Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 9 December 2021 [1]

Case C-561/20

Q,
R,
S
v
United Airlines Inc.

(Request for a preliminary ruling from the Nederlandstalige ondernemingsrechtbank Brussel (Brussels Companies Court (Dutch-speaking), Belgium))

(Reference for a preliminary ruling – Air transport – Regulation (EC) No 261/2004 – Right to compensation in the event of long delay of flights – Flight divided into two legs – Long delay in reaching the final destination that occurred during the second leg linking two airports in a third country – Validity of Regulation (EC) No 261/2004 in the light of international law)

I. Introduction

1. This request for a preliminary ruling has been made in proceedings between Ms Q, Ms R and Mr S ('the applicants in the main proceedings') and United Airlines Inc. (United States) concerning compensation for the long delay of a connecting flight.

2. By its first question referred for a preliminary ruling, which concerns the interpretation of Article 3(1)(a) and Article 7 of Regulation (EC) No 261/2004 on compensation for air passengers, [2] the referring court asks the Court to clarify certain aspects of the applicability of that regulation in the context of connecting flights departing from an airport located in the territory of a third State and with another airport in that third State as the final destination.

3. In that regard, although the Court has not yet had the opportunity to examine the applicability of Regulation No 261/2004 to situations in which the delay of a series of connecting flights operated entirely by a non-Community operating air carrier occurs during a leg of that flight

[1] Original language: French.

[2] Regulation 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).

which takes place entirely in the territory of a third country, it is my view that the principles stemming from existing case-law provide useful guidance that can be transposed *mutatis mutandis* to the present case. [3]

4. By its second question referred for a preliminary ruling, which is put in the alternative, the referring court asks the Court as to the validity of Regulation No 261/2004 in the light of international law and, in particular, the principle of the complete and exclusive sovereignty of State over its airspace. That question will allow the Court to examine, for the first time, the validity of that regulation in the light of public international law and, in particular, customary international air law. [4]

5. At the end of my analysis, I will propose that the Court answer those two questions to the effect that, first, Article 3(1)(a) and Article 7 of Regulation No 261/2004 must be interpreted as meaning that a situation such as that described in point 3 of this Opinion falls within the scope of that regulation and, second, that that regulation remains valid in the light of international law, and in particular the principle of the exclusive and complete sovereignty of a State over its airspace.

II. Legal context

6. Recitals 1, 4 and 7 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.

…

(4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.

…

(7) In order to ensure the effective application of this Regulation, the obligations that it creates should rest with the operating air carrier who performs or intends to perform a flight, whether with owned aircraft, under dry or wet lease, or on any other basis.'

[3] The Court has already had occasion to examine the applicability of Regulation No 261/2004 in the case of connecting flights, in particular in the judgments of 26 February 2013, *Folkerts* (C-11/11, EU:C:2013:106; 'judgment in *Folkerts*'); of 31 May 2018, *Wegener* (C-537/17, EU:C:2018:361; 'judgment in *Wegener*'); of 11 July 2019, *České aerolinie* (C-502/18, EU:C:2019:604; 'judgment in *České aerolinie*'); and of 30 April 2020, *Air Nostrum* (C-191/19, EU:C:2020:339). On the question of the applicability of Regulation No 261/2004 to a flight connection initially departing from and with a final destination in a third country, but including two flights with a point of departure or arrival in a Member State, see Opinion of Advocate General Saugmandsgaard Øe in *Airhelp (Delay of re-routing flight)* (C-451/20, EU:C:2021:829, points 24 to 60), judgment not yet having been given when this Opinion was delivered.

[4] The Court has already had occasion to examine the validity of a legislative act of the European Union in the light of that principle, namely Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), in the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864; 'judgment in *ATAA*'; paragraphs 103 and 104).

7. Under Article 2 of that regulation, entitled 'Definitions':

'For the purposes of this Regulation:

(a) "air carrier" means an air transport undertaking with a valid operating licence;

(b) "operating air carrier" means an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger;

(c) "Community carrier" means an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers [5];

…

(h) "final destination" means the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected;

…'

8. Article 3 of Regulation No 261/2004, entitled 'Scope', provides, in paragraphs 1 and 5 thereof:

'1. This Regulation shall apply:

(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.

…

5. This Regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2. Where an operating air carrier which has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger.'

9. Article 5 of that regulation, entitled 'Cancellation', provides, in paragraphs 1 and 3 thereof:

'1. In case of cancellation of a flight, the passengers concerned shall:

…

5 OJ 1992 L 240, p. 1.

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

…

3. 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.'

