004 be interpreted as meaning that the cancellation of a flight is caused by extraordinary circumstances where, as a result of the collapse of global air traffic from March 2020, following the outbreak of the global Covid-19 pandemic, the airline drastically reduces its flight schedule and cancels numerous flights due to a lack of economically-effective capacity utilisation of flights and in order to protect the health of the crew and the pilot, without having been forced to cancel the flight by measures of authorities such as airport closures, flight bans or entry bans?

G r o u n d s:

I.

The applicants, the married couple VO and GR, each booked with the defendant an outbound flight from Düsseldorf to Miami via Madrid on 7 March 2020 (flight numbers: UX 1446 and UX 97) and a return flight from Miami to Düsseldorf via Madrid on 16/17 March 2020 (flight numbers: UX 98 and UX 1447).

The defendant cancelled the return flights scheduled for 16/17 March 2020 (flight numbers: UX 98 and UX 1447). It was only after the applicants had arrived at Miami airport on 16 March 2020 that they were informed of the cancellation. The applicants were not offered any replacement transport.

The applicants brought an action before the Amtsgericht Düsseldorf (Local Court, Düsseldorf) for payment of compensation of EUR 600.00 each in accordance with Article 7(1)(c) of the Air Passenger Rights Regulation.

The defendant argues that the cancellation was due to extraordinary circumstances within the meaning of Article 5(3) of the Air Passenger Rights Regulation and that it could not have been avoided even if reasonable measures had been taken. In that regard, the defendant invokes travel restrictions brought about by the Covid-19 pandemic. It submits that that pandemic brought air traffic to a standstill on a global level. As a result, airlines reorganised and drastically reduced their schedules and cancelled numerous flights. This was also the case with regard to flights UX 98 and UX 1447 on 16/17 March 2020. The cancellation also occurred on grounds of protecting the health of the crews. The novel coronavirus, the danger presented by it, and its modes of transmission were completely unknown. The defendant did not want to expose its crews to such a risk.

The Local Court, Düsseldorf upheld the action by judgment of 1 December 2021 […] and ordered the defendant inter alia to pay compensation to the applicants in the amount of EUR 600 each.

The defendant brought an appeal against that judgment in good time and in due form. The applicants defend the judgment at first instance.

II.

The success of the defendant's appeal hinges […] on the question set out above.

Specifically:

The appeal would be unfounded if the reasons put forward by the defendant for the cancellation of the flights at issue from Miami to Düsseldorf via Madrid on 16/17 March 2020 (flight numbers: UX 98 and UX 1447), namely the voluntary reduction of flight schedules for economic reasons due to the collapse of international air traffic and in order to protect the health of the crew against the background of the global Covid-19 pandemic, did not constitute an extraordinary circumstance within the meaning of Article 5(3) of the Air Passenger Rights Regulation.

Under Article 5(3) of the Air Passenger Rights Regulation, an air carrier is to be released from its obligation to pay passengers compensation under Article 7 of that regulation if the carrier can prove that the cancellation or delay of three hours or more is caused by 'extraordinary circumstances' which could not have been avoided even if all reasonable measures had been taken and, where such circumstances do arise, that it adopted measures appropriate to the situation, deploying all its resources in terms of staff or equipment and the financial means at its disposal in order to prevent that situation from resulting in the cancellation or long delay of the flight in question, without the air carrier being required to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time (see […] judgment of 4 April 2019, C-501/17, *Germanwings*, [EU:C:2019:288] […], paragraph 19; judgment of 11 June 2020, C-74/19, *Transportes Aéreos Portugueses*, [EU:C:2020:460] […], paragraph 36).

1.

According to settled case-law of the Court, the concept of ‘extraordinary circumstances’ within the meaning of Article 5(3) of the Air Passenger Rights Regulation refers only to 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 that carrier’s actual control; those two conditions are cumulative and their fulfilment must be assessed on a case-by-case basis (see […] judgment of 23 March 2021, C-28/20, *Airhelp*, [EU:C:2021:226] […], paragraph 23). In that respect, events whose origin is ‘internal’ must be distinguished from those whose origin is ‘external’ to the operating air carrier. The concept of ‘extraordinary circumstances’ thus encompasses only ‘external’ events. The feature shared by those external events is that they result from the activity of the air carrier and from external circumstances which are more or less frequent in practice but which the air carrier does not control because they arise from a natural event or an act of a third party, such as another air carrier or a public or private operator interfering with flight or airport activity (see […] loc. cit., paragraph 39 et seq.).

