Case C-411/23

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

Date lodged:

3 July 2023

Referring court:

Sąd Okręgowy w Warszawie (Poland)

Date of the decision to refer:

26 May 2023

Applicant:

D. SA

Defendant:

P. SA

Subject matter of the main proceedings

Claim for compensation of EUR 600 for a flight delay of over three hours pursuant to Article 7 of Regulation No 261/2004

Subject matter and legal basis of the request

Interpretation of the terms 'extraordinary circumstances' and 'unexpected [flight safety] shortcomings' in the context of a flight which has been delayed due to the discovery of a design defect in the aircraft engine, about the possible occurrence of which the carrier had been warned – The range of preventive measures that a carrier should take within the scope of 'all reasonable measures', which would exempt it from the obligation to pay compensation for a delay to the flight – Article 267 of the Treaty on the Functioning of the European Union

Questions referred

(1) Does an engine design defect revealed by the manufacturer constitute an 'extraordinary circumstance' and does it come within the scope of 'unexpected [flight safety] shortcomings' within the meaning of recitals 14 and 15 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, if the carrier knew about the potential design defect several months before the flight?

(2) If the defect in the design of the engine referred to in [Question] 1 constitutes an 'extraordinary circumstance' within the meaning of recitals 14 and 15 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, do 'all reasonable measures' as mentioned in recital 14 and in Article 5(3) of Regulation No 261/2004 refer to the expectation that the air carrier should take into account the likely revelation of a design defect in the aircraft engine and take preventive steps in order to have back-up aircraft at the ready for the purpose of Article 5(3) of Regulation No 261/2004 in order to relieve it of the obligation to pay the compensation provided for in Article 5(1)(c) and Article 7(1) of that regulation?

Provisions of EU law cited

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 – recitals 14 and 15 and Article 5(1) and (3) and Article 7

EU case-law cited

The referring court cites the following judgments of the Court of Justice:

– Judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraphs 21, 23, 24, 25 and 26);

– Judgment of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716, paragraphs 61 and 69);

– Judgment of 12 May 2011, *Eglītis and Ratnieks* (C-294/10, EU:C:2011:303, paragraphs 25 and 30);

– Judgment of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraphs 29 and 38);

– Judgment of 17 September 2015, *van der Lans* (C-257/14, EU:C:2015:618, paragraphs 36, 37, 38, 41 and 43);

– Judgment of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342, paragraphs 20, 21, 22, 28 and 29);

– Judgment of 4 April 2019, *Germanwings* (C-501/17, EU:C:2019:288);

– Judgment of 12 March 2020, *Finnair* (C-832/18, EU:C:2020:204, point 2 of the operative part of the judgment);

– Judgment of 23 March 2021, *Airhelp* (C-28/20, EU:C:2021:226, paragraph 22).

The referring court also cites the Opinion of Advocate General L. Medina in Joined Cases *TAP Portugal (Death of the co-pilot),* C-156/22 to C-158/22, EU:C:2023:91, points 30, 46 and 58.

Succinct presentation of the facts of the case

1 On 2 July 2018, J.D. (the passenger) entered into a contract of carriage with P. S.A. (the air carrier) for the journey from Kraków to Chicago. The flight in question took place on the same day. It was delayed, however, a fact which caused the passenger to arrive at the destination airport more than three hours after the scheduled arrival time. On 18 July 2018, J.D. entered into an assignment agreement as the assignor, with P.[R] S.A. as the assignee, under which the passenger transferred any receivables due to him for the flight delay to the assignee. By application lodged on 29 March 2019, D. S.A. (formerly ‘P.[R] S.A.’) made an application for the payment of EUR 600 by the air carrier, plus statutory interest until the date of payment.

2 In its defence, the defendant carrier submitted that the action should be dismissed. The carrier acknowledged that the flight in question had been delayed. It explained that the engines, of the mark R., which were fitted to aircraft used for transatlantic flights, had manifested design defects, but argued that it was exempted from liability for the flight delay as it had taken action to minimise disruptions to scheduled flights.

