Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 12 April 2018[1]

Joined Cases C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17

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v
TUIfly GmbH
(24 Requests for a preliminary ruling from the Amtsgericht Hannover (Local Court, Hanover, Germany))
And
EUflight.de GmbH (C-292/17)
v
TUIfly GmbH

(Request for a preliminary ruling from the Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany))

(Reference for a preliminary ruling — Air transport — Regulation (EC) No 261/2004 — Article 5(3) — Compensation to passengers in the event of denied boarding and of cancellation or long delay of flights —Notion of 'extraordinary circumstances' — Massive absence of flight staff due to so-called 'wildcat strike' under the guise of sick leave — Causation — Avoidability)

I. Introduction

1. Does a so-called 'wildcat strike'[2] under the guise of sick leave amount to 'extraordinary circumstances' under Article 5(3) of Regulation (EC) No 261/2004,[3] so that an air carrier is not obliged to pay compensation to passengers who suffer flight delays and cancellations as a result of it?

2. That is in essence the key question that arises for the Court's consideration by way of these joined references for a preliminary ruling submitted by the Amtsgericht Hannover (Local Court, Hanover, Germany) and the Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany) before which several passengers have brought cases seeking compensation under Regulation No 261/2004 after their flights were cancelled or considerably delayed because an unusually high percentage of the flight staff of the air carrier were on sick leave.

3. This case therefore provides the Court with the opportunity to develop its jurisprudence on the interpretation of Regulation No 261/2004 which, it should be recalled, has a real impact on the lives of the citizens of the European Union and all persons who travel within its borders.

2 At http://dictionnaire-juridique.jurimodel.com/Gr%E8ve.html, a 'grève sauvage' is defined as grève déclenchée en dehors d'un mot d'ordre d'un syndicat. At https://dictionary.cambridge.org/us/dictionary/english/wildcat-strike, the Cambridge dictionary defines a wildcat strike as 'a sudden strike (= act of refusing to work as a protest) without warning by the workers and often without the official support of the unions'. For a discussion of wildcat strikes in EU law, see e.g. Alan Bogg, '*Viking and Laval*: The International Labour Law Perspective' in Mark R. Freeland and Jeremias Prassl, *Viking, Laval and Beyond* (2014, Hart Publishing) pp. 41-74.

3 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 (OJ 2004 L 46, p. 1) ('Regulation No 261/2004').

II. Legal framework

4. Recitals 1, 2, 14 and 15 of Regulation No 261/2004 state:

'(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

…

(14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

(15) Extraordinary circumstances should be deemed to 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, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.'

5. Article 5(3) of Regulation No 261/2004 states:

'An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.'

III. The facts in the main proceedings and the questions referred for a preliminary ruling

A. Reference from the Amtsgericht Hannover

6. The plaintiffs in the 24 cases pending before the Amtsgericht Hannover (Local Court, Hanover) booked flights with TUIfly GmbH ('TUIfly') which is an air carrier based in Hannover, Germany. The plaintiffs seek compensation from TUIfly under Article 7 of Regulation No 261/2004[4] because their flights were cancelled or considerably delayed between 3 October 2016 and 8 October 2016.

7. The flight cancellations or delays in question originate in an incident which took place in early October 2016 when a large number of TUIfly's flight staff suddenly reported sick, with the result that a total of more than 100 flights had to be cancelled and many more were considerably delayed.

8. This wave of sick leave occurred after TUIfly's management notified its workforce on 30 September 2016 of prospective restructuring plans which were strongly opposed.

4 For the levels of compensation entailed when a flight is cancelled or delayed, see point 38 below.

9. According to the order for reference, the sickness rate of TUIfly's staff generally amounts to about 10 % of its workforce, comprising cockpit and cabin personnel. However, following the announcement of the restructuring measures by TUIfly's management on 30 September 2016, the sickness rate of TUIfly's staff skyrocketed, especially during the period between 3 October 2016 and 9 October 2016, reaching its peak on 7 October 2016 with 89 % of the cockpit personnel and 62 % of the cabin personnel absent on account of sickness.

10. Consequently, on 3 October 2016, TUIfly completely abandoned its original flight plan and created a new one. TUIfly also subchartered other airlines and recalled staff members who were on holiday.