2.

First, the Covid-19 pandemic does not fall outside the scope of the Air Passenger Rights Regulation, despite its generally significant and global impact on travel. The Air Passenger Rights Regulation does not contain a separate category of ‘particularly extraordinary’ events, beyond the ‘extraordinary circumstances’ referred to in Article 5(3) of that regulation, which would lead to the air carrier being automatically exempted from all its obligations under that regulation (see […] judgment of 31 January 2013, C-12/11, *McDonagh*, [EU:C:2013:43] […], paragraph 30).

3.

The defendant invokes travel restrictions brought about by the Covid-19 pandemic. It submits that, as a result of the worldwide entry restrictions implemented from mid-March 2020, the airline industry was forced severely to restrict its operations. Air traffic decreased sharply during the first phase of the pandemic between March and June 2020. Intercontinental flights were drastically reduced or stopped altogether. Therefore, flight schedule changes, or flight cancellations, at short notice were unavoidable during that time. This was also the case with regard to flights UX 98 and UX 1447 on 16/17 March 2020. The cancellations also served to protect the health of the crews and pilots. The novel coronavirus, the danger presented by it, and its modes of transmission were completely unknown. The defendant did not want to expose its employees to such a risk.

The present Chamber takes the view that that submission is not capable of substantiating extraordinary circumstances. It is true that the global Covid-19 pandemic and the associated travel restrictions and risks of infection are, by their

very nature and origin, no longer inherent in the normal exercise of the activity of an air carrier, because the defendant has no influence on those circumstances, and the pandemic is outside its control. However, the defendant has not sufficiently demonstrated that the cancellation of the return flight (flight numbers: UX 98 and UX 1447) on 16/17 March 2020 was directly 'caused' by the Covid-19 pandemic within the meaning of Article 5(3) of the Air Passenger Rights Regulation and that the effects of the global Covid-19 pandemic on the flight at issue in the present case were beyond the control of the defendant in its capacity as an air carrier.

It is true that the European Commission stated the following in its notice of 18 March 2020, C(2020) 1830 final:

'The Commission considers that, where public authorities take measures intended to contain the Covid-19 pandemic, such measures are by their nature and origin not inherent in the normal exercise of the activity of carriers and are outside their actual control. Article 5(3) waives the right to compensation on condition that the cancellation in question "is caused" by extraordinary circumstances, which could not have been avoided even if all reasonable measures had been taken. This condition should be considered fulfilled, where public authorities either outright prohibit certain flights or ban the movement of persons in a manner that excludes, *de facto*, the flight in question to be operated. This condition may also be fulfilled, where the flight cancellation occurs in circumstances where the corresponding movement of persons is not entirely prohibited, but limited to persons benefitting from derogations (for example nationals or residents of the state concerned). Where no such person would take a given flight, the latter would remain empty if not cancelled. In such situations, it may be legitimate for a carrier not to wait until very late, but to cancel the flight in good time (and even without being certain about the rights of the various passengers to travel at all), in order for appropriate organisational measures to be taken, including in terms of care for passengers owed by the carrier. In cases of the kind, and depending on the circumstances, a cancellation may still be viewed as "caused" by the measure taken by the public authorities. Again, depending on the circumstances, this may also be the case in respect of flights in the direction opposite to the flights directly concerned by the ban on the movement of persons. Where the airline decides to cancel a flight and shows that this decision was justified on grounds of protecting the health of the crew, such cancellation should also be considered as "caused" by extraordinary circumstances. The above considerations are not and cannot be exhaustive in that other specific circumstances in relation to Covid-19 may also fall under the ambit of Article 5(3).'

Nevertheless, those recommendations of the Commission are not binding on the judiciary. It is true that the Court has ruled that recommendations and opinions within the meaning of the fourth paragraph of Article 288 TFEU do not create individual rights upon which Union citizens may rely before national courts. However, the latter are bound to take recommendations and opinions into consideration in order to decide disputes submitted to them, in particular where the recommendations are capable of casting light on the interpretation of other

national or EU provisions (see judgment of the Court of 13 December 1989, C-322/88, *Grimaldi*, [EU:C:1989:646, paragraph 18] […]. It is questionable from the outset whether the Commission's interpretative guidelines are recommendations and opinions within the meaning of the fourth paragraph of Article 288 TFEU and not *sui generis* measures. In any event, the requirement that the guidelines be taken into account by the national courts cannot mean that they are in fact binding for interpretation purposes, but only that the national courts are required to analyse the content of the guidelines when interpreting EU law.

