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October 20, 2013

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. British Airways
Complaint about rules governing liability and denied boarding compensation
File No.: M 4120/13-00661
Reply to British Airways' answer of March 22, 2013

Please accept the following submissions in relation to the above-noted matter as a reply, as per Rule 44 and Decision No. LET-C-A-114-2013, to British Airways' answer dated March 22, 2013.

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I. Applicable legal principles

(a) Powers of the Agency

By enacting section 86 of the *Canada Transportation Act* (the "*CTA*"), Parliament conferred upon the Agency very broad regulatory and regulation-making powers with respect to carriage by air to and from Canada, which include:

> 86. (1) The Agency may make regulations
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> ⋮
>
> (h) respecting traffic and tariffs, fares, rates, charges and terms and conditions of carriage for international service and
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> (i) providing for the disallowance or suspension by the Agency of any tariff, fare, rate or charge,
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> (ii) providing for the establishment and substitution by the Agency of any tariff, fare, rate or charge disallowed by the Agency,
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> (iii) authorizing the Agency to direct a licensee or carrier to take corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of carriage applicable to the service it offers that were set out in its tariffs, and
>
> (iv) requiring a licensee or carrier to display the terms and conditions of carriage for its international service on its Internet site, if the site is used for selling the international service of the licensee or carrier;

Section 113 of the *Air Transportation Regulations* (the "*ATR*"), promulgated in accordance with these powers, confers upon the Agency equally broad powers to regulate the contents of tariffs for international service:

> **113.** The Agency may
>
> (a) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and
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> (b) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (a).

The *CTA*, and the *ATR* promulgated pursuant to it, do not merely create a mechanism for enforcing the rights of individual passengers; rather, Parliament intended to establish a regulatory scheme: Carriers must set and publish their tariffs, which must be clear and applied to all passengers. Under the *ATR*, the Agency has a dual role: To review, disallow, suspend, and substitute tariff provisions on the one hand, and to enforce tariff provisions by ordering carriers to take corrective measures.

The purpose of having a regulatory scheme in place is not merely to enforce the general common law, but also to promote adequate protection of consumers, and protect passengers from terms and conditions that are unreasonable within the context of carriage of passengers and baggage.

Thus, the *CTA* and the *ATR* do confer upon the Agency jurisdiction to disallow unreasonable terms and conditions for international service, and to substitute them with reasonable ones that the Agency finds appropriate. In particular, in carrying out its mandate, the Agency can impose and has imposed various obligations and liabilities upon carriers by ordering the carriers to amend their tariffs accordingly (see *Pinksen v. Air Canada*, 181-C-A-2007; *Lukács v. WestJet*, 483-C-A-2010; *Lukács v. Air Canada*, 291-C-A-2011; and *Lukács v. Air Canada*, 251-C-A-2012).

The Federal Court of Appeal dismissed WestJet's motion for leave to appeal that challenged the Agency's jurisdiction to impose such obligations and liabilities upon carriers (see FCA File No.: 10-A-42).

Therefore, contrary to British Airways' position, the current state of the law is that the Agency does have jurisdiction to impose terms and conditions upon carriers that carriers must include in their tariffs even if these provisions may impose obligations and liabilities beyond the general common law of contract and tort liability.

(b) Provisions that are inconsistent with the legal principles of the *Montreal Convention* cannot be just and reasonable

British Airways claims that a tariff provision that is inconsistent with the legal principles of liability underlying the *Montreal Convention* can be reasonable within the meaning of the *ATR*. The Applicant respectfully disagrees, and notes that British Airways has provided not even a single authority in support of its position, and which would contradict the authorities cited by the Applicant.

Indeed, in *Lukács v. Air Canada*, LET-C-A-29-2011, the Agency (at para. 33) held that:

> In striking the balance between passengers' rights and the statutory, commercial obligations of Air Canada, the Agency, applying the precedents noted above, is of the preliminary opinion that it is reasonable to apply the principles of the *Montreal Convention* to carriage involving itineraries to which neither the *Montreal Convention* nor *Warsaw Convention* applies. [...] it is important that passengers have the right, and are able, to rely on general consumer protection principles, irrespective of the passengers' itineraries. [...]

The Agency went on and noted that, as in the present case, the airline:

> [...] has not provided any evidence or arguments as to commercial or operational factors that it believes should be taken into account by the Agency to offset the fundamental right of passengers to some form of baggage liability protection on all flights.

