Protection of Consumers in the Sphere of an Air Carrier's Responsibility in the Event of a Flight Cancellation Due To a Strike of the Air Carrier's Employees. Case Comment to the Judgment of the EU Court of Justice of 23 March 2021 *Airhelp* (C-28/20)

bv

Cezary Banasiński*

CONTENTS

Abstract

The case annotation discusses consumer protection in the sphere of an air carrier's liability for damages arising from a strike of its pilots, which was treated by the carrier as an extraordinary circumstance exempting the carrier from the obligation to pay compensation in the event of a flight cancellation. The Court of Justice interpreted the definition of 'extraordinary circumstances', both 'internal' and 'external' to the activity of the operating carrier, as the premise obliging or releasing the carrier from its liability.

* Cezary Banasiński, Associate Professor, Department of Administrative Economic Law of the Faculty of Law and Administration of the University of Warsaw, as well as the Institute of Competition Law s.k. Email: c.banasinski@wpia.uw.edu.pl; ORCID: 0000-0002-5723-1083.

Article received: 15 May 2021, accepted: 23 June 2021.

Résumé

Le commentaire discute de la protection des consommateurs dans le cadre de la responsabilité d'un transporteur aérien pour les dommages résultant d'une grève de ses pilotes, qui a été traitée par le transporteur comme une circonstance extraordinaire le dispensant de l'obligation d'indemnisation en cas d'annulation de vol. La Cour de justice a interprété la définition des "circonstances extraordinaires", tant internes qu'externes à l'activité du transporteur aérien, comme les prémisses obligeant ou déchargeant le transporteur de sa responsabilité.

Key words: air passengers' rights; air carriers' liability; collective disputes; Regulation 261/2004.

JEL: K29

I. Introduction

The judgment C-28/20 *Airhelp*[1] refers to consumer protection in the sphere of an air carrier's liability for damages arising from a strike of its pilots, which was organized according to applicable legal requirements, and was treated by the carrier as an extraordinary circumstance exempting the carrier from the obligation to pay compensation in the event of a flight cancellation. The Court of Justice (hereinafter: CJ) interpreted the definition of 'extraordinary circumstances', both 'internal' and 'external' to the activity of the operating carrier, as the premise obliging or releasing the carrier from its liability.

II. Facts of the case

The CJ ruling was delivered as a result of a request for a preliminary ruling. The application was presented by Attunda tingsrätt (the first instance court in Attunda, Sweden), on the basis of Article 267 TFEU on 21 January 2020. The application was put forward as a result of a dispute between Airhelp Ltd and Scandinavian Airlines System Denmark-Norway-Sweden (hereinafter: SAS or defendant), whereby the latter refused to pay damages for a cancelled flight to 'S.', whose rights were assumed by Airhelp (hereinafter: Airhelp or plaintiff).

[1] CJ judgment of 23.03.2021, Case C-28/20 *Airhelp*, ECLI:EU:C:2021:226.

The case presented to the CJ concerned the reservation of an SAS flight, which was cancelled on the day of its departure due to a strike of SAS pilots who aimed to obtain a new collective agreement with the airline. S. had reserved a place for an internal flight from Malmö to Stockholm (Sweden). The flight was to be executed by SAS on 29 April 2019, but was cancelled on that day because of a pilot strike in Denmark, Sweden and Norway. The industrial action had not come as a surprise, as employee organizations representing SAS pilots in Denmark, Sweden and Norway had decided, already in 2018, to dissolve the existing collective agreement with SAS valid until 2020; negotiations to reach a new agreement started in March 2019. Since the negotiations failed, the pilots' unions called their members to strike, which began on 26 April 2019 and lasted until 2 May 2019. The strike resulted in the cancellation of over 4000 SAS flights, impacting about 380 000 passengers, including S. The strike ended on 2 May 2019 because a new collective agreement was reached to be valid until 2022.