The recommendations are also not convincing in terms of their content. In view of the objective of the Air Passenger Rights Regulation, set out in recital 1, of ensuring a high level of protection for passengers, and the fact that Article 5(3) of that regulation derogates from the principle that passengers have the right to compensation if their flight is cancelled, the concept of 'extraordinary circumstances' within the meaning of that provision must be interpreted strictly (see […] judgment of 23 March 2021, C-28/20, *Airhelp*, [EU:C:2021:226] […], paragraph 24). It is true that it may be correct to assume the existence of extraordinary circumstances where authorities either prohibit certain flights by operation of law or prohibit or restrict passenger traffic in a way that *de facto* precludes the operation of the flight in question (for example, airport closures, flight bans, entry bans, and so forth). However, it would be excessive to assume the existence of extraordinary circumstances even where the operation of a flight is legally and factually possible without restrictions, but the air carriers decide to reduce the number of flight connections and to cancel flights on the basis of economic considerations (for example to avoid empty flights). If air carriers were to be released from liability to such a great extent, this would be detrimental to passengers and would run counter to the objective of the Air Passenger Rights Regulation to establish a high level of protection for passengers.

The origin of such economic considerations is clearly 'internal' and not 'external' in nature. In such cases, the situation is also 'within the control' of air carriers because they decide to cancel the flight under their own responsibility and voluntarily, without being 'forced' to do so by external circumstances.

4.

It is also not sufficient that extraordinary circumstances within the meaning of Article 5(3) of the Air Passenger Rights Regulation exist at the time of cancellation of the flight. The cancellation of the specific flight must also be 'caused' precisely by those extraordinary circumstances, and the cancellation must not have been avoidable if reasonable measures had been taken. This is conceivable in the context of the Covid-19 pandemic if, for example, the airport operator or air traffic control prohibits individual flights, or the authorities close airports or entry bans are imposed by law. In addition, it is apparent from recital 15 of Regulation No 261/2004 that 'extraordinary circumstances' may relate only to 'a particular aircraft on a particular day', which cannot apply to a passenger denied boarding because of the rescheduling of flights as a result of

circumstances (also) affecting other flights. The concept of 'extraordinary circumstances' is intended to limit the obligations of an air carrier – or even exempt it from those obligations – when the event in question could not have been avoided even if all reasonable measures had been taken. However, if an air carrier voluntarily decides to reschedule its flights due a circumstance which (also) affects other flights, that carrier cannot in any way be considered to be constrained by those circumstances to cancel a certain flight (see […] judgment of 4 October 2012, C-22/11, *Finnair*, […] paragraph 37: concerning denied boarding due to a rearrangement of the flight schedule following a strike by air traffic control personnel). That case-law should also be transferable to a reduction of the flight schedule in the context of the Covid-19 pandemic.

5.

In so far as the defendant claims that the cancellation also served to protect the health of the crew, that objection is also unsuccessful. Cancellation on grounds of protecting the crew's health and safety at the workplace is not to be regarded as an extraordinary circumstance either. First, the crew's health and safety at the workplace, which comes within the scope of the air carrier's obligations in its capacity as employer, is a circumstance internal to the defendant's own operations and not an 'external circumstance'. Any increased health risks for the crew and the pilot in the context of the Covid-19 pandemic were also within the defendant's control, as it could have countered them by taking appropriate safety precautions (HEPA filters, mandatory masks, and so forth). Moreover, sweepingly taking the protection of the health of the crew into account could lead to the outcome where, with an extremely cautious and preventive approach, every potential flight could be cancelled solely 'for reasons of health protection', without any concrete indications being relevant. However, this would ultimately entail a 'carte blanche', because there can in principle be an increased health risk from international flights with passengers of different origins in a confined space on every flight connection, even irrespective of the coronavirus crisis.

Since – as far as can be seen – the Court of Justice has not ruled on these questions to date, a reference is to be made to it for a preliminary ruling.

[…]

[…] [Statements regarding national procedural law]

[…] [Signatures]

[…]

[…] [Formalities]