3 In April 2018, the defendant carrier received information from the engine manufacturer R. imposing a number of restrictions on the use of the aircraft, which arose from design defects discovered in the engines fitted to the B. aircraft. The defect concerned the compressor blades. On 28 June 2018, pre-flight monitoring carried out on the aircraft scheduled to fly on 2 July 2018 identified irregularities in engine function. After engine surge had been confirmed, a visual inspection of the compressor was carried out and a boroscopy was performed. The

engine was declared faulty, removed and sent away for repair. Due to the lack of available working spare engines – which was a global problem since the manufacturer had not produced the required number of spare engines – it was not possible to replace the engine until 5 July 2018, and the aircraft was brought back into service on 7 July 2018.

4 As a result of the circumstances described above, the defendant carrier decided to operate the flight using another, airworthy aircraft which arrived at Chicago airport late due to the sudden change in schedule. The flight was therefore delayed by more than three hours.

5 Following the discovery of the engine design defect in April 2018, the defendant had on several occasions contacted other operators about leasing additional aircraft.

6 By a judgment of 3 December 2021, the court of first instance dismissed the application, as it held that there were circumstances conferring exemption as referred to in Article 5(3) of Regulation No 261/2004, referring in this regard to the elements described in paragraphs 3 and 5 above, stressing in particular that the immediate cause of the flight delay in question was a manufacturing defect in the engine, and that the defendant had taken all reasonable measures possible to arrange a replacement aircraft.

7 In this context, the court of first instance stated that manufacturing defects in an aircraft can be regarded neither as typical defects that should have been discovered earlier, nor as defects arising from the operation of the aircraft. It was an unforeseeable event which threatened the safety of the flight and had occurred suddenly during the routine operation of the aircraft. The court took the view that the operator had acted appropriately and professionally, had complied with the engine manufacturer's recommendations and had demonstrated that the aircraft had been maintained in accordance with the required maintenance schedule.

8 The court of first instance agreed that the defendant carrier was unable to resolve the problem that had arisen due to the fact that it was a global problem, while any duplication of its fleet or possession of several back-up aircraft would have undermined the liquidity of the company. Lack of manufacturing capacity meant that the engine manufacturer was unable to replace all faulty engines of all carriers, and the carrier did not have sufficient time to rearrange its entire network of connections.

9 The applicant, D. S.A., lodged an appeal against the judgment of 3 December 2021, claiming an incorrect establishment of the facts, and calling into question the assertions that the immediate cause of the delay was an extraordinary circumstance in the form of an engine design fault, that the defendant had taken all reasonable measures to prevent the delay of the flight, that the issue with the R. engines was a new problem in 2018 that had been previously unknown to carriers, and that the defendant did not have sufficient time to rearrange the entire network

of connections. According to D. S.A., the case did not involve extraordinary circumstances exempting the carrier from liability for the long flight delay.

Succinct presentation of the reasoning in the request for a preliminary ruling

10 The dispute concerns the interpretation of the terms 'extraordinary circumstances' and 'unexpected [flight safety] shortcomings' within the meaning of recitals 14 and 15 of Regulation No 261/2004 in the context of a global design defect in an aircraft engine. The referring court refers to the case-law of the Court of Justice, citing paragraph 20 of the judgment in Case C-315/15, according to which an air carrier is to be released from its obligation to pay passengers compensation under Article 7 of the regulation if the carrier can prove that the cancellation or delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

11 Citing, inter alia, the judgment in Case C-257/14 (paragraphs 36 and 38), the referring court finds that certain technical problems may constitute extraordinary circumstances, for example, where it is revealed by the manufacturer of the aircraft comprising the fleet that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. Technical problems with aircraft can be considered to be covered by unexpected flight safety shortcomings, as they qualify as events that are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control on account of their nature or origin.

12 The hidden engine defect in the present case is an external event in relation to the air carrier. There is, however, doubt as to whether a manufacturing defect the occurrence of which was in some way notified, and which was therefore to some extent foreseeable, should also fall within the concepts of 'extraordinary circumstances' and 'unexpected [flight safety] shortcomings'. If these preconditions are to be appraised, it is necessary to assess how likely it was that the carrier could have foreseen the occurrence and discovery of the hidden engine defect and the consequences of that event.

13 The present case concerns an engine manufacturing defect which was nevertheless revealed by the manufacturer. The carrier was informed of the discovery of the engine design defect by the engine manufacturer in April 2018. However, it was not certain that a defect would be discovered, as cracked compressor blades were not discovered at each inspection. The manufacturer did not recommend the immediate grounding of all aircraft, and did not indicate that the aircraft were not airworthy. The flight in question took place on 2 July 2018, while the defect in this particular aircraft, which was supposed to perform the flight that day, was discovered on 28 June 2018. The present court therefore needs to establish whether the defect was beyond the carrier's control with regard to its foreseeability. The only assumption that could be made was that a defect preventing an aircraft from being operated would be found in a certain percentage

of engines. It was not, however, possible to foresee with certainty whether the defect actually existed in the case in question.