In relation to the fact of S. assigning any rights he had *vis a vis* SAS to Airhelp, Airhelp asked Attunda tingsrätt to order a 250 EUR compensation from SAS, together with default interest, from 10 September 2019 until the day of the payment, provided in Article 5(1)(c) in connection with Article 7(1)(a) of Regulation 261/2004.[2]

The defendant refused compensation payment, arguing that the strike constituted an 'extraordinary circumstance' according to EU Regulation 261/2004; in SAS's opinion, the pilots' strike was beyond the carrier's control, and as such was not inherent in the carrier's normal activity. The strike thus constituted an extraordinary circumstance, which could not be prevented, even if all rational means were applied, especially since the pilots' unions' requests concerning salary increases were, in SAS's evaluation, excessive. SAS emphasized that this had been one of the biggest strikes in the air transport sector. In the defendant's opinion, it rendered efficient reorganization of flights in order to maintain the schedule impossible; due to the fact that the strike was legal, the possibility of ordering pilots to work was also excluded. The defendant also raised the point that the announcement of a strike can be presented only one week beforehand, meaning that SAS was unable to reorganize the flights on such a short notice.

In retort, the plaintiff (Airhelp) questioned the fact that the strike constituted an 'extraordinary circumstance', as per Article 5(3) Regulation 261/2004. In the plaintiff's opinion, the conclusion of collective agreements is inherent to the normal activity of an air carrier, and it does not exclude the possibility of social

[2] Regulation 261/2004 of the European Parliament and Council of 11.02.2004, laying down the common rules of compensation and help for passengers in case of refusal to board, flight cancellation or long delay, repealing EEC Regulation 295/91 (OJ L 46/10).

conflicts between the employer and the unions. Collective actions, like strikes or lockouts, are typical, standard actions undertaken during the negotiations of collective agreements. The plaintiff also pointed out that, considering the pilots' pay rise scale in recent years, a conflict with its employees was absolutely foreseeable for SAS.

The Swedish court decided to suspend the proceedings and ask the CJ the following questions: 1) does a strike by airline pilots who are employed by an air carrier and who are needed to carry out a flight constitute an 'extraordinary circumstance' within the meaning of Article 5(3) of Regulation 261/2004, when the strike is not implemented in connection with a measure decided upon or announced by the air carrier, but of which notice is given, and which is lawfully initiated by workers' organizations as an industrial action intended to induce the air carrier to increase wages, provide benefits or amend employment conditions in order to meet the organizations' demands? 2) What significance, if any, is to be attached to the fairness of the workers' organizations' demands and, in particular, to the fact that the wage increase demanded is significantly higher than the wage increases which generally apply to the national labour markets in question? 3) What significance, if any, is to be attached to the fact that the air carrier, in order to avoid a strike, accepts a proposal for a settlement from a national body responsible for mediating labour disputes, but the workers' organizations do not?

III. Legal status

In the light of motives 1 and 2 of Regulation 261/2004, it is necessary to provide a high level of protection for air transport passengers, as any flight cancellation or delay causes serious problems and inconveniences. According to its Article 5(1)(c), in case of a flight cancellation or delay, passengers have the right to compensation, with the amount depending on the flight distance, defined in Article 7 of Regulation 261/2004, unless one of three conditions are met. First, if passengers are informed of the cancellation at least two weeks before the scheduled time of departure. Second, if 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 departure time, and to reach their final destination less than four hours after the scheduled time of arrival. Third, if they are informed about the cancellation within a period shorter than seven days before the scheduled departure, but are offered re-routing enabling departure no more than one hour before the scheduled departure, and reaching their

final destination within a maximum of two hours delay to the scheduled time of arrival. The air carrier is also not obliged to pay compensation, if it can prove that the cancellation was caused by 'extraordinary circumstances', which could not have been avoided even if all reasonable measures had been taken.