10. Article 7 of the regulation, entitled 'Right to compensation', provides, in paragraph 1 thereof:

'Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1 500 kilometres or less;

(b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;

(c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.'

11. Article 13 of the same regulation, entitled 'Right of redress', provides:

'In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.'

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

12. The applicants in the main proceedings made a single booking, via a travel agency, with the Community carrier Deutsche Lufthansa AG ('Lufthansa') [6] for a connecting flight departing from Brussels Airport (Belgium) to San José International Airport (United States), with a stopover at Newark International Airport (United States).

13. Both legs were operated by United Airlines, a third-country air carrier. The applicants in the main proceedings reached their final destination 223 minutes late on account of a delay which affected the second leg of the flight, namely a technical problem with the aircraft.

14. By letter of 6 September 2018, the company Happy Flights, to which the claim lodged by the applicants in the main proceedings was assigned, issued a summons to United Airlines requesting the payment of compensation in the amount of EUR 600 per person for the delay of the second leg of the flight, that is to say, a total of EUR 1 800, under Regulation No 261/2004.

15. By letter of 4 October 2018, United Airlines replied to Happy Flights arguing that Regulation No 261/2004 did not apply in the present case because the technical problem which caused the delay had occurred during part of the second leg of the flight, which linked two airports located in the United States.

16. By letter of 5 October 2018, Happy Flights replied to that letter of United Airlines and, referring to the case-law of the Court, challenged the airline's position and urged it to proceed with payment of the compensation.

17. By letter of 10 October 2018, United Airlines in turn replied to that letter from Happy Flights.

18. On 11 October 2018, Happy Flights served a notice of default on United Airlines. On that same day, United Airlines informed Happy Flights that it was standing by its position.

19. On 3 May 2019, Happy Flights, whilst again putting United Airlines on notice that it was in default of payment, informed that airline that the claim which had been assigned to it had been reassigned to the applicants in the main proceedings.

20. On 22 July 2019, the applicants in the main proceedings summoned United Airlines to appear before the Nederlandstalige ondernemingsrechtbank Brussel (Brussels Companies Court (Dutch-speaking), Belgium), the referring court, seeking an order that United Airlines pay compensation totalling EUR 1 800, plus default interest from 6 September 2018 and statutory interest.

21. In that context, the referring court has doubts as to how to handle certain arguments raised by United Airlines concerning both the applicability of Regulation No 261/2004 and the validity of that regulation, being of the view that the answers cannot be found in the case-law of the Court.

[6] The travel agency and Lufthansa are not parties to the main proceedings.

22. In the first place, with regard to the question of the applicability of Regulation No 261/2004, United Airlines disputes that that regulation applies where the long delay occurs during a flight departing from, and with a destination in, the territory of a third country, even if that flight is the second and final leg of a connecting flight and if the first flight departs from an airport located in the territory of a Member State.

23. In that regard, first, the referring court states that, although the judgment in *Wegener*, which concerned a delay that occurred during the first flight, departing from an airport located in the territory of a Member State, which had been operated by a non-Community air carrier, militates in favour of the applicability of Regulation No 261/2004, the guidance provided in that judgment cannot simply be transposed to the present case since, in this case, it was during the second flight, departing from an airport located in the territory of a third country, that the delay occurred.

24. Second, the referring court observes that, in the judgment in *České aerolinie*, the Court held that Regulation No 261/2004 applies also to the second leg of a connecting flight where the first flight was operated from an airport located in the territory of a Member State. That case raised the question whether the Community carrier that had operated the first flight could be required to compensate a passenger who had suffered a long delay caused on the second flight, which was physically operated by a third-country air carrier. However, in that court's view, the case at issue in the main proceedings is different because it does not concern a Community carrier, the Community carrier which issued the tickets (Lufthansa) not even being a party to the main proceedings. Therefore, once again, the solution adopted by the Court in that judgment cannot simply be transposed to the facts of the present dispute.

25. In the second place, with regard to the validity of Regulation No 261/2004, United Airlines argues that, if that regulation were to apply in the event of a long delay that occurred during the second flight of a connecting flight, it would have extraterritorial scope contrary to international law if that second flight were operated entirely within the territory of a third country. More specifically, the principle of sovereignty precludes that regulation from applying to a situation that takes place within the territory of a third country, such as that at issue in the main proceedings, where the delay occurred in the territory of the United States and its consequences occurred exclusively within that territory. In that regard, reference is made to the judgment in *ATAA*, in which the Court recognised the principle of customary international law that each State has complete and exclusive sovereignty over its own airspace. In the event that that argument of United Airlines is correct, this then raises, in the referring court's view, the question of the validity of the same regulation in the light of international law.