As explained in *Lukács v. Air Canada*, 291-C-A-2011 (at para. 42), which upheld the preliminary findings made in Decision No. LET-C-A-29-2011, requiring a carrier to include certain tariff provisions that reflect the principles of the *Montreal Convention* does not amount to imposing the entire Convention upon the carrier, and neither amounts to nor requires any legislative change:

> [...] the Agency is not asking or requiring that Air Canada implement the entire scheme of the Montreal Convention, but rather that certain of Air Canada's tariff provisions reflect some of the principles set out in the Montreal Convention relating to liability which the Agency has determined are reasonable.

In *Lukács v. Air Canada*, LET-C-A-129-2011, the Agency conducted a very careful and detailed analysis of the applicability of the principles of the *Montreal Convention* to a domestic tariff provision, reviewed a wealth of authorities on this point (paras. 30-45), and concluded that:

> [43] Accordingly, it is clear that the Agency is, and has been, of the view that the Convention is a useful interpretive tool to which the Agency may refer when applying its "reasonableness" test and striking the balance between passengers' rights and the statutory, commercial and operational obligations of a carrier. <u>In doing so the Agency takes into account the principles of the Convention rather than applying the Convention itself.</u>
>
> [44] The Agency is of the view that passengers should expect and be entitled to consistency in treatment irrespective of whether they are on a domestic or international flight. To that end, the principles set out in the Convention provide insight into what is reasonable to apply in a domestic context.
>
> [Emphasis added.]

These findings of the Agency were upheld in *Lukács v. Air Canada*, 251-C-A-2012:

> [20] In light of the foregoing, the Agency concludes that the principles of Article 19 of the Convention are equally applicable to domestic carriage.

Therefore, the Applicant submits that the <u>principles</u> of the *Montreal Convention* governing liability for loss and damage to baggage, and delay of passengers and baggage, are equally applicable to international carriage to which neither the *Montreal Convention* nor the *Warsaw Convention* applies, and that the Agency ought to take into account these principles in deciding the reasonableness of the impugned provisions.

(c) The tariff must reflect British Airways' policies and obligations

Pursuant to s. 122(c) of the *ATR*, the tariff of every carrier must clearly address a basic list of topics, and the carrier must state its policy with respect to these core matters:

> **122.** Every tariff shall contain
>
> ⋮
>
> (c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> ⋮
>
> (iii) compensation for denial of boarding as a result of overbooking,
>
> (iv) passenger re-routing,
>
> (v) failure to operate the service or failure to operate on schedule,
>
> (vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,
>
> ⋮
>
> (x) limits of liability respecting passengers and goods,
>
> (xi) exclusions from liability respecting passengers and goods, and
>
> (xii) procedures to be followed, and time limitations, respecting claims.

Thus, tariffs are meant to be comprehensive stand-alone documents that describe the rights and obligations in relation to carriage. In particular, the tariff should not contradict any convention referenced in the tariff. Indeed, in *Lukács v. Air Canada*, 208-C-A-2009, the Agency held that:

> [18] Pursuant to paragraph 122(a) of the ATR, an air carrier must clearly state its terms and conditions in a tariff, and pursuant to subsection 110(4) of the ATR, an air carrier must apply the terms and conditions of carriage specified in its tariff. The Agency is therefore of the opinion that, to the extent possible, an air carrier's tariff should be a stand-alone document, requiring no reference to other documents to determine the rights and obligations associated with carriage. The Agency is also of the opinion that to promote and protect the interests of both consumers and carriers, <u>in situations where it is clear that there are inconsistencies between provisions in tariffs, or between tariffs and referenced documents, such situations must be addressed, and the inconsistencies corrected</u>.
>
> [Emphasis added.]

II. Rule 55(C) is unclear and unreasonable

(a) Clarity

At least 152 states are parties to the *Warsaw Convention*, while over 100 states are parties to the *Montreal Convention*. Moreover, the Agency has held on numerous occasions that the *Montreal Convention* applies to round-trip travel originating and ending in Canada (for example, *Balakrishnan v. Aeroflot*, 328-C-A-2007, para. 19 and *Thakkar v. Aeroflot*, 434-C-A-2007, para. 20).

Thus, the *Montreal Convention* or the *Warsaw Convention* apply to the vast majority of carriage by air to and from Canada, and itineraries on which neither of the conventions apply are rare and exceptional.

However, the wording of British Airways Tariff Rule 55(C) suggests quite the opposite, and creates the impression that the provisions set out in 55(C) are the general rule, and they are not applicable only it exceptional situations.

The substantive wording of Rule 55(C)(1) purports to relieve British Airways from every liability except when the passenger can prove negligence or willful misconduct, which is substantially different than the liability regime of the *Montreal Convention* or the *Warsaw Convention*.