IV. Comment

The CJ ruling must receive full approval. The CJ, considering the three prejudicial questions mentioned above, ruled that Article 5(3) of Regulation 261/2004 should be interpreted as follows. A strike performed at the request of a trade union of the staff of the operating air carrier, in compliance with the conditions laid down by national legislation (in particular the notice period imposed by it), which is intended to assert the demands of the workers of the air carrier, and which is participated in by a category of staff whose presence is necessary to operate a flight, does not constitute an 'extraordinary circumstance' in the understanding of this Regulation.

While interpreting Article 5(3) of Regulation 261/2004, the CJ referred to motives 14 and 15 of the Regulation, which imply that an air carrier is released from the duty to make a compensation payment if it is demonstrated that the flight cancellation (or at least three hour delay) was caused by 'extraordinary circumstances', which could not have been avoided even if all reasonable measures had been taken. Regulation 261/2004 clearly refers here to the Convention for the Unification of Certain Rules for International Carriage by Air – the Montreal Convention[3], which was incorporated into EU's legislation by Regulation 889/2002,[4] thus changing Regulation 2027/97.[5] With respect to the EU, the Montreal Convention entered into force on 28 June 2004.[6] However, motive 14 of Regulation 261/2004 clearly widens the range of exoneration premises in comparison to the Montreal Convention,

[3] Convention for the Unification of Certain Rules for International Carriage by Air – the Montreal Convention, concluded in Montreal on 28.05.1999, signed by the European Community on 9.12.1999 and approved on its behalf by Council Decision 2001/539/EC of 5.04.2001 (OJ 2001 L 194/38).

[4] Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13.05.2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents (OJ 2002 L 140/2).

[5] Council Regulation (EC) No 2027/97 of 9.10.1997 on air carrier liability in the event of accidents (OJ 1997 L 285/1).

[6] See also judgments of the CJ: of 10.01.2006, Case C-344/04 *IATA and ELFAA*, ECLI:EU:C:2006:10, para. 36 and of 22.12.2008, Case C-549/07 *Wallentin-Hermann*, ECLI:EU:C:2008:771, para. 28.

stating that 'extraordinary circumstances should be considered situations, when decision of flight management concerning certain aircraft results on this day in cancellation of one or more flights of this aircraft (or creating serious delay, postponement till the next day) even if all rational measures were undertaken by the concerned carrier in order to avoid those cancellations'. It therefore concerns circumstances which could not be avoided, even if all rational measures were applied. In interpreting the above wording, the CJ underlined that, taking into consideration the purpose of the Regulation which is to provide a high level of passenger protection, and the fact that Article 5(3) of the Regulation creates a deviation from the rule of passenger right to compensation in case of a flight cancellation, a strict interpretation should be applied to the definition of 'extraordinary circumstances' under this Regulation.[7]

In consequence, the CJ – on the basis of hitherto existing jurisdiction – stated that the definition of 'extraordinary circumstances' as in Article 5(3) of Regulation 261/2004 comprises only the events which: first – because of their character or source are not inherent to a carrier's regular activities and, secondly – are impossible to control; both these premises have a cumulative character and their preservation requires the evaluation of each case separately.[8] Thus it applies to circumstances which are not, because of their character or source, inherent to a carrier's regular activity and, at the same time, remain beyond its effective control; although these premises have to be fulfilled jointly, they should be analysed separately. However, the burden lies on the air carrier to demonstrate that 'it adopted measures appropriate to the situation, deploying all its resources, in terms of staff, equipment and the financial means at its disposal, in order to prevent that situation from resulting in the cancellation of the flight in question. It cannot, however, be required to make sacrifices that are intolerable in the light of the capacities of its undertaking at the relevant time'.[9]

Analyzing both above premises separately, the CJ pointed out the necessity of establishing if the strike may, in the first place because of its character or source, constitute an event that is not inherent to the carrier's regular activity. Raising thus the issue of the right to collective actions, including strikes, it is a fundamental right laid down in Article 28 of the Charter of Fundamental

[7] Such is the case in the CJ judgment of 17.04.2018, Joined Cases C-195/17, from C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, from C-278/17 to C-286/17 and from C-290/17 to C-292/17 *Krüsemann*, ECLI:EU:C:2018:258, para. 36.