11. On 3 October 2016, due to staff shortage, 24 flights were considerably delayed. On 4 October 2016, 7 flights were cancelled and 29 flights were considerably delayed. From 5 October 2016 onwards, a large number of flights were cancelled. On 7 and 8 October 2016, TUIfly cancelled all flights from Germany to their respective destinations based on the assumption that the return transportation of passengers at the end of their journey could no longer be guaranteed.

12. On 7 October 2016, TUIfly's management informed its workforce that an agreement had been reached with the staff representatives concerning the restructuring plans. Subsequently, the sickness rate of its flight staff decreased to the normal level.

13. In the main proceedings, TUIfly contends that it is not obliged to pay compensation to the plaintiffs because the flight cancellations or delays in question were caused by 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004. The plaintiffs argue that TUIfly is not released from paying them compensation because the events in question did not constitute extraordinary circumstances and could have been avoided if all reasonable measures had been taken.

14. It is in these circumstances that the Amtsgericht Hannover (Local Court, Hanover) decided to stay the 24 proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is the absence on sick leave of a significant part of an operating air carrier's staff for flight operation an extraordinary circumstance under Article 5(3) of Regulation No 261/2004? In the event that the first question is answered in the affirmative: how high must the rate of absence be to constitute such an extraordinary circumstance?

(2) In the event that the first question is answered in the negative: is the spontaneous absence, due to unauthorised work stoppage under employment law or collective agreements ("wildcat strike"), of a significant part of an operating air carrier's staff for flight operation an extraordinary circumstance under Article 5(3) of Regulation No 261/2004? In the event that the second question is answered in the affirmative: how high must the rate of absence be to constitute such an extraordinary circumstance?

(3) In the event that the first or the second question is answered in the affirmative: must the extraordinary circumstance itself have been present at the time the flight was cancelled or is the operating air carrier entitled to devise a new flight plan pursuant to economic considerations?

(4) In the event that the first or the second question is answered in the affirmative: does the avoidability criterion relate to the extraordinary circumstance or, rather, to the consequences of the occurrence of the extraordinary circumstance?'

B. Reference from the Amtsgericht Düsseldorf

15. In the main proceedings pending before the Amtsgericht Düsseldorf (Local Court, Düsseldorf), a single plaintiff has brought a case against TUIfly seeking compensation under Article 7 of Regulation No 261/2004. The order for reference indicates that the plaintiff EUflight.de is pursuing this claim on behalf of the passenger who assigned to it his right to compensation under that regulation based on a cancelled flight on 7 October 2016.

16. According to the order for reference, the Amtsgericht Düsseldorf (Local Court, Düsseldorf) assumes that the occurrence of a sudden and large number of staff members on sick leave, whether attributed to a wave of real sickness or to a so-called 'wildcat strike', qualifies as 'extraordinary circumstances' under Article 5(3) of Regulation No 261/2004. Yet, the referring court doubts whether there is a sufficient causal link between those extraordinary circumstances and the cancellation of the flight in question since it was made in the context of TUIfly's general rescheduling of its flight plan as from 2 October 2016. In particular, the referring court points out that since TUIfly does not state which specific crew was planned for the flight in question, it will be exempted from having to pay compensation on account of extraordinary circumstances only if the causal link between those circumstances and the flight cancellation is interpreted broadly.

17. It is in these circumstances that the Amtsgericht Düsseldorf (Local Court, Düsseldorf) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is a flight cancellation still caused by an extraordinary circumstance within the meaning of Article 5(3) of Regulation No 261/04 when the circumstances (here, "wildcat strike" or "wave of illness") only indirectly affect the flight in question in that they prompted the air carrier to reschedule its entire flight plan and the new schedule includes the scheduled cancellation of that specific flight? Can an air carrier avoid liability under Article 5(3) of Regulation No 261/04 where the flight in question, had it not been rescheduled, could have been operated because the crew planned for that flight would have been available if it had not been assigned to other flights through rescheduling?'

IV. The procedure before the Court

18. Pursuant to Article 54 of the Court's Rules of Procedure, the 24 references for a preliminary ruling from the Amtsgericht Hannover (Local Court, Hanover) and the single reference for a preliminary ruling from the Amtsgericht Düsseldorf (Local Court, Düsseldorf) were joined for the purposes of the written and oral parts of the procedure and for judgment. [5]

19. Written observations were submitted to the Court by the representatives of the plaintiffs in nine of the joined cases, [6] TUIfly, the German Government, the Polish Government and the Commission.

