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JUDGMENT OF THE COURT (Fourth Chamber)

19 November 2009 (\*)

(Air transport – Regulation (EC) No 261/2004 – Article 2(l) and Articles 5, 6 and 7 – Concept of flight ‘delay’ and ‘cancellation’ – Right to compensation in the event of delay – Concept of ‘extraordinary circumstances’)

In Joined Cases C-402/07 and C-432/07,

REFERENCES for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany) and the Handelsgericht Wien (Austria) made by decisions of 17 July and 26 June 2007, received at the Court on 30 August and 18 September 2007 respectively, in the proceedings

**Christopher Sturgeon,**

**Gabriel Sturgeon,**

**Alana Sturgeon**

v

**Condor Flugdienst GmbH (C-402/07),**

and

**Stefan Böck,**

**Cornelia Lepuschitz**

v

**Air France SA (C-432/07),**

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting for the President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász, G. Arestis and J. Malenovský (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 24 September 2008,

after considering the observations submitted on behalf of:

- C. Sturgeon, G. Sturgeon and A. Sturgeon, by R. Schmid, Rechtsanwalt,
- S. Böck and C. Lepuschitz, by M. Wukoschitz, Rechtsanwalt,
- Condor Flugdienst GmbH, by C. Marko and C. Döring, Rechtsanwälte,

- Air France SA, by O. Borodajkewycz, Rechtsanwalt,
  - the Austrian Government, by E. Riedl, acting as Agent,
  - the Greek Government, by S. Chala and D. Tsagkaraki, acting as Agents,
  - the French Government, by G. de Bergues and A. Hare, acting as Agents,
  - the Italian Government, by I.M. Braguglia, acting as Agent, and W. Ferrante, avvocato dello Stato,
  - the Polish Government, by M. Dowgielewicz, acting as Agent,
  - the Swedish Government, by A. Falk, acting as Agent,
  - the United Kingdom Government, by T. Harris, acting as Agent, and D. Beard, Barrister,
  - the Commission of the European Communities, by R. Vidal-Puig and P. Dejmek, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 2 July 2009,  
gives the following

### **Judgment**

- 1 These references for a preliminary ruling concern the interpretation of Articles 2(l), 5, 6 and 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 (OJ 2004 L 46, p. 1).
- 2 The references were made in proceedings between (i) Mr Sturgeon and his family ('the Sturgeons') and Condor Flugdienst GmbH ('Condor') (C-402/07) and (ii) Mr Bock and Ms Lepuschitz and Air France SA ('Air France') (C-432/07), concerning the refusal of those airlines to pay compensation to the passengers concerned, whose arrival at the airport of destination was delayed by 25 and 22 hours respectively in relation to the scheduled arrival time.

### **Legal context**

- 3 Recitals 1 to 4 in the preamble to 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.
- (3) While Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport [(OJ 1991 L 36, p. 5)] created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays.
- (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.'
- 4 According to Recital 15 in the preamble to 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.'

5 Article 2 of Regulation No 261/2004, headed 'Definitions', provides:

'For the purposes of this Regulation:

...

- (l) "cancellation" means the non-operation of a flight which was previously planned and on which at least one place was reserved.'

6 Article 5 of that regulation, headed 'Cancellation', states:

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

- (a) be offered assistance by the operating air carrier in accordance with Article 8; and

...

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

...

- (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.

...'

7 Article 6 of Regulation No 261/2004, headed 'Delay', is worded as follows:

'1. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:

- (a) for two hours or more in the case of flights of 1 500 kilometres or less; or  
(b) for three hours or more in the case of all intra-Community flights of more than 1 500 kilometres and of all other flights between 1 500 and 3 500 kilometres; or  
(c) for four hours or more in the case of all flights not falling under (a) or (b),

passengers shall be offered by the operating air carrier:

- (i) the assistance specified in Article 9(1)(a) and 9(2); and  
(ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).

2. In any event, the assistance shall be offered within the time-limits set out above with respect to each distance bracket.'

8 Article 7 of Regulation No 261/2004, headed 'Right to compensation', provides:

'1. 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.

