

**Case C-405/23**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date of Receipt:**

3 July 2023

**Referring court:**

Landgericht Köln (Cologne Regional Court, Germany)

**Date of the decision to refer:**

22 June 2023

**Defendant and appellant:**

Touristic Aviation Services Limited

**Applicant and respondent:**

Flightright GmbH

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**Subject matter of the case in the main proceedings**

Air transport – rights of passengers – Regulation (EC) No 261/2004 – compensation to passengers in the event of long delay of flights – shortage of baggage loading staff – extraordinary circumstances, which could not have been avoided even if all reasonable measures had been taken

**Subject matter and legal basis of the reference**

Interpretation of EU law, Article 267 TFEU

**Question referred**

Is Article 5(3) of Regulation (EC) No 261/2004 to be interpreted as meaning that a shortage of staff at the airport operator, or at a company commissioned by the airport operator, responsible for handling the baggage loading operations to be provided by that airport operator, constitutes an extraordinary circumstance, within the meaning of that provision, that has an external and uncontrollable effect

on the normal activity of the air carrier using that service of the airport operator / company commissioned by that airport operator, or is the loading of baggage by the airport operator / a company commissioned by that airport operator and a shortage of loading staff at that airport operator / company commissioned by that airport operator to be classified as part of the normal exercise of the activity of that air carrier, such that an exculpation as provided for under Article 5(3) of Regulation (EC) No 261/2004 can be considered only if the reason for the shortage of staff constitutes an extraordinary circumstance within the meaning of that provision?

### **Provisions of EU law cited**

Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports

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

### **Brief summary of the facts and procedure**

- 1 The reference for a preliminary ruling is made in the context of a dispute between the parties concerning a compensation payment in the total amount of EUR 800, as claimed by the applicant on the basis of the rights subrogated by the passengers concerned. Those passengers were booked on flight XR 1092 of 4 July 2021 from Cologne/Bonn to Kos, operated by the defendant, which reached the airport of arrival with a delay of approximately three and a half hours.
- 2 The Amtsgericht (Local Court) upheld the action. It left open the question of whether the long delay was due to an extraordinary circumstance because it found that the delay could in any case have been avoided by the defendant if all reasonable measures had been taken.
- 3 By its appeal before the referring court, the defendant maintains its request for the action to be dismissed. The applicant contends that the appeal should be dismissed.

### **Principal arguments of the parties in the main proceedings**

- 4 The defendant maintains that the long delay was due to a shortage of staff at the operator of Cologne Bonn Airport, which was caused by the COVID-19 pandemic and was not attributable to the defendant. The previous flight had already been delayed by 1 hour and 17 minutes due to a shortage of check-in staff. If the check-in operations for the previous flight and the flight at issue had been properly

handled, a delay of more than three hours would not have been foreseeable. However, according to the defendant's submissions, there was also a shortage of baggage handling staff, which delayed operation of the flight by a further 2 hours and 13 minutes. Lastly, there was an additional weather-related delay of 19 minutes after the doors were closed.

- 5 The applicant argues that the circumstances set out above cannot be regarded as an extraordinary circumstance.

### **Brief summary of the basis for the reference**

- 6 In the view of the referring court, the Amtsgericht (Local Court) wrongly upheld the action on the ground that the defendant had failed to indicate the measures it had examined with a view to preventing or reducing the delay at issue in the present case.
- 7 According to the case-law of the Court of Justice of the European Union ('the Court'), recitals 14 and 15 and Article 5(3) of Regulation No 261/2004 state that 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 avoid 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 (judgments of 4 April 2019, *Germanwings*, C-501/17, EU:C:2019:288, paragraph 19, and of 11 June 2020, *Transportes Aéreos Portugueses*, C-74/19, EU:C:2020:460, paragraph 36). The measures that an air carrier can reasonably be expected to take in order to avoid extraordinary circumstances leading to a considerable delay of a flight or giving rise to its cancellation are determined by the circumstances of the individual case; the reasonableness is to be assessed depending on the situation (judgments of 22 December 2008, C-549/07, *Wallentin-Hermann*, EU:C:2008:771, paragraphs 40 and 42, and of 12 May 2011, *Eglītis and Ratnieks*, C-294/10, EU:C:2011:303, paragraph 30).
- 8 On that basis, there was no obligation for the defendant to examine and take measures within the meaning of Article 5(3) of Regulation No 261/2004. There is no clear evidence to show that the occurrence of a long delay could have been foreseen by the defendant. The delayed arrival of the previous flight at Cologne/Bonn was due to an initial delay to the flight that had taken place the previous day, which was caused by a shortage of check-in staff that lay within the defendant's own sphere of responsibility. There was no evidence to suggest that further delays might have resulted from that circumstance. Furthermore, there are

no obvious measures that the defendant could have taken in order to avoid the long delay. In the opinion of the referring court, the Court's judgment of 11 June 2020, *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:460), as cited by the Amtsgericht (Local Court), does not impose any obligation to examine the possibility of rebooking the passengers concerned onto another flight. The shortage of baggage handling staff at the airport operating company affected a large number of flights which also experienced delays. Under those circumstances, it could not objectively have been expected that a rebooking would have enabled the passengers concerned to reach their destination more quickly.