26. In those circumstances, the Nederlandstalige ondernemingsrechtbank Brussel (Brussels Companies Court (Dutch-speaking)) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Should Article 3(1)(a) and Article 7 of [Regulation No 261/2004], as interpreted by the Court of Justice, be interpreted as meaning that passengers are entitled to financial compensation from a non-Community air carrier when they arrive at their final destination with a delay of more than three hours as a result of a delay of the last flight, the place of departure and the place of arrival of which are both situated in the territory of a third country, without a stopover in the territory of a Member State, in a series of connecting flights commencing at an airport situated in the territory of a Member State, all of which have been physically

operated by that non-Community air carrier and all of which have been reserved in a single booking by the passengers with a Community air carrier which has not physically operated any of those flights?

(2) If the first question is answered in the affirmative, does [Regulation No 261/2004], as interpreted in the first question, infringe international law and, in particular, the principle of the exclusive and complete sovereignty of a State over its territory and airspace, in making EU law applicable to a situation taking place within the territory of a third country?'

27. Written observations have been submitted by the applicants in the main proceedings, United Airlines, the Belgian and Polish Governments, the European Parliament, the Council of the European Union and the European Commission. In their observations, the Parliament and the Council examined the second question only.

IV. Analysis

28. As a preliminary point, I would recall that, in accordance with the Court's settled case-law, passengers whose flights are delayed may be treated as passengers whose flights are cancelled for the purposes of the application of the right to compensation and may thus rely on the right to compensation laid down in Article 7(1) of Regulation No 261/2004 where they suffer, on arrival at their 'final destination', a loss of time equal to or in excess of three hours, that is to say when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.[7] In that connection, in the case of a connecting flight, it is only the delay beyond the scheduled time of arrival at the final destination, understood as the destination of the last flight taken by the passenger concerned, which is relevant for the purposes of the fixed compensation under Article 7 of that regulation.[8]

29. In the present case, United Airlines does not dispute that, under Article 7(1)(c) of Regulation No 261/2004, if that regulation were to apply, the applicants in the main proceedings would indeed be entitled to compensation totalling EUR 1 800, since the last flight of the connecting flight at issue in the main proceedings was delayed by 223 minutes, that is to say, more than three hours as compared with the arrival time originally scheduled.

30. However, it is precisely the applicability of that regulation – and, in the alternative, its validity – that United Airlines is calling into question in the dispute in the main proceedings. It is those two aspects that are the subject of the two questions referred for a preliminary ruling and of the following analysis.

A. The first question referred for a preliminary ruling

31. By its first question, the referring court asks, in essence, whether Article 3(1)(a) and Article 7 of Regulation No 261/2004 must be interpreted as meaning that a passenger is entitled to compensation from a third-country air carrier if he or she arrives at his or her final destination with a delay of more than three hours occurring during the last leg of a connecting flight, the places of departure and of arrival of which were both located in the territory of a third country,

[7] See, to that effect, judgments of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716, paragraph 61); of 23 October 2012, *Nelson and Others* (C-581/10 and C-629/10, EU:C:2012:657); in *Folkerts* (paragraphs 32 and 33); and in *České aerolinie* (paragraph 19).

[8] Judgment in *Folkerts* (paragraphs 34 and 35).

in the context of a connecting flight departing from an airport located in the territory of a Member State, all of those flights having been operated by that third-country air carrier and reserved in a single booking by the passenger with a Community carrier.

32. The question, as worded, contains two elements relating, first, to the applicability of Regulation No 261/2004 in the context of a connecting flight, such as that in the main proceedings, and, second, to the determination of the air carrier liable for the compensation.

1. Applicability of Regulation No 261/2004

33. With regard to the question of the scope of Regulation No 261/2004, it is apparent from Article 3(1)(a) of that regulation that the regulation is to apply, inter alia, to passengers departing from an airport located in the territory of a Member State. Unlike the situation with Article 3(1)(b), that first situation is not subject to the condition that the operating air carrier of the flight concerned come under the concept of a 'Community carrier' within the meaning of Article 2(c) of the regulation.