2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked:

- (a) by two hours, in respect of all flights of 1 500 kilometres or less; or
- (b) by three hours, in respect of all intra-Community flights of more than 1 500 kilometres and for all other flights between 1 500 and 3 500 kilometres; or
- (c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air carrier may reduce the compensation provided for in paragraph 1 by 50%.

...'

9 Article 8(1) of Regulation No 261/2004 provides that where reference is made to Article 8, passengers are to be offered the choice between, under paragraph 1(a), reimbursement of the ticket and a return flight to the first point of departure or, under paragraph 1(b) and (c), re-routing, under comparable transport conditions, to their final destination.

10 Article 9(1) of that regulation, where reference is made to Article 9, passengers are to be offered free of charge, under Article 9(1)(a), meals and refreshments and, under Article 9(1)(b) and (c), hotel accommodation and transfer to the place of accommodation; in addition, under Article 9(2), they are to be offered free of charge two telephone calls, telex or fax messages, or e-mails.

### **The disputes in the main proceedings and the questions referred for a preliminary ruling**

#### *Case C-402/07*

11 The Sturgeons booked return tickets with Condor from Frankfurt am Main (Germany) to Toronto (Canada).

12 The return flight from Toronto to Frankfurt was due to depart at 16.20 on 9 July 2005. Following check-in, passengers on that flight were informed that the flight was cancelled, as was indicated on the airport departures board. Their luggage was returned to them and they were then driven to a hotel where they spent the night. The following day, the passengers were checked in at another airline's counter for a flight with the same number as that on their booking. Condor did not schedule another flight with the same number for the day concerned. The passengers were given different seats from those they had been allocated on the previous day. The booking was not converted into a booking for a flight scheduled by another airline. The flight concerned arrived in Frankfurt at around 07.00 on 11 July 2005, some 25 hours

after its scheduled arrival time.

13 The Sturgeons took the view that, in light of all the abovementioned circumstances, in particular the delay of more than 25 hours, the flight had been not delayed but cancelled.

14 The Sturgeons brought an action against Condor before the Amtsgericht Rüsselsheim (Local Court, Rüsselsheim) (Germany), claiming compensation of EUR 600 per person plus damages, since, in their view, the damage sustained was the result not of a flight delay but of a cancellation.

15 Condor contended that the action as framed should be dismissed on the ground that the flight in question was delayed and not cancelled. Prior to the proceedings before the national court, Condor claimed that the flight had been delayed as the result of a hurricane in the Caribbean but during the proceedings it attributed the delay to technical faults on the plane and illness among the crew.

16 The Amtsgericht Rüsselsheim concluded that the flight had been delayed not cancelled and, consequently, dismissed the Sturgeons' claim for compensation. The Sturgeons appealed to the Landgericht Darmstadt (Regional Court, Darmstadt) which upheld the decision of the lower court.

17 The Sturgeons then appealed on a point of law ('Revision') to the Bundesgerichtshof (Federal Court of Justice).

18 Taking the view that the outcome of the appeal depended on the interpretation of Articles 2(l) and 5(1)(c) of Regulation No 261/2004, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- '1. Is it decisive for the interpretation of the term "cancellation" whether the original flight planning is abandoned, with the result that a delay, regardless of how long, does not constitute a cancellation if the air carrier does not actually abandon the planning for the original flight?
2. If Question 1 is answered in the negative: in what circumstances is a delay of the planned flight no longer to be regarded as a delay but as a cancellation? Is the answer to this question dependent on the length of the delay?'

#### *Case C-432/07*

19 Mr Böck and Ms Lepuschitz booked return tickets with Air France from Vienna (Austria) to Mexico City (Mexico) via Paris (France).

20 The Mexico City-Paris flight which Mr Böck and Ms Lepuschitz were due to take was scheduled to depart at 21.30 on 7 March 2005. When they came to check in, they were immediately informed, without the check-in taking place, that their flight was cancelled. The cancellation resulted from a change in the flight planning between Mexico City and Paris, which arose because of a technical breakdown on the aircraft due to fly from Paris to Mexico City and on account of the need to observe the rest period prescribed by law for the crew.