20. The representatives of the plaintiffs in 11 of the joined cases, [7] TUIfly, the French Government, the German Government and the Commission participated at the hearing which took place on 25 January 2018.

5 I note that originally there were 28 references for a preliminary ruling submitted by the Amtsgericht Hannover (Local Court, Hanover), but the 3 references in Cases C-196/17, C-276/17 and C-277/17 have been withdrawn, thereby leaving 25 cases remaining. I note additionally that the 19 references for a preliminary ruling in Cases C-307/17, C-311/17, C-316/17, C-317/17, C-352/17 to C-362/17, C-394/17, C-403/17, C-409/17 and C-429/17 which were submitted by the Amtsgericht Hannover (Local Court, Hanover) - one of which (C-352/17) was withdrawn - have been stayed pursuant to Article 55 of the Court's Rules of Procedure until the Court delivers judgment in the present cases.

6 Cases C-197/17, C-198/17, C-201/17, C-203/17, C-254/17, C-275/17, C-280/17, C-284/17 and C-292/17.

7 Cases C-197/17, C-198/17, C-201/17, C-203/17, C-226/17, C-228/17, C-254/17, C-275/17, C-282/17, C-283/17 and C-292/17. Thus, the representatives of the plaintiffs which had submitted written observations to the Court also participated in the hearing, except for those in Cases C-280/17 and C-284/17. The representatives of the plaintiffs in Cases C-226/17, C-228/17, C-282/17 and C-283/17 presented only oral observations to the Court.

V. Analysis

21. My analysis is divided into three main parts. First, I will provide a preliminary remark concerning the consideration of the questions referred to the Court. Second, I will address certain preliminary issues on admissibility that have been raised by TUIfly. Third, I will proceed to the substance of the four questions referred, preceded by an overview of the Court's case-law on Article 5(3) of Regulation No 261/2014 that informs the assessment that follows.

A. Preliminary remark

22. By virtue of its four questions, the Amtsgericht Hannover (Local Court, Hanover) queries in substance whether a so-called 'wildcat strike' under the guise of sick leave that directly or indirectly caused a flight cancellation or long delay constitutes 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004, thereby exempting the air carrier from its obligation to pay compensation to the passengers in the main action.

23. Article 5(3) of Regulation No 261/2004 provides that an air carrier is not obliged to pay compensation under Article 7 of that regulation 'if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'.

24. Consequently, Article 5(3) of Regulation No 261/2004 indicates that three main elements must be proven by the air carrier in order to benefit from the exemption set forth therein: (1) the existence of 'extraordinary circumstances' must be shown; (2) the flight cancellation or long delay must be 'caused' by the extraordinary circumstances; and (3) the extraordinary circumstances 'could not have been avoided even if all reasonable measures had been taken'.[8]

25. The four questions posed by the Amtsgericht Hannover (Local Court, Hanover) relate to all three of these conditions. The first and second questions concern the first of these conditions, namely whether a wave of sick leave or a so-called 'wildcat strike' qualify as 'extraordinary circumstances'. The third question concerns the second condition in respect of causality, as to whether it is sufficient that the extraordinary circumstances constitute only an indirect cause of the flight cancellation or long delay due to TUIfly's rescheduling of the flight plan. The fourth question concerns the third condition in terms of whether the extraordinary circumstances themselves or their consequences must have been 'avoided'.

26. The single question posed by the Amtsgericht Düsseldorf (Local Court, Düsseldorf) concerns whether, under the assumption that a wave of illness or a so-called 'wildcat strike' qualifies as 'extraordinary circumstances', the flight cancellation is still caused by extraordinary circumstances when they only indirectly affect the flight in question, since the crew for that flight was indeed available and that flight would have taken place had it not been for the general rescheduling undertaken by TUIfly, thereby assigning that crew to other flights on account of those extraordinary circumstances.

27. Accordingly, the question referred by the Amtsgericht Düsseldorf (Local Court, Düsseldorf) is very similar to the third question referred by the Amtsgericht Hannover (Local Court, Hanover). I will therefore deal with them together in my analysis below.