34. First of all, I would point out that Court has stated that the concept of a 'connecting flight' must be understood as referring to two or more flights constituting a whole for the purposes of the right to compensation for passengers provided for in Regulation No 261/2004.[9] That is the case when two or more flights were booked as a single unit, as in the case in the main proceedings.[10] In that context, the fact that a change of aircraft might take place during a connecting flight has no influence on that classification.[11] It follows that, to assess the applicability of that regulation in the context of a connecting flight under a single booking, it is necessary to take into account the place of original departure and the final destination.[12]

35. Next, in relation to connecting flights departing from the European Union, as is the case here, it is apparent from the case-law of the Court that, even if the stopovers of a flight are located in the territory of a third country, this does not preclude the applicability of Regulation No 261/2004, despite the fact that the carrier which operated such a flight or a leg of such a flight is not a Community carrier.

36. In the judgment in *Wegener*, the Court held that Regulation No 261/2004 applied to passenger transport effected under a single booking and comprising, between its departure from an airport located in the territory of a Member State (Berlin, Germany) and its arrival at an airport located in the territory of a third country (Agadir, Morocco), a scheduled stopover outside the European Union (Casablanca, Morocco), with a change of aircraft. The Court stated, in essence, that a connecting flight the first flight of which departs from an airport located in a Member State and the second flight of which is to an airport located in a third country should be treated as single unit, even where the second leg of the connecting flight departs from an airport located in a third country. In that connection, and contrary to the claim made by United Airlines in its written observations, the Court did not establish that that regulation applied on the basis of the

9 Judgment in *Wegener* (paragraphs 17 and 18 and the case-law cited).

10 Judgment in *Wegener* (paragraphs 19 and 20 and the case-law cited).

11 Judgment in *Wegener* (paragraph 23).

12 Judgments in *Wegener* (paragraph 25), and in *České aerolinie* (paragraph 16), and order of 12 November 2020, *KLM Royal Dutch Airlines* (C-367/20, EU:C:2020:909, paragraph 19; 'order in *KLM*').

Euro-Mediterranean Aviation Agreement, concluded in 2006. The applicability of that regulation was based solely on the interpretation of Article 3(1)(a) of Regulation No 261/2004, without the agreement even being mentioned in that judgment.

37. In the same vein, in the judgment in *České aerolinie*, the Court ruled expressly on the applicability of Regulation No 261/2004 in the context of a connecting flight, composed of two flights and the subject of a single booking, departing from an airport located in the territory of a Member State (Prague, Czech Republic) and travelling to an airport located in a third country (Bangkok, Thailand) via an airport in another third country (Abu Dhabi, United Arab Emirates). In that scenario, the Court held that a passenger who suffers a delay in reaching his or her destination of three hours or more, the cause of that delay in the second flight, operated, under a code-share agreement, by a carrier established in a non-Member State (Etihad Airways), may bring his or her action for compensation under that regulation against the Community carrier that operated the first flight (České aerolinie).

38. It is true that, as the referring court points out, those judgments were handed down in factual circumstances different from those of the dispute in the main proceedings. First, in the judgment in *Wegener*, the connecting flight was delayed in the course of the first flight, which departed from the territory of a Member State, whereas, in the present case, the delay occurred during the final flight, which was effected entirely within the territory of a third country. Second, the judgment in *České aerolinie* concerned the possibility of bringing an action against the Community carrier operating the first leg of a connecting flight which was delayed during the second leg of that flight, which was operated entirely in a third country by a third-country air carrier, under a code-sharing agreement. By contrast, in the present case, the connecting flight was operated in its entirety by the same third-country air carrier.

39. Nevertheless, despite those factual differences, the principles set out in point 35 of this Opinion which stem from those two judgments are, in my view, still valid in the present case.

40. First, it is apparent from the abovementioned case-law that the place where the delay occurs has no bearing on the applicability of Regulation No 261/2004 in the case of connecting flights from the European Union subject to a single booking and thus constituting a whole for the purpose of the right to compensation for passengers provided for in that regulation. Indeed, it follows from the judgment in *České aerolinie* and the order in *KLM* that any operating air carrier which participates in the performance of at least one leg of a connecting flight is liable for that compensation, regardless of whether or not the flight which the carrier operated is the cause of the long delay to the passenger's arrival at his or her final destination.[13] Therefore, in the present case, the fact that the delay occurred during the last leg of the flight and within the territory of a third country is irrelevant as far as the applicability of that regulation is concerned.