Therefore, British Airways Tariff Rule 55(C) and 55(C)(1) in particular is misleading and confusing about the rights of passengers in that it indicates as the general rule a liability regime that is substantially different than what is set out in the conventions.

In *Lukács v. Air Canada*, LET-C-A-29-2011 (para. 65), and more recently, in *Lukács v. Porter*, 16-C-A-2013 (para. 62), the Agency held that a phrase such as "Subject to the Warsaw Convention or the Montreal Convention" renders tariff provisions unclear, contrary to s. 122 of the *ATR*.

British Airways has failed to address these authorities in its submissions, nor did it provide any arguments why the Agency's conclusions in these past decisions were incorrect.

In light of the Agency's findings in *Lukács v. Air Canada*, 291-C-A-2011 (paras. 50-52), it is submitted that the Applicant's concerns about the clarity of Rule 55(C) could be addressed by replacing the phrase "Except as the convention or other applicable law may require" with "For the exceptional international itineraries where no Convention applies."

(b) Reasonableness

The Applicant respectfully disagrees with British Airways' submission that Rule 55(C)(1) sets out the general provisions of the common law. On the contrary, to a great extent, it is the *Montreal Convention* that accomplishes this. Indeed, at common law, the common carrier is responsible for the safety of the goods entrusted to it in all events, except for certain specific perils, such acts of God and the Queen's enemies, and it is not necessary to prove the existence of a contract between

the common carrier and the owner of the goods. This principle, and the comparison between the *Montreal Convention* and the common law, are eloquently explained in *Foord v. United Air Lines Inc.*, 2006 ABPC 103 (para. 33):

> The common law duty and liability of a common carrier is described in 4 *Halsbury's Laws*, 3rd edition, page 141 and page 142.
>
> > "The common carrier is an insurer of the safety of the goods against everything extraneous which may cause loss or injury except the act of God or the Queen's enemies. This responsibility as an insurer is imposed upon a common carrier by the custom of realm, and it is not necessary to prove a contract between him and the owner of the good in order to establish liability. Failure on the part of the carrier to deliver the goods safely is a breach of a duty placed upon him by the common law; and therefore an action in tort lies against him for such breach, the owner not being bound to prove any contract. Where, however, there is a contract, liability may arise either at common law or under the contract, and the contract may limit the carrier's responsibility."
>
> What the Montreal Convention does is confirm the common law liability of the international carrier and then it goes on to permit the international air carrier to limit its liability in a way which is consistent world-wide.

As the Agency held in *Lukács v. Air Canada*, LET-C-A-29-2011 (at para. 33), it is important that passengers have the right and are able to rely on general consumer protection principles in a consistent manner, irrespective of their itineraries, and it is reasonable to apply the principle of the *Montreal Convention* to carriage involving itineraries whether neither of the conventions themselves apply. The same conclusion was reached by the Agency in *Lukács v. Air Canada*, LET-C-A-129-2011 (paras. 30-45).

British Airways has not provided any evidence or arguments as to commercial or operational factors that it believes should be taken into account by the Agency to offset the fundamental right of passengers to some form of protection on all flights. Nor did British Airways provide any arguments as to why the Agency's conclusions in the aforementioned decisions were wrong.

Therefore, it is submitted that there is no reason for British Airways to not apply the liability principles of the *Montreal Convention* even on those exceptional itineraries where the conventions themselves do not apply. The Applicant is not suggesting to impose the entire *Montreal Convention* upon all international carriage by air, but rather imposing on British Airways tariff provisions that reflect some of the principles set out in the *Montreal Convention* relating to liability (see *Lukács v. Air Canada*, 291-C-A-2011, para. 42). By enacting s. 86(1)(h)(ii) of the *CTA*, Parliament did certainly confer jurisdiction upon the Agency to do so.

III. Liability caps: Rules 115(H), 116(H), and 55(C)(6)-(8)

(a) Rules 115(H) and 116(H) misstate the liability caps under the *Montreal Convention*

In November 2009, the Agency published a "Notification to Air Carriers of Upward Revision of the Limits of Liability for International Transportation Governed by the Montreal Convention," which stated that:

> The *Air Transportation Regulations* SOR/88-58, as amended (ATR), require air carriers to set out their policy with respect to limitations of liability in their respective tariffs. As a result of the change to the limits set out in the Montreal Convention, these revised levels must be updated in carriers' tariffs and carriers must apply the new limits as of December 30, 2009. Air carriers are therefore requested to amend their tariffs on file with the Canadian Transportation Agency (Agency) accordingly on or before December 29, 2009 for effect on December 30, 2009.