- 9 The Amtsgericht (Local Court) should not therefore have left open the question as to whether the shortage of handling staff that was cited as a reason for the long delay constituted an extraordinary circumstance.
- 10 According to the Court's settled case-law, the concept of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 refers 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 judgments of 31 January 2013, *McDonagh*, C-12/11, EU:C:2013:43, paragraph 29, and of 23 March 2021, *Airhelp*, C-28/20, EU:C:2021:226, paragraph 23). In its judgment of 23 March 2021, *Airhelp* (C-28/20, EU:C:2021:226), the Court stated that it follows from its case-law relating to the concept of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 that events whose origin is 'internal' must be distinguished from those whose origin is 'external' to the carrier. The feature shared by all '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. In the order of 14 November 2014, *Siewert* (C-394/14, EU:C:2014:2377, paragraph 19), the Court held: 'however, as regards a technical problem resulting from an airport's set of mobile boarding stairs colliding with an aircraft, it should be pointed out that such mobile stairs or gangways are indispensable to air passenger transport, enabling passengers to enter or leave the aircraft, and, accordingly, air carriers are regularly faced with situations arising from their use. Therefore, a collision between an aircraft and any such set of mobile boarding stairs must be regarded as an event inherent in the normal exercise of the activity of the air carrier.'
- 11 On that basis, the activity of loading baggage could be classified as forming part of the normal exercise of the defendant's activity in the present case, because it directly serves the purposes of performing the transport service owed to the passengers. In turn, it would then be appropriate to regard a shortage of loading staff as part of the normal exercise of the defendant's activity and it would therefore have to be held that an extraordinary circumstance did not exist. On the other hand, it could follow from the very fact that the baggage loading at Cologne

Bonn Airport is handled by the airport operator, and not by the defendant itself or by a service provider commissioned by the defendant, that the shortage of loading staff constitutes an external cause that impacted the defendant's normal activity from the outside in a manner that was beyond its control.

- 12 In the opinion of the referring court, an extraordinary circumstance does exist. Baggage loading forms part of the groundhandling services initially provided in Germany by the airport operators themselves, or by their subsidiaries, and, as such, it generally remains within the airport operating company's sphere of responsibility, even after the liberalisation of European air transport by Directive 96/67/EC and its transposition into national law. Accordingly, the question of whether a shortage of baggage loading staff constitutes an extraordinary circumstance should be determined by reference to whether, as in the present case, the baggage loading was carried out by the airport operator, with the result that the existence of an extraordinary circumstance would have to be affirmed, or whether the air carrier concerned was itself responsible for the baggage loading, or had entrusted that task to a service provider, which would mean that the baggage loading operation formed part of the normal activity of the air carrier concerned and that it would therefore have to be held that an extraordinary circumstance did not exist.
- 13 In view of the exculpation that applies in the present case vis-à-vis the further delay of 2 hours 13 minutes that occurred at Cologne Bonn Airport as a result of a lack of loading staff, the delay attributable to the defendant would amount to less than three hours, which would mean that the defendant is not obliged to pay compensation.
- 14 If, on the other hand, the interpretation were to lead to the conclusion that the baggage loading operations carried out by the airport operator are also to be regarded as forming part of the normal exercise of the activity of the air carriers using that service, an exculpation of the defendant by virtue of Article 5(3) of Regulation No 261/2004 could be considered only if the staff shortage cited as the reason for the delay was caused by an extraordinary circumstance. In the opinion of the referring court, that question is to be answered in the negative. With respect to the operation of the flight at issue, the shortage of loading staff was not an inevitable consequence of the COVID-19 pandemic that the defendant was incapable of preventing. It is not apparent from the defendant's submissions that the airport operator was unable to adapt its human resources planning, such that, when flight operations resumed after the pandemic, it was unable to organise the operations in a way that would avoid significant flight delays. It is instead acknowledged that the airport operator, surprised by the sudden and explosive increase in the passenger and flight numbers as of early July 2021, had failed to increase its staff numbers again in good time.
- 15 It follows from all of the above considerations that the success of the appeal depends on the interpretation of Article 5(3) of Regulation No 261/2004.