41. That solution also appears justified to me from the perspective of ensuring a high level of consumer protection, in so far as making a distinction according to whether the delay is caused in the first or the second flight as part of a single booking would amount to making an unjustified distinction, such that United Airlines would be obliged to pay compensation in the event of disruption occurring during the first flight, but would not be obliged to do so in the event of disruption occurring during the second flight of the same journey, even though, in both cases, the passengers suffer the same delay in arriving at the final destination and, therefore, the same inconvenience.

[13] Judgment in *České aerolinie* (paragraphs 20 to 26), and order in *KLM* (paragraph 28).

42. Second, it is apparent from that same case-law that the status of Community carrier is not relevant to the applicability of Regulation No 261/2004 to connecting flights from the European Union. As I have observed above, unlike Article 3(1)(b) of that regulation, which concerns passengers departing from an airport located in a third country and travelling to an airport situated in the territory of a Member State, Article 3(1)(a) of thereof does not require that the air carrier be a Community carrier in the case of passengers departing from an airport located in the territory of a Member State in order for the same regulation to apply.

43. Accordingly, the performance of a flight by a Community carrier is a condition for the application of Regulation No 261/2004 only in the case of flights departing from the territory of a third country to the territory of a Member State. Moreover, Article 3(5) of that regulation states that the regulation is to apply to any *operating* carrier providing that transport. In the judgment in *Wegener*, the fact that the operating air carrier (Royal Air Maroc) was not a Community carrier underwent no analysis whatsoever since, under Article 3(1)(a) of Regulation No 261/2004, that classification has no bearing on that regulation's application.

44. In the light of the foregoing, I propose that the Court find that a connecting flight from the European Union, such as that in the main proceedings, falls within the scope of Regulation No 261/2004, pursuant to Article 3(1)(a) of that regulation.

2. Determination of the air carrier liable for the compensation

45. With regard to the question of which carrier is liable, in this case, for the compensation provided for in Article 7(1)(c) of Regulation No 261/2004, I note that the special circumstances of the present case lie in the fact that the tickets at issue were issued by Lufthansa, a Community carrier which is not a party to the main proceedings, whereas it is United Airlines, a third-country air carrier, that physically operated the two flights at issue.

46. In that regard, the Court has held that it is apparent from the wording of Article 5(1)(c) and of Article 5(3) of Regulation No 261/2004 that the carrier liable to pay the compensation due in a case of long delay in the arrival of connecting flights can only be the 'operating air carrier', within the meaning of Article 2(b) of that regulation. [14] Under that provision, an 'operating air carrier' is an air carrier that 'performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger'.

47. That definition therefore sets two cumulative conditions for an air carrier to be classifiable as an 'operating air carrier' relating, first, to the performance of the flight at issue and, second, to the existence of a contract concluded with a passenger. [15] That definition, however, in no way requires that the operating air carrier have the status of Community carrier, that status being relevant only for the purpose of assessing the scope of the regulation to passengers arriving on flights from a third country (see points 33 and 42 of this Opinion). Furthermore, the liability of the 'operating air carrier' is exclusive since, when adopting Regulation No 261/2004, the EU legislature opted to exclude parallel responsibility between the tour operator and the contractual air carrier. [16]

[14] Judgment in *České aerolinie* (paragraph 20).

[15] Judgment in *České aerolinie* (paragraph 23).

[16] For an analysis of the *travaux préparatoires* for Regulation No 261/2004, see Opinion of Advocate General Tanchev in *flightright* (C-186/17, EU:C:2018:399, point 46).

48. With regard to the first condition, recital 7 of Regulation No 261/2004 confirms that, 'in order to ensure the effective application of this Regulation, the obligations that it creates should rest with the operating air carrier who performs or intends to perform a flight, whether with owned aircraft, under dry or wet lease, or on any other basis'. The Court has clarified the condition relating to the 'performance of the flight' in the case of flights operated under contracts for the lease of aircraft including crew (a 'wet lease'), holding that the operating air carrier is the carrier which, 'in the course of its air passenger transport carriage activities, decides to perform a particular flight, including fixing its itinerary, and, by so doing, offers to conclude a contract of air carriage with members of the public … The adoption of such a decision means that that air carrier bears the responsibility for performing the flight in question, including, inter alia, any cancellation or significantly delayed time of arrival'. [17]

49. As for the existence of a contract concluded with a passenger, it should be observed that the absence of a contractual link between the passengers concerned and the operating air carrier is irrelevant in that regard, provided that the operating air carrier has established its own contractual relationship with the contracting air carrier. [18]