The Applicant notes that to this date, British Airways has failed to comply with this directive.

The parties agree that the current liability cap for destruction, loss, damage or delay of baggage under the *Montreal Convention* is 1,131 SDR. Moreover, British Airways submitted that it complies with the baggage liability limitation currently applicable.

Thus, the parties agree that Rules 115(H) and 116(H) do not reflect British Airways' obligations under the *Montreal Convention*, nor do they reflect British Airways' actual practice and policy on baggage liability.

In particular, Rules 115(H) and 116(H) are unreasonable in that they purport to set a lower limit of liability than what is set out in the *Montreal Convention*.

Therefore, there is no reason for keeping the outdated liability caps in British Airways' Tariff, and British Airways ought to be directed to update Rules 115(H) and 116(H) to reflect the current liability caps of the *Montreal Convention*.

(b) Rule 55(C)(7) is unreasonable

The parties agree that Rule 55(C)(7) sets out the liability caps of the *Warsaw Convention*. The parties also agree that British Airways may apply these caps on itineraries where the *Warsaw Convention* applies. Furthermore, the parties agree that British Airways cannot apply these caps on itineraries where the *Montreal Convention* is applicable.

The Applicant, however, disputes the reasonableness of the liability caps set out in Rule 55(C)(7) on itineraries where neither the *Warsaw Convention* nor the *Montreal Convention* applies, which amount to a liability cap of CAD$460.00 for a 23 kg suitcase or $640.00 for a 32 kg suitcase.

The Applicant submits that these liability caps are unreasonably low. Indeed, in *Lukács v. WestJet*, 483-C-A-2010, the Agency held that WestJet's proposed liability cap of CAD$1,000 was unreasonable (leave to appeal denied by the Federal Court of Appeal; 10-A-42).

The Applicant notes that British Airways has provided no justification for applying these liability caps on itineraries that are not subject to the *Warsaw Convention*, nor did it provide any evidence to demonstrate how altering this provision would affect its ability to meet its commercial obligations.

Therefore, it is submitted that Rule 55(C)(7) provides unreasonably low liability caps for British Airways, and it ought to be disallowed. It is further submitted that Rule 55(C)(7) ought to be substituted with a provision that provides for liability caps identical to what is set out in the *Montreal Convention* on itineraries where no convention is applicable.

(c) Rule 55(C)(6) is unreasonable or unclear

British Airways' answer to this issue states that:

> BA Tariff Rule 55(C)(6) is not intended to overrule the provisions of Article 22(5) of the *Montreal Convention*. It is intended to clarify that the liability of the carrier for delay shall be the liability provided for under the *Convention* and no more.

While the Applicant does not object to this stated intention of Rule 55(C)(6), it is submitted that the wording of Rule 55(C)(6), when read together with Rule 55(C), does not clearly reflect this intention:

> EXCEPT AS THE CONVENTION OR OTHER APPLICABLE LAW MAY OTHERWISE REQUIRE:
>
> ⋮
>
> (6) IN ANY EVENT LIABILITY OF CARRIER FOR DELAY OF PASSENGER SHALL NOT EXCEED THE LIMITATION SET FORTH IN THE CONVENTION.

Furthermore, Rule 55(C)(6) fails to clearly specify which convention it refers to, the *Montreal Convention* or the *Warsaw Convention*. In spite of the similarity in the legal principles, the liability caps set out in the two conventions substantially differ.

Thus, it is submitted that Rule 55(C)(6), at the very least, fails to be clear, and ought to be substituted with the following:

> In any event, liability of Carrier for delay of passenger shall not exceed the limitation set forth in Article 22 of the *Montreal Convention*.

(d) Rule 55(C)(8) is unreasonable

The parties agree that Rule 55(C)(8) sets out the liability regime of the *Warsaw Convention*. The parties also agree that British Airways may apply these caps on itineraries where the *Warsaw Convention* applies. Furthermore, the parties agree that British Airways cannot apply these caps on itineraries where the *Montreal Convention* is applicable.

The Applicant, however, disputes the reasonableness of Rule 55(C)(8) on itineraries where neither the *Warsaw Convention* nor the *Montreal Convention* applies. British Airways has provided no reasons for applying an over 80-year-old liability regime on itineraries where it is not applicable, and given that the *Montreal Convention* is considered the current standard in this area, with over 100 states being parties to it.

The value or importance of items need not be proportionate to their weight, and thus the modern liability regime of the *Montreal Convention* is no longer based on the weight of the checked baggage. The price of clothing items is far from being proportionate to their weight.