8 See e.g. Opinion of Advocate General Sharpston in *Kramme*, C-396/06, EU:C:2007:555, point 31.

B. Admissibility

28. TUIfly submits that the reference submitted by the Amtsgericht Hannover (Local Court, Hanover) is partially inadmissible. It contends that the first and second questions go beyond the subject matter of the main proceedings since those questions suppose a high rate of sick leave of the air carrier's entire personnel, whereas the main proceedings concern a high rate of sick leave only among the flying personnel, that is to say, pilots, hostesses and stewards. It also argues that the first and second questions, in seeking indications as to how high the rate of absence must be in order to constitute an extraordinary circumstance, concerns an appreciation of the facts which is for the national court, not this Court. Moreover, TUIfly asserts that the third question has no connection with the subject matter of the dispute in the main proceedings since TUIfly did not establish a new flight plan 'pursuant to economic considerations', and in any event, that question is too abstract.

29. I also note that although the German Government has not raised an objection of inadmissibility in respect of the reference submitted by the Amtsgericht Hannover (Local Court, Hanover), it nonetheless considers that an answer to the first question referred by the Amtsgericht Hannover is not determinative for resolving the dispute in the main action, since there was no mass sickness among TUIfly's flying staff, but rather a so-called 'wildcat strike'.

30. In my view, the questions referred by the Amtsgericht Hannover (Local Court, Hanover) are admissible.

31. It is well established under the Court's case-law that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[9]

32. Furthermore, that presumption of relevance cannot be rebutted by the simple fact that one of the parties to the main proceedings contests certain facts on which the delimitation of the subject matter of those proceedings depends.[10]

33. In the present case, it is clear from the order for reference and from the context of the first and second questions as formulated by the referring court that those questions pertain to TUIfly's flight staff. It is not disputed that the interested persons within the meaning of Article 23 of the Statute were able to state their views effectively on these questions.

34. Moreover, it is not obvious that the questions referred are unrelated to the actual facts of the main action or its purpose. There is also no suggestion in the order for reference that the questions relate to a purely hypothetical problem.

35. Accordingly, there are insufficient grounds to rebut the presumption of relevance enjoyed by the questions referred for a preliminary ruling by the Amtsgericht Hannover (Local Court, Hanover).

9 See e.g. judgment of 14 December 2017, *Avon Cosmetics*, C-305/16, EU:C:2017:970, paragraph 59 and the case-law cited.

10 See e.g. judgment of 22 September 2016, *Breitsamer und Ulrich*, C-113/15, EU:C:2016:718, paragraph 34 and the case-law cited.

C. Substance

1. Overview of the Court's case-law on Article 5(3) of Regulation No 261/2004

36. It follows from the settled case-law of the Court that derogations from provisions granting rights to air passengers are to be interpreted strictly.[11] However, the case-law equally acknowledges that, with the adoption of Regulation No 261/2004, the Union legislature also sought to strike a balance between the interests of air passengers and those of air carriers.[12] That being so, the exemption from the obligation of air carriers to pay compensation for cancellations and long delays in the event of 'extraordinary circumstances', a term that is not defined in Regulation No 261/2004, has been interpreted by the Court as follows.

37. The Court has rejected arguments to the effect that excessive financial burdens on air carriers should predominate in the interpretation of Article 5(3) of Regulation No 261/2004, pointing out that the case-law shows that the importance of the objective of consumer protection, which includes the protection of air passengers, may justify even substantial negative economic consequences for certain economic operators.[13]

38. The Court has noted that the amount of compensation, fixed at EUR 250, 400 and 600 depending on the distance of the flights concerned, may still be reduced by 50% in accordance with Article 7(2)(c) of Regulation No 261/2004, where the delay is – in the case of a flight not falling under subparagraphs (a) or (b) of Article 7(2) – less than four hours,[14] and that the discharge of obligations pursuant to Regulation No 261/2004 is without prejudice to air carriers' rights to seek compensation from any person who caused the delay, including third parties, as Article 13 of that regulation provides. Such compensation may accordingly reduce or even remove the financial burden borne by air carriers in consequence of those obligations.