[8] See especially C-549/07 *Wallentin-Hermann*, para. 23 and CJ judgment of 17.09.2015, Case C-257/14 *Van der Lans*, ECLI:EU:C:2015:618, para. 36.

[9] Similarly, in CJ judgment of 11.06.2020, Case C-74/19 *Transportes Aéros Portugueses*, ECLI:EU:C:2020:460, para. 36.

Rights of the European Union (hereinafter: Charter), which is protected in accordance with EU law as well as national laws and practices[10] (Vogt et al., 2020; Waas, 2014; Hardy and Butler, 2007). In the CJ's opinion, strikes are events inherent to the normal exercise of activity of any employer, irrespective of the particular features of the labour market concerned, or the national legislation applicable in regard to that fundamental right.

This opinion deserves approval. A strike consists of collective abstaining from work as a measure aiming to reach the resolution of a dispute, whether it concerns work conditions, wages, benefits or unions' rights and freedoms, or other groups to which the right of organizing unions applies (Leyton-García, 2017).

It is certainly a radical form of action, but possible to be avoided by the employer – it cannot be declared without the previous exhaustion of rules on collective dispute resolution as defined in legislation. In Polish law, these rules are standardized by the Act of 23 May 1991 on collective dispute solutions.[11] According to these rules, the day of the declared strike cannot fall before 14 days from the date of declaration of the dispute. It is the duty of the employer to start the negotiations immediately in order to solve the dispute through an agreement. During the negotiations, it is possible to use mediation provided the mediator is a person of guaranteed impartiality. Only the failure to reach an agreement solving the collective dispute through the mediation procedure entitles the employees to a strike action, unless the leader engaged in the dispute on the employees' side, without implementing the right to a strike, will attempt to solve the dispute by way of presenting it to the college of social arbitration; if neither side decides otherwise before the presentation, the college's decision binds the sides. The final condition of engaging in a strike action is carrying out a strike referendum, in which a minimum of 50% of the employees have participated; declaring a strike is then possible when a simple majority votes for it, and not earlier than at least 5 days before the strike's beginning. The conditions are no different in Swedish legislation, which arises straight from the actual state of CJEU's caselaw; the collective disputes lasted for over a year in this case.

Referring to the ruling of 17 April 2018, in the *Krusemann* case, the CJ raised the point that air carriers are constantly confronted with conflicts with their employees, meaning that this kind of social conflict and the measures used, such as working conditions and remuneration of the staff, fall within the normal management of the carrier's activity. It is especially pertinent in a situation when the strike is legal and organized according to applicable

[10] See also, in particular, the judgment of the CJ of 11.12.2007, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*, ECLI:EU:C:2007:772, para. 44.

[11] Uniform text Journal Of Laws of 2020, item 123.

national legislation. It is worth noting that SAS, during the CJ proceedings, pointed out that the ruling in the *Krusemann* case cannot be applied to the main proceedings; SAS stated that the strike was not considered to be justified by the action undertaken by SAS, nor was it SAS's personnel's spontaneous reaction to the usual management measures undertaken by SAS. Specific to the *Krusemann*'s ruling was the fact that it concerned the mass protest action of TUIfly's employees, taken in light of the information appearing about the carrier's restructuration plans, an action which resulted in taking sick-leave by about 90% of cockpit staff and about 60% of cabin staff. This kind of protest action was described by the CJ as a 'wildcat strike', stating that company restructurings constitute regular management tools, while air carriers are constantly confronted with various differences of opinion or conflicts with their employees; so it cannot be seen as an 'extraordinary circumstance' in the meaning of Article 5(3) of Regulation 261/2004, particularly as the protest action had its source in the air carrier's decision.[12]

Comparing the *Krusemann* ruling to the one considered here, it can be ascertained that if even a 'wildcat strike' is an event that is inherent to normal activities of an air carrier, this would especially be the case for any employer in regard to a strike announced and executed as a part of a collective dispute, and as using the right guaranteed in Article 28 of the Charter (Hinarejos, 2008). Such strike, constituting part of a collective dispute, has an 'internal' character, thus being inherent to the carrier's normal activity (this statement is also in line with the earlier ECJ judgment in case C-338/89 *Organization Danske Slagterier*),[13] while it has the possibility to prepare for it and, if need be, diminish its consequences, thus keeping a certain degree of control over the events.