For example a businessman, a lawyer, or an accountant travelling to an important meeting may be required to purchase or rent a suit if her or his baggage containing the usual business attire is delayed. Similarly, a passenger travelling to a wedding or a funeral cannot appear in a T-shirt and jeans, and thus may be required to purchase or rent a tuxedo or other attire that is socially expected at a particular type of event. This common knowledge and experience was recognized by the Agency in *Shetty v. Air Canada*, 353-C-A-2012, where it was held that the passenger was entitled to compensation in the amount of $800.52 in relation to a 14-hour delay of baggage in domestic carriage.

Therefore, it is submitted that Rule 55(C)(8) is unreasonable insofar as it applies to itineraries where the *Warsaw Convention* is not applicable, and hence it ought to be disallowed and/or substituted.

IV. Blanket exclusions of liability for baggage: Rules 55(C)(10), 115(N), and 116(N) are unreasonable

British Airways has failed to address in its answer any of the Applicant's arguments with respect to the unreasonableness of Rules 55(C)(10), 115(N), and 116(N), and it devoted only two lines to this issue:

> BA Tariff Rules 55(C)(10), 115(N) and 116(N) continue to apply to non *Montreal Convention* international carriage and are clear and reasonable.

As a preliminary matter, it is not sufficient for a carrier to simply state that it believes that certain provisions are reasonable. Indeed, in *Griffiths v. Air Canada*, 287-C-A-2009, the Agency held that:

> [25] The terms and conditions of carriage are set by an air carrier unilaterally without any input from future passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in statutory or purely commercial requirements. There is no presumption that a tariff is reasonable. Therefore, a mere declaration or submission by the carrier that a term or condition of carriage is preferable is not sufficient to lead to a determination that the term or condition of carriage is reasonable.

[Emphasis added.]

The basic legal principles of the *Montreal Convention* with respect to baggage liability are identical to those of the *Warsaw Convention*. Thus, it is equally unreasonable to apply British Airways Tariff Rules 55(C)(10), 115(N) and 116(N) to itineraries that are subject to the *Warsaw Convention*. Furthermore, the reasonableness of tariff provisions such as Rules 55(C)(10), 115(N) and 116(N) on itineraries where no convention is applicable was carefully analyzed in great detail in *Lukács v. Air Canada*, LET-C-A-29-2011 (paras. 23-54), where the Agency concluded that:

> [54] As noted above, as a basic principle, consumers should be afforded protection against lost, damaged or delayed baggage irrespective of the itinerary that applies to their travel. Accordingly, the Agency is of the preliminary opinion that existing and proposed Rule 55(C)(7) do not provide passengers with reasonable liability coverage.

These conclusions were confirmed by the Agency in *Lukács v. Air Canada*, 291-C-A-2011. British Airways has provided no arguments as to why the same conclusions are not applicable to the impugned provisions. Since British Airways' alleged "primary competitor," Air Canada, was ordered by the Agency to substitute its Rule 55(C)(7) with a language that does reflect the principles of the *Montreal Convention*, British Airways will suffer no competitive disadvantage as a result of being directed to do the same.

Hence, it is submitted that British Airways Tariff Rule 55(C)(10), and the portions of Rules 115(N) and 116(N) that govern liability, ought to be disallowed and substituted as in the case of Air Canada.

V. Blanket exclusions of liability for delay of passengers: Rules 85(A) and 85(B)(2) are unreasonable

British Airways has failed to address in its answer any of the Applicant's arguments with respect to the unreasonableness of Rules 85(A) and 85(B)(2), and it devoted only two lines to this issue:

> BA Tariff Rules 85(A) and 85(B)(2) are clear and reasonable and are virtually the same wording as that contained in Air Canada's Tariff Rules 85(A)(A) and 85(B)(2).

While British Airways is correct in observing the similarity between the impugned tariff provisions and Air Canada's Tariff Rules 85(A) and 85(B)(2), the latter have never been challenged before the Agency, and so the Agency never ruled on their reasonableness. (In Decision No. 250-C-A-2012, the Agency reviewed Rule 80(C) of Air Canada, but did not consider Rule 85 at all.) Indeed, Air Canada's Tariff Rules 85(A) and 85(B)(2) are as unreasonable as the corresponding provisions in British Airways' Tariff.

As the Agency noted in *Lukács v. Air Canada*, in Decisions No. LET-C-A-129-2011 (para. 154) and No. 251-C-A-2012 (para. 75), "an industry practice does not, in itself, mean that the practice is reasonable." In other words, two wrongs do not make a right, and the fact that Air Canada's Tariff contains unreasonable provisions does not justify the same unreasonable provisions in British Airways' Tariff.