21 In order to get back earlier, Mr Böck and Ms Lepuschitz accepted Air France's offer of seats on a flight operated by Continental Airlines, which was scheduled to leave the following day, 8 March 2005, at 12.20. Their tickets were first cancelled and then new tickets were issued to them at the Continental Airlines counter.

22 The other passengers on the Mexico City-Paris flight, who did not take the Continental Airlines flight, left Mexico City, with a number of additional passengers, on 8 March 2005 at 19.35. That flight, whose original number was followed by the letter 'A', was operated in addition to the regular flight scheduled by Air France on the same day.

23 Mr Böck and Ms Lepuschitz arrived in Vienna almost 22 hours after the scheduled arrival time.

24 Mr Böck and Ms Lepuschitz brought an action against Air France before the Bezirksgericht für Handelssachen Wien (District Commercial Court, Vienna) (Austria), claiming EUR 600 compensation per person for cancellation of their flight, on the basis of Articles 5 and 7(1)(c) of Regulation No 261/2004. That

court dismissed their claim on the ground that, despite the evident flight delay, Regulation No 261/2004 did not support the conclusion that there was a flight cancellation. Mr Böck and Ms Lepuschitz appealed against that decision to the Handelsgericht Wien (Commercial Court, Vienna).

25 In those circumstances, the Handelsgericht Wien decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Must Article 5, read in conjunction with Articles 2(l) and 6, of Regulation ... No 261/2004 ..., be interpreted as meaning that a 22-hour delay in the time of departure constitutes a "delay" within the meaning of Article 6?
2. Must Article 2(l) of Regulation ... No 261/2004 be interpreted as meaning that instances in which passengers are transported significantly later (22 hours later) on a flight operating under a longer flight number (original flight number supplemented by an "A") and carrying only an – albeit large – proportion of the passengers booked on the initial flight, but also additional passengers not booked on the initial flight, constitute "cancellations" rather than "delays"?

If Question 2 is to be answered in the affirmative:

3. Must Article 5(3) of Regulation ... No 261/2004 be interpreted as meaning that technical problems with a plane and the resulting changes to the flight schedule represent extraordinary circumstances (which could not have been avoided even if all reasonable measures had been taken)?

26 By order of the President of the Court of 19 October 2007, Cases C-402/07 and C-432/07 were joined for the purposes of the written and oral procedure and of the judgment.

### **Consideration of the questions referred**

27 Before the national courts, the applicants in the main actions claim from Condor and Air France respectively the compensation provided for in Article 7 of Regulation No 261/2004 on the ground that with those airlines they reached their airports of destination, in the first case, 25 and, in the second case, 22 hours after the scheduled arrival times. Condor and Air France assert that the applicants are not entitled to any compensation, since the flights concerned were not cancelled but delayed and Regulation No 261/2004 provides for a right to compensation only in the case of flight cancellation. Furthermore, the airlines maintain that the late arrival of the flights was attributable to technical faults on the aircraft, which are covered by the concept of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004, and that they are thus released from the obligation to pay compensation.

28 In those circumstances, in order to give the national courts a useful answer, the questions referred should be understood as seeking, in essence, to ascertain:

- whether a flight delay must be regarded as a flight cancellation for the purposes of Articles 2(l) and 5 of Regulation No 261/2004 where the delay is long;
- whether Articles 5, 6 and 7 of Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are delayed may, for the purpose of the application of the right to compensation laid down in Article 7 of that regulation, be treated as passengers whose flights are cancelled, and
- whether a technical problem in an aircraft is covered by the concept of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004.

*The first part of the questions referred, concerning the concept of delay*

29 Regulation No 261/2004 does not contain a definition of 'flight delay'. That concept may, however, be clarified in the light of the context in which it occurs.

30 In that regard, it should be recalled, first, that a 'flight' within the meaning of Regulation No 261/2004 consists in an air transport operation, performed by an air carrier which fixes its itinerary (Case C-173/07

*Emirates Airlines* [2008] ECR I-5237, paragraph 40). Thus, the itinerary is an essential element of the flight, as the flight is operated in accordance with the carrier's pre-arranged planning.