39. Nor does it appear unreasonable, the Court has held, for those obligations initially to be borne, subject to the abovementioned right to compensation, by the air carriers with which the passengers concerned have a contract of carriage that entitles them to a flight that should be neither cancelled nor delayed.[15]

40. The rule established by the text of Article 5(3) of Regulation No 261/2004 has been afforded further precision through its interpretation by the Court. The Court has noted that recital 14 of Regulation No 261/2004 states that such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an air carrier.[16] Thus, the Court has deduced therefrom that events may be classified as extraordinary circumstances, within the meaning of Article 5(3) of Regulation No 261/2004, if, by their nature or origin, they are not inherent in the normal exercise of the activity of the air carrier concerned and are outside that carrier's actual control.[17] That being so, the Court has held that a collision between an aircraft and a bird, as well as any damage caused by that collision, are not intrinsically linked to the operating system of the aircraft, and are not by their nature or origin inherent in the normal exercise of the

11 Judgment of 4 October 2012, *Finnair*, C-22/11, EU:C:2012:604, paragraph 38. See also the Opinion of Advocate General Sharpston in *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:416, point 48, where the Advocate General points out that the Court clearly identified in judgment of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 48, that 'protecting passengers' is the 'immediate objective' of Regulation No 261/2004.

12 Judgment of 23 October 2012, *Nelson*, C-581/10 and C-629/10, EU:C:2012:657, paragraph 39.

13 Ibid., paragraph 81 and the case-law cited.

14 Ibid., paragraph 78.

15 Ibid., paragraph 80 and the case-law cited.

16 Judgment of 4 May 2017, *Pešková and Peška*, C-315/15, EU:C:2017:342, paragraph 21 and the case-law cited.

17 Ibid., paragraph 22 and the case-law cited.

activity of the air carrier concerned. This event was outside the air carrier's actual control.[18] In reaching this conclusion the Court noted that 'air carriers must not be encouraged to refrain from taking the measures necessitated by such an incident by prioritising the maintaining of punctuality of their flights over the objective of safety'.[19]

41. That said, the Court has held that, in the course of the activities of an air carrier, a breakdown caused by premature malfunction of certain components of an aircraft is an unexpected event, but that such a breakdown remains intrinsically linked to the very complex operating system of the aircraft, such that this unexpected event is inherent in the normal exercise of an air carrier's activity, as air carriers are confronted as a matter of course with unexpected technical problems. Further, the prevention of such a breakdown is not beyond the actual control of the carrier.[20]

42. Finally, the Court has observed that a 'hidden manufacturing defect which impinges on flight safety' may stem from events which are not inherent in the normal exercise of the activity of the air carrier concerned and *are* beyond its actual control,[21] and that the same applies to damage to aircraft caused by acts of sabotage or terrorism.[22] The Court has also held that the closure of European airspace as a result of the eruption of a volcano does amount to 'extraordinary circumstances'.[23]

43. In addition to this, the Court's case-law has established that the Union legislature intended to confer exemption from the obligation to pay compensation to passengers in the event of cancellation of flights not in respect of all extraordinary circumstances, but only in respect of those extraordinary circumstances which *could not have been avoided even if all reasonable measures had been taken.*[24]

44. Since not all extraordinary circumstances confer exemption, the onus is on the party seeking to rely on them, like TUIfly, to establish, in addition, that the extraordinary circumstances could not on any view have been avoided by measures appropriate to the situation, that is to say, by measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned.

45. It is for that party to establish that, even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able – unless it had made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time – *to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight.*[25]

46. In this context, the Court has established an individualised and flexible concept of 'reasonable measures', leaving to the national court the task of assessing whether, in the circumstances of the particular case, the air carrier could be regarded as having taken measures appropriate to the situation.[26]

18 Ibid., paragraph 24.

19 Ibid., paragraph 25.

20 Judgment of 17 September 2015, *van der Lans*, C-257/14, EU:C:2015:618, paragraphs 41 to 43.

21 My emphasis.

22 Judgment of 22 December 2008, *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 26.

23 Judgment of 31 January 2013, *McDonagh*, C-12/11, EU:C:2013:43, paragraph 34.

24 My emphasis.

25 Judgment of 22 December 2008, *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraphs 39 to 41. My emphasis. See also judgment of 4 May 2017, *Pešková and Peška*, C-315/15, EU:C:2017:342, paragraphs 28 and 29 and the case-law cited.