Therefore, based on the Agency's findings in *Lukács v. Porter*, 16-C-A-2013, which were recently reaffirmed by the Agency in *Lukács v. Porter*, 344-C-A-2013, it is submitted that the words "without notice" and "carrier assumes no responsibility for making connections" ought to be disallowed in Rule 85(A), and the phrase "without any liability except to refund.... ...of the ticket" ought to be disallowed in Rule 85(B)(2).

VI. Denied boarding compensation: Rule 87(B)(3)(B) is unreasonable

The Applicant is challenging the reasonableness of British Airways' International Tariff Rule 87(B)(3)(B), which governs denied boarding compensation with respect to flights between points in Canada and points in the United Kingdom.

Complaint of Dr. Lukács (January 30, 2013), pp. 37-38, Exhibit "C"

The Applicant is asking the Agency to make a finding that Rule 87(B)(3)(B) is unreasonable, as the Agency did with respect to denied boarding compensation rules in *Lukács v. Air Canada*, 204-C-A-2013 and *Lukács v. WestJet*, 227-C-A-2013. The Applicant is also asking the Agency to impose a new, reasonable denied boarding compensation policy upon British Airways, in the same fashion, albeit with different parameters, as the Agency did in *Lukács v. Air Canada*, 342-C-A-2013.

(a) Jurisdiction of the Agency

British Airways is vehemently challenging the Agency's jurisdiction to impose provisions upon British Airways that govern denied boarding compensation. The Applicant respectfully disagrees, and submits that British Airways misstates the issue.

Pursuant to the *Canada Transportation Act* and the *Air Transportation Regulations* (the "*ATR*"), carriage by air is regulated in Canada, and that regulatory body is the Agency. The regulation encompasses not only matters related to licensing, but also the terms and conditions that passengers are subjected to by airlines.

Section 110 of the *ATR* requires carriers to establish and file a tariff with the Agency, while subsection 111(1) of the *ATR* requires the tariff to be "just and reasonable."

Section 113 of the *ATR*, which implements s. 86(1)(h)(i)-(ii) of the *Canada Transportation Act*, confers upon the Agency the power to disallow and/or establish and substitute any tariff provision that fails to be "just and reasonable" contrary to subsection 111(1). The power to substitute tariff provisions is a vital tool in the hands of the Agency to enforce s. 111(1), and allows the Agency to use its expertise in the area of air transportation to establish tariff provisions that in its opinion meet the requirements of s. 111(1).

Thus, the Agency's power to establish and substitute tariff provisions is a broad and unrestricted one, and the Agency may impose any tariff or tariff provision upon a carrier if the Agency finds it appropriate to do so.

Section 122(c) of the *ATR* requires carriers, including British Airways, to set out their terms and conditions, clearly setting out the carrier's policy at least with respect to a prescribed list of matters, including compensation of passengers who are denied boarding (s. 122(c)(iii)). This brings the matter of denied boarding compensation within the Agency's jurisdiction over the contents of tariffs pursuant to ss. 110, 111(1), and 113 of the *ATR*.

Therefore, British Airways is not free to set its denied boarding compensation policy as it sees fit, but rather the policy must be "just and reasonable," and it is subject to the Agency's review, disallowance, and substitution powers set out in s. 113 of the *ATR*. In particular, the Agency may disallow British Airways' present denied boarding compensation policy, and impose a new denied boarding policy upon British Airways, as it did in *Lukács v. Air Canada*, 342-C-A-2013.

In determining whether a tariff provision is reasonable, and what may be an appropriate substitute tariff provision, the Agency is entitled to consider not only Canadian, but also foreign legislation, and international instruments. Indeed, the Agency has done so on a number of occasions.

In *Lukács v. WestJet*, 483-C-A-2010, the Agency considered the baggage liability limits of the *Montreal Convention* to determine the appropriate liability limit for WestJet with respect to domestic carriage of baggage. Although the *Montreal Convention* is not applicable as a matter of law to domestic carriage, the Agency found it a helpful tool in establishing WestJet's new liability cap. The Agency's jurisdiction to do so was upheld by the Federal Court of Appeal, which dismissed WestJet's motion for leave to appeal (File No.: 10-A-42).

Recently, in *Lukács v. Air Canada*, 204-C-A-2013, the Agency considered the denied boarding compensation regimes of the European Union and the United States in the context of determining what may be the appropriate substitute for Air Canada's denied boarding compensation policy, which the Agency found unreasonable. In its show-cause order, the Agency considered the possibility of imposing the amounts prescribed by the US regime upon Air Canada:

> [81] Further, the Agency provides Air Canada with an opportunity to show cause, within 30 days from the date of this Decision, why:
>
> ⋮
>
> 2. with respect to the disallowed Rule 245(E)(2), Air Canada should not apply either the denied boarding compensation regime in effect in the United States of America or the regime proposed by Mr. Lukács.