31 It is clear furthermore from Article 6 of Regulation No 261/2004 that the Community legislature adopted a notion of 'flight delay' which is considered only by reference to the scheduled departure time and which implies as a consequence that, after the departure time, the other elements pertaining to the flight must remain unchanged.

32 Thus, a flight is 'delayed' for the purposes of Article 6 of Regulation No 261/2004 if it is operated in accordance with the original planning and its actual departure time is later than the scheduled departure time.

33 Second, according to Article 2(l) of Regulation No 261/2004, flight cancellation, unlike delay, is the result of non-operation of a flight which was previously planned. It follows that, in that regard, cancelled flights and delayed flights are two quite distinct categories of flights. It cannot therefore be inferred from Regulation No 261/2004 that a flight which is delayed may be classified as a 'cancelled flight' merely on the ground that the delay is extended, even substantially.

34 Consequently, a flight which is delayed, irrespective of the duration of the delay, even if it is long, cannot be regarded as cancelled where there is a departure in accordance with the original planning.

35 In those circumstances, where passengers are carried on a flight whose departure time is later than the departure time originally scheduled, the flight can be classified as 'cancelled' only if the air carrier arranges for the passengers to be carried on another flight whose original planning is different from that of the flight for which the booking was made.

36 Thus, it is possible, as a rule, to conclude that there is a cancellation where the delayed flight for which the booking was made is 'rolled over' onto another flight, that is to say, where the planning for the original flight is abandoned and the passengers from that flight join passengers on a flight which was also planned – but independently of the flight for which the passengers so transferred had made their bookings.

37 By contrast, it cannot, as a rule, be concluded that there is a flight delay or cancellation on the basis of a 'delay' or a 'cancellation' being shown on the airport departures board or announced by the air carrier's staff. Similarly, the fact that passengers recover their luggage or obtain new boarding cards is not, as a rule, a deciding factor. Those circumstances are not connected with the objective characteristics of the flight as such. They can be attributable to inaccurate classifications or to factors obtaining in the airport concerned or, yet again, they may be unavoidable given the waiting time and the fact that it is necessary for the passengers concerned to spend the night in a hotel.

38 Nor, as a rule, is it conclusive that the composition of the group of passengers who initially held reservations is essentially identical to that of the group subsequently transported. Indeed, as the delay grows longer by reference to the departure time originally scheduled, the number of passengers in the first of those groups may decrease because some passengers have been offered re-routing on another flight and others, for personal reasons, have decided not to take the delayed flight. Conversely, to the extent that seats have become available on the flight for which the booking was made, there is nothing to prevent the carrier accepting, before departure of the plane which is delayed, additional passengers.

39 In view of the foregoing, the answer to the first part of the questions referred is that Articles 2(l), 5 and 6 of Regulation No 261/2004 must be interpreted as meaning that a flight which is delayed, irrespective of the duration of the delay, even if it is long, cannot be regarded as cancelled where the flight is operated in accordance with the air carrier's original planning.

*The second part of the questions referred, concerning the right to compensation in the event of delay*

40 Article 5(1) of Regulation No 261/2004 provides that in the event of cancellation of a flight, the passengers concerned are to have the right to compensation by the operating air carrier in accordance with Article 7 of the regulation.

41 By contrast, it does not expressly follow from the wording of Regulation No 261/2004 that passengers whose flights are delayed have such a right. Nevertheless, as the Court has made clear in its case-law, it is

necessary, in interpreting a provision of Community 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 (see, inter alia, Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 50, and Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 34).