26 Judgment of 4 May 2017, *Pešková and Peška*, C-315/15, EU:C:2017:342, paragraph 30.

47. The Court has held that an air carrier must reasonably, at the stage of organising the flight, take account of the risks of delay connected to the possible occurrence of extraordinary circumstances.[27] To prevent any delay, even insignificant, to which extraordinary circumstances have given rise inevitably leading to the cancellation of a flight, the reasonable air carrier must organise its resources in good time to provide for some reserve of time, so as to be able, if possible, to operate the flight once the extraordinary circumstances have come to an end.[28]

48. In the light of this, the Court has held, with respect to passengers who have been denied boarding an aircraft, that 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 extraordinary circumstances affecting an earlier flight. 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. If such a carrier is obliged to cancel a scheduled flight on the day of a strike by airport staff and then takes the decision to reschedule its later flights, that carrier cannot in any way be considered to be constrained by that strike to deny boarding to a passenger who has duly presented himself for boarding two days after the flight's cancellation.[29]

49. It is against this backdrop that the Court has been asked to determine if a so-called 'wildcat strike' constitutes 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004, and the consequences that follow in the event that it is.

2. Proposed answer to Question 1

50. If taken in isolation, the answer to Question 1 is straightforward. On the one hand, on the basis of the case-law summarised above, arrangements for managing sick leave for an enterprise conducting business across a normally healthy community are among the matters which are inherent in the normal exercise of the activity of air carriers and which are within that carrier's actual control. On the other hand, a mass absence due to a pandemic or some other public health emergency is not inherent in the normal exercise of the activity of air carriers and is outside that carrier's actual control. The former would not amount to 'extraordinary circumstances' for the purposes of Article 5(3) of Regulation No 261/2004, while the latter would.

51. However, it is clear from both the case file, and the arguments made at the hearing, that these are not the factual circumstances of the main proceedings. What has occurred is a mass absence, in the guise of sick leave, in the execution of a so-called 'wildcat strike'. That being so, while the answer to the first question, taken in isolation, is in principle in the affirmative, this is not sufficient to resolve the dispute in the main proceedings, which is based factually on a so-called 'wildcat strike' and not a pandemic or some other public health emergency. This, at least, forms the heart of the guidance that is requested by the referring court.[30]

27 Judgment of 12 May 2011, *Eglītis and Ratnieks*, C-294/10, EU:C:2011:303, paragraph 27.

28 Ibid., paragraph 28.

29 Judgment of 4 October 2012, *Finnair*, C-22/11, EU:C:2012:604, paragraph 37.

30 See above, points 28 to 35.

52. I therefore propose the following answer to Question 1:

'Only the genuine absence on sick leave of a significant part of an operating air carrier's staff for flight operation that is due to a pandemic or some other public health emergency amounts to an "extraordinary circumstance" under Article 5(3) of Regulation No 261/2004. The precise rate of absenteeism, in such circumstances, required before the situation can amount to "extraordinary circumstances" is to be determined by the referring court, with due account taken of all the relevant factual circumstances.'

3. Proposed answer to Question 2

53. By its second question, the referring court asks in substance if a so-called 'wildcat strike' constitutes 'extraordinary circumstances' for the purposes of Article 5(3) of Regulation No 261/2004. If the answer to this question is in the affirmative, the referring court asks how high the rate of absenteeism must be to constitute extraordinary circumstances.

54. As the Court has made clear in its case-law, it is necessary, in interpreting a provision of EU law, to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part.[31] In that regard, the operative part of an EU act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption.[32]

55. On the one hand, recital 1 of Regulation No 261/2004 refers to the need to ensure a 'high level of protection' for passengers, while recital 2 of that regulation indicates that denied boarding and flight cancellation causes serious trouble and inconvenience to passengers.

56. On the other hand, recital 14 of Regulation No 261/2004 states that, as under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

57. Thus, the objectives of Regulation No 261/2004 point toward the inclusion of 'strikes' within the concept of 'extraordinary circumstances'. This is buttressed by the case-law of the Court, detailed above, at least in the context of substantial absences affecting operational capacity, on the interpretation of 'extraordinary circumstances' to date, particularly with respect to so-called 'wildcat strikes'. Given that a wildcat strike takes place outside of the rigours of law, they are outside of the air carrier's actual control.[33] It is also supported by the *travaux préparatoires* to Article 5(3) of Regulation No 261/2004. In the course of them, the term 'force majeure' was altered to 'extraordinary circumstances'. According to the Council's statement in the Common Position, this change was made in the interests of legal clarity.[34]

31 See e.g. judgment of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 41 and the case-law cited.

32 Ibid., paragraph 42 and the case-law cited.

33 The Commission's proposal for Regulation No 261/2004 refers to exceptional circumstances beyond an air carrier's 'responsibility'. See e.g. COM(2001) 784 final, p. 6, point 20.