Referring to the second premise, that is a circumstance that does not fall, because of its character or source, into the scope of the normal activity of an air carrier and is outside its effective control, the CJ restricted the definition of 'extraordinary circumstances', taking into account the necessity of a strict interpretation of Article 5(3) of Regulation 261/2004 and as an exception from the general rule of obligatory compensation for flight cancellations, only to factors that are completely beyond the control of the air carrier. This concerns only events having an 'external' character in regard to the air carrier.

The CJ thus restricted these events to *force majeure* only. Both in doctrine as well as in the ruling, it is raised that *force majeure* is an event of an accidental or natural character, but always 'external' to the subject, impossible to foresee

[12] CJ judgments: of 4.04.2019, Case C-501/17 *Germanwings*, ECLI:EU:C:2019:288, para. 20; of 26.06.2019, Case C-159/18 *Moens*, ECLI:EU:C:2019:535, para. 16.

[13] ECJ judgment of 7.05.1991, Case C-338/89 *Organization Danske Slagterier*, ECLI:EU:C:1991:192, para. 18.

and impossible to prevent (Dellinger, 2017; Fontaine and De Ly, 2006). It is confirmed by cases cited in the ruling relating to events such as: collision of a plane with a bird (C-315/15 *Pešková and Peška*[14]); damage to the aircraft's tire by a foreign body on the runway (C-501/17 *Germanwings*[15]); presence of fuel on the runway, causing its closure (C-159/18 *Moens*[16]); a collision between the elevator of an aircraft in a parked position and the wing of an aircraft of another airline caused by the movement of the latter (C-264/20 *Airhelp*) or a production fault, including acts of sabotage or terrorism (C-549/07 *Wallentin-Hermann*[17], C-257/14 *Van der Lans*[18]). What they have in common is the fact of an issue arising from external circumstances, which the carrier cannot control, as they are caused by a natural occurrence or a third party action being outside the control of the carrier.

The aforementioned rulings quoted by the CJ show that the CJ pays attention to the objective meaning of these events, separately from the necessity of application of the subjective theory of extraordinary care (Burke and Molitorisová, 2017). This kind of legal interpretation is also in accordance with hitherto existing Polish rulings, accepting that it concerns unavoidable events, impossible to restrain or to prevent their consequences, and events impossible to foresee in the circumstances given.[19] This kind of external event could be a strike actions outside the influence of the air carrier, like those taken by traffic control personnel or airport employees,[20] as well as strikes concerning demands which can be fulfilled only by public authorities, so again impossible to control by the air carrier.

On the other hand, the CJ fully rejected SAS's argument that a compensation duty applicable in case of a strike was interfering with the freedom of economic activity and the property freedom (property right) guaranteed in Articles 16 and 17 of the Charter. In the CJ's opinion, both freedoms do not have an absolute character and have to be considered in accordance with Article 38 of the Charter, which, similarly to Article 169 TFEU, aims to provide a high level of consumer protection in EU policies, and includes air passengers.[21] Ensuring consumer protection can result in negative economic effects, which might even be serious for economic entities.

---

[14] CJ judgment of 4 May 2017, Case C-315/15 *Pešková and Peška*, ECLI:EU:C:2017:342, para. 26.

[15] C-501/17 *Germanwings*, para. 34.

[16] C-159/18 *Moens*, para. 29.

[17] C-549/07 *Wallentin-Hermann*, para. 26.

[18] C-257/14 *Van der Lans*, para. 38.