- 42 In that regard, the operative part of a Community 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 (Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, paragraph 97 and the case-law cited).
- 43 It must be stated that, even though the possibility of relying on 'extraordinary circumstances', allowing air carriers to be released from the obligation to pay compensation under Article 7 of Regulation No 261/2004, is provided for only in Article 5(3) thereof, which concerns flight cancellation, Recital 15 in the preamble to the regulation nevertheless states that that ground may also be relied on where an air traffic management decision in relation to a particular aircraft on a particular day gives rise to 'a long delay [or] an overnight delay'. As the notion of long delay is mentioned in the context of extraordinary circumstances, it must be held that the legislature also linked that notion to the right to compensation.
- 44 That is implicitly borne out by the objective of Regulation No 261/2004, since it is apparent from Recitals 1 to 4 in the preamble, in particular from Recital 2, that the regulation seeks to ensure a high level of protection for air passengers regardless of whether they are denied boarding or whether their flight is cancelled or delayed, since they are all caused similar serious trouble and inconvenience connected with air transport.
- 45 That is *a fortiori* the case since the provisions conferring rights on air passengers, including those conferring a right to compensation, must be interpreted broadly (see, to that effect, Case C-549/07 *Wallentin-Hermann* [2008] ECR I-0000, paragraph 17).
- 46 In those circumstances it cannot automatically be presumed that passengers whose flights are delayed do not have a right to compensation and cannot, for the purposes of recognition of such a right, be treated as passengers whose flights are cancelled.
- 47 Next, it must be stated that, according to a general principle of interpretation, a Community act must be interpreted, as far as possible, in such a way as not to affect its validity (see, to that effect, Case C-403/99 *Italy v Commission* [2001] ECR I-6883, paragraph 37). Likewise, where a provision of Community law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness (see, inter alia, Case 187/87 *Land de Sarre and Others* [1988] ECR 5013, paragraph 19, and Case C-434/97 *Commission v France* [2000] ECR I-1129, paragraph 21).
- 48 In that regard, all Community acts must be interpreted in accordance with primary law as a whole, including the principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 70, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95).
- 49 In view of the objective of Regulation No 261/2004, which is to strengthen protection for air passengers by redressing damage suffered by them during air travel, situations covered by the regulation must be compared, in particular by reference to the type and extent of the various types of inconvenience and damage suffered by the passengers concerned (see, to that effect, *IATA and ELFAA*, paragraphs 82, 85, 97 and 98).
- 50 In this instance, the situation of passengers whose flights are delayed should be compared with that of passengers whose flights are cancelled.
- 51 In that connection, Regulation No 261/2004 seeks to redress damage in an immediate and standardised manner and to do so by various forms of intervention which are the subject of rules relating to denied boarding, cancellation and long flight delay (see, to that effect, *IATA and ELFAA*, paragraph 43).
- 52 Regulation No 261/2004 has, in those measures, the objective of repairing, inter alia, damage consisting, for the passengers concerned, in a loss of time which, given that it is irreversible, can be redressed only by compensation.