50. In the present case, whilst the carrier that concluded the contract with the applicants in the main proceedings (via a travel agency) is Lufthansa, the carrier that operated both flights is United Airlines, presumably under a code-share agreement. [19]

51. Accordingly, it would appear to me that the two abovementioned conditions for classification as an 'operating air carrier' seem to be met as far as United Airlines is concerned, which, moreover, does not dispute that classification in its written observations. United Airlines is the carrier that actually operated all legs of the connecting flight and that therefore acted on behalf of Lufthansa, which had concluded the contract with the applicants in the main proceedings. In that regard, I would point out that the second sentence of Article 3(5) of Regulation No 261/2004 states that, where an operating air carrier which has no contract with the passenger performs obligations under that regulation, it is to be regarded as doing so on behalf of the person having a contract with that passenger. [20]

52. That finding, namely that United Airlines is the operating air carrier and is, therefore, liable to pay the compensation provided for in Article 7(1)(c) of Regulation No 261/2004, is consistent with the objective, set out in recital 1 of that regulation, of ensuring a high level of protection for passengers, since, as United Airlines acknowledges in its observations, it is the carrier that is easily identifiable to passengers and that, in most cases, is responsible for any problems occurring during the flight.

53. Finally, I note that, under Article 13 of Regulation No 261/2004, the discharge of obligations by the operating air carrier pursuant to that regulation is without prejudice to its right to seek compensation, under the applicable national law, inter alia, from any person who caused the air carrier to fail to fulfil its obligations, including third parties, such as a tour operator or any other person with whom the operating air carrier has concluded a contract. [21]

[17] Judgment of 4 July 2018, *Wirth and Others* (C-532/17, EU:C:2018:527, paragraphs 19 and 20).

[18] See, to that effect, Opinion of Advocate General Tanchev in *flightright* (C-186/17, EU:C:2018:399, point 27). The request for a preliminary ruling having been withdrawn, Case C-186/17 was removed from the Court's register (see order of the President of the Court of 2 August 2018, *flightright* (C-186/17, not published, EU:C:2018:657)).

[19] It is apparent from the order for reference and from United Airlines' observations that the first leg of the flight was marketed by Lufthansa under flight number LH 8854 and operated by United Airlines under flight number UA 998.

[20] Judgment in *České aerolinie* (paragraph 28).

[21] Judgment in *České aerolinie* (paragraph 31 and the case-law cited).

54. In the light of all the foregoing considerations, I propose that the first question referred for a preliminary ruling be answered to the effect that Article 3(1)(a) and Article 7 of Regulation No 261/2004 must be interpreted as meaning that, in the context of a connecting flight composed of two flights that were the subject of a single booking, departing from an airport located in the territory of a Member State and arriving at an airport located in a third country via another airport in that third country, a passenger who suffers a delay in reaching his or her final destination of three hours or more caused during the second flight operated, just like the first flight, by a third-country air carrier, may bring his or her action for compensation under that regulation against that operating air carrier where the single booking was made with a Community carrier which did not physically operate any of those flights.

B. The second question referred for a preliminary ruling

55. By its second question, the referring court askes, in essence, whether, should the Court find that Regulation No 261/2004 is applicable to a situation such as that at issue in the main proceedings, that regulation is valid in the light of the principle of international law that each State has complete and exclusive sovereignty over its own airspace.

56. As a preliminary point, I would observe that, as is apparent from Article 3(5) TEU, the European Union is to contribute, inter alia, 'to the strict observance and the development of international law'. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union. [22]

57. In that regard, in the judgment in *ATAA*, the Court acknowledged that the principle that each State has complete and exclusive sovereignty over its airspace is a principle of customary international law which is binding upon the institutions of the Union. [23] It is likewise apparent from that judgment that that principle may be relied upon by an individual for the purpose of the Court's examination of the validity of an act of the European Union in so far as, first, that principle is capable of calling into question the competence of the Union to adopt that act and, second, the act in question is liable to affect rights which the individual derives from EU law or to create obligations under EU law in his or her regard. [24] However, as follows from that same judgment, since a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review of an act of the European Union in the light of a principle of customary international law must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying that principle. [25]

58. In the present case, the referring court asks about the validity of Regulation No 261/2004 in the light of the abovementioned principle of customary international air law to the extent that that regulation can apply to a situation which, according to that court, occurs outside the territory of the European Union and involves a third-country carrier.