[19] See among others the judgment of the Polish Supreme Court of 11.01.2001, Ref. no. IV CKN 150/00.

[20] CJ judgment of 4.10.2012, Case C-22/11 *Finnair*, ECLI:EU:C:2012:604.

[21] See CJ judgment of 31.01.2013, Case C-12/11 *McDonagh*, ECLI:EU:C:2013:43, paras. 60, 62–63.

One should support this opinion. The freedom of economic activity and property freedoms as rules of EU law; they may obviously be in conflict with other rules, but these conflicts exist without the necessity of ruling non-obligation towards any of them or be subject to comparison when conflict occurs (Alexy, 2002; Menendez and Eriksen, 2006). The rules of law are optimizing norms in the sense that they command the realisation of a certain state of affairs to the highest degree, according to actual and legal possibilities. The directive tendency of law principles, especially general ones, results in them being relativized from their very being in relation to the existence of opposing rules. The latter restricting the given rule obliges their mutual 'weighing' in accordance with the systemically understood legal order. What is at the root of rule collision is the relativism of giving priority to one over the other in a certain set of circumstances. The template of assigning relevance of rivalling rules in a given matter is created by the rule of proportionality – the analysis of the usefulness, necessity and proportionality in a narrow sense, executed from the point of view of consumer protection, can precisely 'outweigh' deviations from the freedom of an economic activity and property freedoms (property guarantee), which are justified by public interest.

The standpoint of the CJ deserves full approval. Article 5(3) of Regulation 261/2004 establishes common rules of compensation and help for passengers in case of a refusal to board a plane, a flight cancellation or its long delay, thus repealing Regulation 295/91; Article5(3) has to undergo a strict interpretation, whereby the definition of 'extraordinary circumstances' should be limited only to events that, because of their character or source, are not inherent to the normal activity of the air carrier and which are impossible to control by the air carrier – these two premises are of a cumulative character and respecting them requires the evaluation of each case separately. A strike, irrespective of whether it is a 'wildcat' or falls within the conditions stated in national legislation, especially one respecting the necessary timeframe, aiming to fulfil employee requests, of staff whose presence is necessary to execute a flight, is not included in the definition of 'extraordinary circumstance' in light of this Regulation.

Literature

Alexy, R. (2002). *A Theory of Constitutional Rights*. Oxford: Oxford University Press.

Burke, C. and Molitorisová, A. (2017). Some birds fly high: The Disappearance of Force Majeure Doctrine in European Aviation Tort Low. Retrieved from https://ssrn.com/abstract=2916183. https://doi.org/10.2139/ssrn.2916183.

Dellinger, M. (2017). Rethinking Force Majeure in Public International Law. *Pace Law Review*, *37*(2).

Fontaine, M., De Ly, F. (2006). *Drafting International Contracts. An Analysis of Contract Clauses*. Leiden-Boston: Martinus Nijhoff Publishers. https://doi.org/10.1163/ej.9781571053558.i-654.43.

Hardy, S. and Butler, M. (2007). *European Employment Laws. A Comparative Guide*. London: Spiramus Press.

Hinarejos, A. (2008). Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms. *Human Rights Law Review*, *8*(4), 714–729. https://doi.org/10.1093/hrlr/ngn030.

Leyton-García, J.A. (2017). The Right to Strike as a Fundamental Human Right: Recognition and Limitations in International Law. *Revista Chilena de Derecho*, *33*(3), 781–804, https://doi.org/10.4067/s0718-34372017000300781.

Menendez, A.J. and Eriksen, O.E. (eds.). (2006). *Arguing Fundamental Rights*. New York: Springer, https://doi.org/10.1007/1-4020-4919-4.

Vogt, J. et al. (2020). *The Right to Strike in International Law*. London: Bloomsbury Publishing. https://doi.org/10.5040/9781509933587.pt-001

Waas, B. (2014). *The Right to Strike. A* Comparative View (Studies in Employment and Social Policy Series). Wolters Kluwer Law & Business.