- 53 In that regard, it must be stated that that damage is suffered both by passengers whose flights are cancelled and by passengers whose flights are delayed if, prior to reaching their destinations, the latter's journey time is longer than the time which had originally been scheduled by the air carrier.
- 54 Consequently, passengers whose flights have been cancelled and passengers affected by a flight delay suffer similar damage, consisting in a loss of time, and thus find themselves in comparable situations for the purposes of the application of the right to compensation laid down in Article 7 of Regulation No 261/2004.
- 55 More specifically, the situation of passengers whose flights are delayed is scarcely distinguishable from that of passengers whose flights are cancelled, who are re-routed in accordance with Article 5(1)(c)(iii) of Regulation No 261/2004 and who may be informed of the flight cancellation at the very last moment, when they actually arrive at the airport (see Case C-204/08 *Rehder* [2009] ECR I-0000, paragraph 19).
- 56 First, both categories of passengers are informed, as a rule, at the same time of the incident which will make their journey by air more difficult. Second, even if they are transported to their final destination, they reach it after the time originally scheduled and, as a consequence, they suffer a similar loss of time.
- 57 That said, passengers who are re-routed under Article 5(1)(c)(iii) of Regulation No 261/2004 are afforded the right to compensation laid down in Article 7 of the regulation where the carrier fails to re-route them on a flight which departs no more than one hour before the scheduled time of departure and reaches their final destination less than two hours after the scheduled time of arrival. Those passengers thus acquire a right to compensation when they suffer a loss of time equal to or in excess of three hours in relation to the duration originally planned by the air carrier.
- 58 If, by contrast, passengers whose flights are delayed did not acquire any right to compensation, they would be treated less favourably even though, depending on the circumstances, they suffer a similar loss of time, of three hours or more, in the course of their journey.
- 59 There appears, however, to be no objective ground capable of justifying such a difference in treatment.
- 60 Given that the damage sustained by air passengers in cases of cancellation or long delay is comparable, passengers whose flights are delayed and passengers whose flights are cancelled cannot be treated differently without the principle of equal treatment being infringed. That is *a fortiori* the case in view of the aim sought by Regulation No 261/2004, which is to increase protection for all air passengers.
- 61 In those circumstances, the Court finds that passengers whose flights are delayed may rely on the right to compensation laid down in Article 7 of Regulation No 261/2004 where they suffer, on account of such flights, 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.
- 62 That solution is, moreover, consistent with Recital 15 in the preamble to Regulation No 261/2004. As stated at paragraph 43 of this judgment, it must be held that the legislature, in that recital, also linked the notion of 'long delay' to the right to compensation. That notion corresponds to a delay to which the legislature attaches certain legal consequences. As Article 6 of the regulation already accepts such legal consequences in the case of certain flights which are delayed for two hours, Recital 15 necessarily covers delays of three hours or more.
- 63 It is important to point out that the compensation payable to a passenger under Article 7(1) of Regulation No 261/2004 may be reduced by 50% if the conditions laid down in Article 7(2) of the regulation are met. Even though the latter provision refers only to the case of re-routing of passengers, the Court finds that the reduction in the compensation provided for is dependent solely on the delay to which passengers are subject, so that nothing precludes the application *mutatis mutandis* of that provision to compensation paid to passengers whose flights are delayed. It follows that the compensation payable to a passenger whose flight is delayed, who reaches his final destination three hours or more after the arrival time originally scheduled, may 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 points (a) or (b) of Article 7(2) – less than four hours.
- 64 The conclusion set out in paragraph 61 of this judgment is not undermined by the fact that Article 6 of Regulation No 261/2004 provides for different forms of assistance under Articles 8 and 9 thereof for

passengers whose flights are delayed.

65 As the Court has already stated, Regulation No 261/2004 provides for various forms of intervention in order to redress, in a standardised and immediate manner, the different types of damage constituted by the inconvenience that delay in the carriage of passengers by air causes (see, to that effect, *IATA and ELFAA*, paragraphs 43 and 45).

66 Those measures are autonomous in the sense that they address different aims and seek to make up for various types of damage caused by such delay.

67 That said, it should be recalled that, with the adoption of Regulation No 261/2004, the legislature was also seeking to strike a balance between the interests of air passengers and those of air carriers. Having laid down certain rights for those passengers, it provided at the same time, in Recital 15 and Article 5(3) of the regulation, that air carriers are not obliged to pay compensation if they can prove that the cancellation or long delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances which are beyond the air carrier's actual control.

68 Moreover, 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 the regulation provides. Such compensation may accordingly reduce or even remove the financial burden borne by carriers in consequence of those obligations. Nor does it appear unreasonable 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 (*IATA and ELFAA*, paragraph 90).

69 In the light of the foregoing, the answer to the second part of the questions referred is that Articles 5, 6 and 7 of Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.

*The third question in Case C-432/07, concerning extraordinary circumstances resulting from a technical problem in an aircraft*

70 The Court has already held that Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control (*Wallentin-Hermann*, paragraph 34).

71 The same conclusion applies when Article 5(3) of Regulation No 261/2004 is pleaded in the case of flight delay.

72 Thus, the answer to the third question in Case C-432/07 is that Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation or delay of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.

## Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting

observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

- 1. Articles 2(I), 5 and 6 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, must be interpreted as meaning that a flight which is delayed, irrespective of the duration of the delay, even if it is long, cannot be regarded as cancelled where the flight is operated in accordance with the air carrier's original planning.**
- 2. Articles 5, 6 and 7 of Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.**
- 3. Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation or delay of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.**

[Signatures]

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\* Language of the case: German.