This demonstrates that there is nothing untoward in the Agency considering the denied boarding compensation regime of a foreign jurisdiction, and imposing its system on a carrier. For greater clarity, it is submitted that doing so does not amount to enforcing a foreign legislation, but rather to using the foreign legislation as a source of inspiration for what may be a reasonable system for compensating passengers affected by denied boarding.

Hence, it is submitted that the Agency is fully empowered to rule upon the reasonableness of Rule 87(B)(3)(B), to disallow it if it is found to be unreasonable, and to subsequently substitute it with a tariff provision that the Agency finds appropriate.

(b) British Airways grossly misstates the law with respect to *Regulation (EC) No. 261/2004*

In its March 22, 2013 answer, British Airways makes false and/or misleading statements with respect to the enforceability of the rights set out in *Regulation (EC) No. 261/2004*, and British Airways' compliance with Article 3(1).

(i) False statement: "does not provide for the enforcement [...] by legal proceedings before the general courts of law"

British Airways claims on page 3 of its March 22, 2013 answer and on page 2 of British Airways' submissions dated August 23, 2013 that:

> The *Regulation* does not provide passengers with any contractual rights and does not provide for the enforcement of the rights under the *Regulation* by legal proceedings before the general courts of law.
>
> [Emphasis added.]

The Applicant submits that this statement is simply false, and misrepresents the current state of the law. In *McDonagh v. Ryanair Ltd*, Case C-12/11 (Annex "A"), the European Court of Justice settled the question of recourse to national courts as follows:

> 23 Article 16 cannot be interpreted as allowing only national bodies responsible for the enforcement of Regulation No 261/2004 to sanction the failure of air carriers to comply with their obligation laid down in Articles 5(1)(b) and 9 of that regulation to provide care.
>
> 24 Consequently, it must be held that an air passenger may invoke before a national court the failure of an air carrier to comply with its obligation, laid down in Articles 5(1)(b) and 9 of Regulation No 261/2004, to provide care in order to obtain compensation from that air carrier for the costs which it should have borne under those provisions.
>
> [Emphasis added.]

There has never been a doubt that the right to monetary compensation set out in Article 7 of *Regulation (EC) No. 261/2004* can be enforced before general courts of law, as confirmed by numerous rulings of the European Court of Justice that stemmed, by reference, from proceedings commenced by individual passengers before national courts:

- *Wallentin-Hermann v. Alitalia*, Case C-549/07 (Annex "B"), by reference from the Handelsgericht Wien (Austria);
- *Finnair v. Lassooy*, Case C-22/11 (Annex "C"), by reference from the Korkein oikeus (Supreme Court) of Finland;

- *Cachafeiro v. Iberia*, Case C-321/11 (Annex "D"), by reference from the Juzgado de lo Mercantil No 2, A Coruña (Spain).

Finally, it is worth nothing that in *M. X... Jean-Baptiste et Madame X... Pascale Marie-Françoise c. Air France* (Annex "E"), the carrier was ordered by a national court to pay compensation for out-of-pocket expenses pursuant to the *Montreal Convention* and to also pay denied boarding compensation as per *Regulation (EC) No. 261/2004*.

Therefore, contrary to British Airways' claim, the rights conferred upon passengers by *Regulation (EC) No. 261/2004* related to denied boarding compensation have always been enforceable by way of claim before general courts of law. *McDonagh v. Ryanair Ltd* also confirms that even the rights for care (that is, meals, accommodation, etc.) are enforceable in this manner, and the national enforcement bodies do not have exclusive jurisdiction over such matters.

(ii) Misleading statement: "British Airways complies with *Regulation (EC) No 261/2004*"

On page 3 of its March 22, 2013 answer, British Airways makes the following false statement:

> British Airways complies with *Regulation (EC) No 261/2004* that applies, pursuant to Article 3, section 1.

In its August 23, 2013 submissions, British Airways refined this outright false statement with one that is technically true, but grossly misleading:

> British Airways complies with *Regulation (EC) No. 261/2004* that applies, pursuant to Article 3, section 1(a) 'to passengers departing from an airport located in the territory of a Member State to which the Treaty applies' and posts all notices and provides all rights set out therein.

This second statement is true. Indeed, the Applicant fully accepts British Airways' evidence that it complies with the provisions of *Regulation (EC) No. 261/2004* with respect to flights departing from the United Kingdom to Canada.