34 Opinion of Advocate General Sharpston in *Kramme*, C-396/06, EU:C:2007:555, point 50, referring to the Common Position, and the Communication to the Parliament of 25 March 2003 (SEC(2003) 361 final) where the Commission noted that the conditions attached to compensation in Common Position (EC) No 27/2003 of 18 March 2003 (OJ 2003 C 125 E, p. 63) 'would link compensation more closely to the trouble and inconvenience caused by cancellations'.

58. Moreover, in a Union governed by the rule of law, so-called 'wildcat strikes' are not inherent in the normal exercise of the activity of the air carrier concerned. They are not akin to something that is intrinsically linked to the operating system of the aircraft, so that it is inherent in the normal exercise of an air carrier's activity. I further take the view that informing the employees of a potential restructuring did not bring the wildcat strike within the control of TUIfly, given that a wildcat strike was not the inevitable consequence of this action. [35]

59. That said, in order to provide a useful answer to the referring court encompassing all relevant elements of EU law, it is important to reiterate (see points 43 to 48 above) that, under the Court's case-law, the mere existence of 'extraordinary circumstances' is not enough to exempt an airline carrier from compensation for flight cancellation and long delay that it would otherwise, pursuant to Regulation No 261/2004, be required to pay. The exemption appearing in Article 5(3) of that regulation only applies in respect of extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken by the air carrier concerned. As explained at points 43 to 48 above, the onus is on TUIfly to prove that it was not able to prevent the extraordinary circumstance with which it was confronted from leading to the cancellation of the flight. [36]

60. It is also for the referring court, based on all of the relevant facts, to determine the question of the rate of absenteeism required under a so-called 'wildcat strike' that is required before it can amount to 'extraordinary circumstances' under Regulation No 261/2004.

61. I therefore propose the following answer to Question 2:

'The spontaneous absence, due to unauthorised work stoppage under employment law or collective agreements (a "wildcat strike"), of a significant part of an operating air carrier's staff for flight operation is an "extraordinary circumstance" under Article 5(3) of Regulation No 261/2004. However, the exemption appearing in Article 5(3) applies only in respect of extraordinary circumstances which could not have been avoided, even if all reasonable measures had been taken by the air carrier concerned. This is a question for the referring court to decide, as is the issue of how high the rate of absenteeism must be for an extraordinary circumstance to have occurred in the context of a wildcat strike.'

4. Proposed answer to Question 3

62. By the third question submitted by the Amtsgericht Hannover (Local Court, Hanover) and the question submitted by the Amtsgericht Düsseldorf (Local Court, Düsseldorf), the referring courts ask in substance about the breadth of the causal link between the extraordinary circumstances and flight cancellation and in particular whether that causal link is broken by TUIfly's decision to reschedule the entire flight plan.

63. According to recital 15 of Regulation No 261/2004, extraordinary circumstances should be deemed to 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, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations. [37]

35 I further note that the conclusion to the effect that a wildcat strike is an extraordinary circumstance is in conformity with a recent Commission proposal to amend Regulation No 261/2004 which provides a non-exhaustive list of circumstances considered as 'extraordinary circumstances' for the purposes of the regulation. This proposal includes 'labour disputes at the operating air carrier or at essential service providers such as airports and Air Navigation Service Providers'. See point 1(vii) of Annex 1 to COM(2013) 130 final, p. 30. See also point 1(vii) of Annex 1 to European Parliament legislative resolution of 5 February 2014, P7_TA(2014) 0092: '***unforeseen*** labour disputes at the operating air carrier or at essential service providers such as airports and Air Navigation Service Providers'. Emphasis in original.

36 National rules of evidence apply in this regard, subject to the principles of effectiveness and equivalence. See Opinion of Advocate General Sharpston in *Kramme*, C-396/06, EU:C:2007:555, points 63 to 72.