14 It should be borne in mind that air carriers must conform with strict technical and administrative procedures in their activities. This also applies to technical problems with aircraft, regardless of their cause. An air carrier is required to have certain procedures in place in this regard, or, failing that – for example, due to the specific nature of a particular event –, should take all necessary, possible and reasonable steps to counteract the event, which could lead to the delay or cancellation of the flight.

15 These procedures were complied with in the present case. The manufacturer, having discovered the engine defect, recommended that all users carry out inspections. However, these would not necessarily lead to the discovery of the defect, although it was possible. The carrier carried out the required technical inspections and the engine defect was indisputably an event independent of it and beyond its control. In other words, even implementation of the procedure in question, and the taking of the necessary measures, would not have guaranteed that the carrier could control the event.

16 It is thus necessary to interpret further the concepts of 'extraordinary circumstances' and 'unexpected [flight safety] shortcomings', and whether they would include structural engine defects which had been revealed by the manufacturer and which could have been foreseen, that is, to some extent 'expected' or the probability of the occurrence of which was foreseeable, although this does not automatically imply that the carrier had the possibility of controlling the event.

17 As regards the concept of 'all reasonable measures', the referring court points out, citing the judgment of the Court of Justice in Case C-315/15 (paragraph 28), that a carrier wishing to rely on extraordinary circumstances conferring exemption is required to establish that they could not have been avoided by measures appropriate to the situation, that is to say, by measures which, at the time when those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned.

18 The question to be addressed in the present case is what preventive measures taken by an air carrier should be considered reasonable.

19 Manufacturing defects cannot be regarded as typical defects that are easy to detect in advance, prior to a flight. However, in view of the notice provided by the engine manufacturer in this case, it was possible to foresee this defect. It should be considered whether in this case the carrier's obligation was to replace the engine (which was still in working order), or whether it should have grounded the aircraft until the manufacturer resolved the problem by repairing the engine or supplying a new one. Here it should be borne in mind that the carrier had requested a replacement engine for the aircraft in question as early as 5 July 2018, and that the

aircraft was brought back into operation on 7 July 2018, that is to say eight days after the engine defect had been discovered.

20 In this regard, it is thus necessary to consider whether the carrier, having been aware of the situation since April 2018, should have prepared a back-up plan and organised replacement aircraft. Prima facie, it would appear that the carrier had ample time in the period between April and the beginning of July to take all necessary and reasonable steps to prevent a flight delay or cancellation, and that it could foresee that the technical engine defect might also affect its aircraft. During this period the carrier could have estimated how many replacement aircraft would be necessary to deal with the potential technical defect and decide to buy such aircraft or lease them from other carriers.

21 Citing the judgment of the Court of Justice in Case C-315/15 (paragraph 29), the referring court points out that the carrier could not, however, be expected to make unreasonable sacrifices with regard to the resources of its undertaking to secure a spare aircraft that would be on stand-by at any time. In the present case, however, the defendant was aware of the possibility of the manifestation of the engine defect since April 2018. Since that time it had contacted eight carriers about leasing an aircraft. D. S.A. argues that it was possible to find 471 aircraft to replace the aircraft concerned in Europe alone, and that the defendant had failed to contact at least 18 carriers, including undertakings offering ‘wet lease’- type services, that is to say, aircraft together with crews and on-board services. The defendant carrier confirmed that since 7 September 2018 it had permanently leased one aircraft, and that in August 2018 it had signed two lease contracts.

22 D. S.A. considers this action to be sluggish and aimed not at actually leasing the aircraft. It claims that this is in contrast to the contemporary practice of airlines, which is to keep spare aircraft on stand-by in case defects occur and a replacement needs to be sent out. For its part, the defendant carrier asserts that it would not be reasonable for it to be expected to have some fully crewed ‘spare’ aircraft on standby to carry out scheduled flights in emergencies and unexpected circumstances due to the enormous costs of leasing and maintaining them. Providing such back-up would, it argues, also undoubtedly have an effect on the price of the services offered.