22 Judgment in *ATAA* (paragraph 101 and the case-law cited).

23 Judgment in *ATAA* (paragraphs 103 and 104 and the case-law cited). That principle is codified, inter alia, in Article 1 of the Convention on International Civil Aviation, signed in Chicago (United States) on 7 December 1944, under which 'the contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory'. However, for the reasons set out in paragraphs 57 to 72 of that same judgment, that convention is not binding, as such, on the European Union.

24 Judgment in *ATAA* (paragraph 107 and the case-law cited).

25 Judgment in *ATAA* (paragraph 110), upholding the judgment of 16 June 1998, *Racke* (C-162/96, EU:C:1998:293, paragraph 52).

59. Given that, in the light of the judgment in *ATAA*, the validity of Regulation No 261/2004 may be examined having regard to the principle of customary international air law, within the confines of a review of manifest error of assessment, the questions therefore arises as to whether the EU legislature committed such an error liable to affect the validity of that regulation.

60. I do not believe that to be the case.

61. In the first place, I recall that, pursuant to Article 3(1)(a) of Regulation No 261/2004, the flight at issue in the main proceedings falls within the scope of that regulation because the applicants in the main proceedings started their journey departing from an airport located in a Member State, namely in Belgium. It is this criterion which creates a close connection with the territory of the European Union. Thus, the fact that, in the present case, the right to compensation arose following a delay that occurred entirely within the territory of a third country in no way alters that connection with the territory of the European Union. Indeed, as I have stated in points 36 and 37 of this Opinion, connecting flights departing from an airport located in a Member State to a third-country airport constitute a whole, which could be equated with a direct flight operating the same route. In that respect, the Court has recognised that, 'if a flight …, which was made entirely outside the European Union, were to be considered a separate transport operation, it would not come within the remit of Regulation No 261/2004. On the other hand, if a transport … were to be considered as a whole, with its point of departure in a Member State, the regulation would apply'. [26]

62. It follows that the Court, on the one hand, has implicitly [27] already recognised that principle of sovereignty, noting that, in cases of separate flights, Regulation No 261/2004 does not apply to the flight effected outside the European Union, but, on the other hand, has held that the application of Article 3(1)(a) and of Article 7 of that regulation to connecting flights does not infringe that principle. Under that rationale, such an application cannot affect the sovereignty of a third country within the territory of which the last leg of a connecting flight is carried out, the applicants in the main proceedings having, by definition, commenced their journey departing from an airport located in the territory of the European Union.

63. In the second place, from the perspective of public international law, and as Advocate General Kokott explained in her Opinion in *ATAA*, it is by no means unusual for a State or an international organisation to take into account in the exercise of sovereign rights circumstances occurring outside its territorial jurisdiction. The decisive element in that regard is that the facts display a sufficient link with the State or international organisation concerned. Thus, international law recognises inter alia two grounds of jurisdiction authorising a State (or an international organisation) to act, namely, first, territorial jurisdiction, by virtue of which a State has the power to act over persons (regardless of their nationality), acts and things located within its territory and, second, personal jurisdiction, by virtue of which a State (or an international organisation) has the power to act in respect of its nationals (natural or legal persons), wherever they are located. [28]

[26] Judgment in *Wegener* (paragraph 15).

[27] In so far as an act of the European Union is interpreted, inter alia, in the light of the relevant rules of international air law (see, by analogy, judgment in *ATAA* (paragraph 123)).

[28] Opinion of Advocate General Kokott in *Air Transport Association of America and Others* (C-366/10, EU:C:2011:637, points 148 and 149 and the case-law cited).

64. Regulation No 261/2004 applies, first, in accordance with Article 3(1)(a) thereof, to passengers departing from an airport located in the territory of a Member State, irrespective of the place of final destination of the flight in question (territorial jurisdiction) [29] and, second, in accordance with Article 3(1)(b) of that regulation, to passengers departing from an airport located in a third country and travelling to an airport located in the territory of a Member State, provided, inter alia, that the operating air carrier of the flight concerned is a Community carrier (personal and territorial jurisdiction). However, that regulation does not apply to connecting flights which are not carried out departing from or arriving at an airport located in the territory of a Member State but which are entirely operated between two third countries, without any connection to the territory of the European Union. [30]

65. The criteria for applicability of Regulation No 261/2004 thus defined, in particular the criterion laid down in Article 3(1)(a) of that regulation, which is at issue in the case in the main proceedings, do not entail the extraterritorial application of EU law, including where the flight in question is bound for a third country. That regulation applies only in the clearly defined circumstances in which the flight in question, considered as a whole, departs from an airport located in the territory of a Member State, such a flight – including the leg carried out outside the European Union – being intrinsically linked to the territory of the Member States of the Union.