37 My emphasis.

64. I take the view that the answer to Question 3 is governed by the findings of the Court in *Finnair*[38] (point 48 above) to the effect that when a carrier is obliged to cancel a scheduled flight on the day of a strike by airport staff and then takes the decision to reschedule its later flights, that carrier cannot in any way be considered to be constrained by that strike to deny boarding to a passenger who has duly presented himself for boarding two days after the flight's cancellation. In other words, the extraordinary circumstances must have occurred at the time that the flight was cancelled, and does not extend to new flight plans devised in the light of the extraordinary circumstances. This is in keeping with the obligation on carriers set forth in the Court's case-law to the effect that the reasonable air carrier must organise its resources in good time to provide for some reserve of time, so as to be able, if possible, to operate the flight once the extraordinary circumstances have come to an end (see point 47 above).[39]

65. I therefore propose the following answer to Question 3:

'The extraordinary circumstances must have been present at the time that the flight was cancelled or delayed, as the case may be.'

5. Proposed answer to Question 4

66. In the event that the second or the third question is answered in the affirmative, by its fourth question, the referring court asks in substance whether the avoidability criterion, relating to the showing that the extraordinary circumstances 'could not have been avoided even if all reasonable measures had been taken', relates to the occurrence of extraordinary circumstances or rather to the consequences of the extraordinary circumstances.

67. The wording[40] of the the sub-clause 'even if all reasonable measures had been taken' in Article 5(3) of Regulation No 261/2004 could be read as referring back to 'the cancellation' and not the incidence of 'extraordinary circumstances', although the relative pronoun 'which' might be viewed as generating ambiguity in this regard. However, as indicated by the italicised phrase at point 45 above, the Court has already held that the touchstone is the prevention of the extraordinary circumstance with which the air carrier was *confronted 'from leading to the cancellation of the flight'*.

68. Thus, 'reasonable measures' relates to the consequences of the extraordinary circumstances rather than their incidence. There could be, for example, no obligation on an air carrier to take any steps to prevent the incidence of a volcanic eruption, but at the same time an air carrier is obliged to take reasonable measures to prevent the cancellation of a flight once confronted with such an incidence. Such measures might include, for example, re-routing of affected flights.

69. This interpretation, I add, is in conformity with recital 15 of Regulation No 261/2004, which refers to the 'impact' on air carriers of extraordinary circumstances, and the reference to the taking of 'reasonable measures' to 'avoid the delays or cancellations'. It is also consistent with the purpose elaborated in recital 1 of that regulation of securing a 'high level of protection' for passengers, and the broader context of Regulation No 261/2004.[41]

38 Judgment of 4 October 2012, *Finnair*, C-22/11, EU:C:2012:604.

39 See further in this regard the Opinion of Advocate General Bot in *Finnair*, C-22/11, EU:C:2012:223, points 53, 54 and 61.

40 On the methods of interpretation applicable to Article 5(3) of Regulation No 261/2004, see point 54 above.

41 For a contrary view, formulated in a context in which the 'extraordinary circumstances' in question concerned technical failure, and which precedes subsequent case-law here referred to, see the Opinion of Advocate General Sharpston in *Kramme*, C-396/06, EU:C:2007:555, points 24 to 32.

70. I therefore propose the following answer to Question 4:

'The avoidability criterion relates only to the consequences of the occurrence of the extraordinary circumstance.'

VI. Conclusion

71. I therefore propose that the Court answer the questions referred by the Amtsgericht Hannover (Local Court, Hanover, Germany) and the Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany) as follows:

(1) Only the genuine absence on sick leave of a significant part of an operating air carrier's staff for flight operation that is due to a pandemic or some other public health emergency amounts to an 'extraordinary circumstance' under Article 5(3) 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. The precise rate of absenteeism, in such circumstances, required before the situation can amount to 'extraordinary circumstances' is to be determined by the referring court, with due account taken of all the relevant factual circumstances.

(2) The spontaneous absence, due to unauthorised work stoppage under employment law or collective agreements (a 'wildcat strike'), of a significant part of an operating air carrier's staff for flight operation is an 'extraordinary circumstance' under Article 5(3) of Regulation No 261/2004. However, the exemption appearing in Article 5(3) applies only in respect of extraordinary circumstanceswhich could not have been avoided, even if all reasonable measures had been taken by the air carrier concerned. This is a question for the referring court to decide, as is the issue of how high the rate of absenteeism must be for an extraordinary circumstance to have occurred in the context of a wildcat strike.

(3) The extraordinary circumstances must have been present at the time that the flight was cancelled or delayed, as the case may be.

(4) The avoidability criterion relates only to the consequences of the occurrence of the extraordinary circumstance.