66. In the third place, that interpretation is supported by the objective pursued by Regulation No 261/2004 of ensuring a high level of consumer protection. [31] For the purpose of the application of the two abovementioned provisions, it is important that the flight have been the subject of a single booking and that that flight have as its place of departure or arrival an airport located in the territory of a Member State. Whether or not the air carrier has chosen a stopover within the territory of the European Union or in a third country should not affect the right to compensation of the passengers concerned.

67. Similarly, in the light of that objective, to which reference is also made in Article 38 of the Charter of Fundamental Rights of the European Union, the European Union legislature may permit an activity of an air carrier to be carried out within the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the objectives which it has set for itself in the area. [32] By Regulation No 261/2004, the EU legislature made air transport departing from the European Union subject to certain criteria with a view to achieving the objective of consumer protection. The fact that a third-country air carrier, such as United Airlines, can be obliged, by virtue of that regulation, to pay compensation for a delay in connection with a technical problem resolved during a stopover made in the territory of a third country is therefore, in my view, not only a condition but also a risk inherent in that carrier's choice to offer its services on the European market. Thus, it is only if that carrier chooses to operate flights arriving at or departing from an airport located in the territory of a Member State that it will be subject to the provisions of Regulation No 261/2004. [33] By making such a choice, that same air carrier's remit covers not just direct flights but also connecting flights which, according to settled case-law, constitute a whole

[29] See, to that effect, judgment of 27 September 1988, *Ahlström Osakeyhtiö and Others* v *Commission* (89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraphs 15 to 18).

[30] See, in this regard, Opinion of Advocate General Saugmandsgaard Øe in *Airhelp (Delay of re-routing flight)* (C-451/20, EU:C:2021:829, points 24 to 60), who, however, argues that Regulation No 261/2004 applies also to connecting flights between two third countries where the place of arrival of the first flight and the place of departure of the second flight are located in the territory of a Member State.

[31] See recitals 1 and 4 of Regulation No 261/2004.

[32] See, by analogy, judgment in *ATAA* (paragraph 128).

[33] See, by analogy, judgment in *ATAA* (paragraph 127).

for the purposes of the right of passengers to compensation provided for in that regulation, whether they be operated by an individual carrier or, as in the present case, under a code-share agreement.

68. In the fourth and final place, it is my view that United Airlines' argument that the applicability of Regulation No 261/2004 infringes the principle of equal treatment since only passengers of the connecting flight (Brussels to San José) may seek compensation, whereas all the passengers of the flight from Newark to San José were negatively impacted as a result of the delay, should be rejected. In my opinion, that argument not only confirms that Article 3(1)(a) of that regulation does not apply without a close connection between a flight and the territory of the European Union, but is also based on an incorrect premiss by omitting that the two groups of passengers which that company mentions are not in an identical situation.

69. In the light of all the foregoing considerations, I propose that the second question referred for a preliminary ruling be answered to the effect that Article 3(1)(a) and Article 7 of Regulation No 261/2004 must be interpreted as meaning that the answer given to the first question is not contrary to the principle, derived from customary international law, that a State has complete and exclusive sovereignty over its airspace, such that that principle cannot affect the validity of that regulation.

V. Conclusion

70. In the light of the foregoing, I propose that the Court answer the questions referred by the Nederlandstalige ondernemingsrechtbank Brussel (Brussels Companies Court (Dutch-speaking), Belgium) for a preliminary ruling as follows:

(1) Article 3(1)(a) and Article 7 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, are to be interpreted as meaning that, in the context of a connecting flight composed of two flights that were the subject of a single booking, departing from an airport located in the territory of a Member State and arriving at an airport located in a third country via another airport in that third country, a passenger who suffers a delay in reaching his or her final destination of three hours or more caused during the second flight operated, just like the first flight, by a third-country air carrier, may bring his or her action for compensation under that regulation against that operating air carrier where the single booking was made with a Community carrier which did not physically operate any of those flights.

(2) Article 3(1)(a) and Article 7 of Regulation No 261/2004 must be interpreted as meaning that the answer given to the first question is not contrary to the principle, derived from customary international law, that a State has complete and exclusive sovereignty over its airspace, such that that principle cannot affect the validity of that regulation.