The second statement is misleading, however, because it is silent about British Airways' deliberate and calculated failure to comply with its obligations under Article 3(1)(b). Indeed, the scope of Article 3(1) is explained in *Emirates Airlines v. Schenkel*, Case C-173/07 by the European Court of Justice (Annex "F"):

> 30 It follows from Article 3(1) as a whole that the regulation applies to situations in which passengers use a flight either departing from an airport located in the territory of a Member State (indent (a)) or departing from an airport located in a non-member country and flying to an airport located in the territory of a Member State if the air carrier operating the flight concerned is a Community carrier (indent (b)).
>
> [Emphasis added.]

There is no doubt that British Airways is a "Community carrier" within the meaning of *Regulation (EC) No. 261/2004*, and consequently it is supposed to also pay denied boarding compensation according to the rates set out in *Regulation (EC) No. 261/2004* to passengers departingfrom Canada to the United Kingdom.

Therefore, it is clear that British Airways is currently not complying with its obligations under *Regulation (EC) No. 261/2004* with respect to passengers departing from Canada to the United Kingdom.

The Applicant is not asking the Agency to enforce *Regulation (EC) No. 261/2004*, but rather to take into account the obligations that it imposes on British Airways in determining the reasonableness of Rule 87(B)(3)(B), and an appropriate substitute for it.

(c) Passengers departing from the United Kingdom to Canada

On July 16, 2013, the Applicant directed a number of questions to British Airways, including the following one:

> Q7. Exhibit "A" to British Airways' submissions is 4th Revised Page AC-22-B from Air Canada's international tariff. Rule 80(G) on that page states that:
>
> > The rules set out in EU regulation no 261/2004 are fully incorporated herein and shall supersede and prevail over any provision of this tariff which may be inconsistent with those rules.
>
> What competitive disadvantage would British Airways suffer, if any, by including an identical or similar provision in its International Tariff?

Motion of Lukács (July 16, 2013), p. 4

In response to this question, British Airways stated that:

> The issue is not competitive advantage with respect to the position of Dr. Lukács that British Airways should be required by the Agency to incorporate *Regulation (EC) No. 261/2004* into British Airways' Canadian International Tariff.

British Airways' submissions (August 23, 2013), answer to Q7

The Applicant accepts the answer provided by British Airways as true, and submits that based on British Airways' own admission, it would not suffer any competitive disadvantage by incorporating the provisions of *Regulation (EC) No. 261/2004* into its International Tariff.

In its August 23, 2013 submissions, British Airways then went on to state that:

> British Airways complies with *Regulation (EC) No. 261/2004* that applies, pursuant to Article 3, section 1(a) 'to passengers departing from an airport located in the territory of a Member State to which the Treaty applies' and posts all notices and provides all rights set out therein.

British Airways' submissions (August 23, 2013), answer to Q7

In response to question Q2, British Airways also provided a list of the amount of denied boarding compensation it paid to passengers departing from the United Kingdom to Canada in the years 2010, 2011, and 2012. Although the amounts listed are in GBP, the list corroborates British Airways' evidence that it has been paying these passengers compensation in accordance with the rates set out in *Regulation (EC) No. 261/2004*, that is, 300 EUR/600 EUR per passenger.

British Airways' submissions (August 23, 2013), pp. 4-9

Thus, Applicant accepts British Airways' evidence that it has been paying denied boarding compensation to passengers departing from the United Kingdom to Canada in accordance with the rates set out *Regulation (EC) No. 261/2004*, that is, 300 EUR/600 EUR, depending on the length of the delay caused.

In particular, Rule 87(B)(3)(B) does not reflect British Airways' policy with respect to denied boarding compensation, contrary to s. 122(c)(iii) of the *ATR*; indeed, British Airways paid denied boarding compensation that substantially exceeds the amount set out in Rule 87(B)(3)(B) ("NOR MORE THAN UKL 100.00").

Complaint of Dr. Lukács (January 30, 2013), pp. 37-38, Exhibit "C"

Therefore, it will not affect British Airways' ability to meet its statutory, commercial, and operational obligations in any way if British Airways amends Rule 87(B)(3)(B) to reflect British Airways' current practice with respect to denied boarding compensation paid to passengers departing from the United Kingdom to Canada (300 EUR/600 EUR per passenger, depending on the length of the delay caused).

Hence, it is submitted that Rule 87(B)(3)(B) is unreasonable with respect to passengers departing from the United Kingdom to Canada, and it ought to be substituted with a provision that reflects British Airways' current practice (300 EUR/600 EUR per passenger, depending on the length of the delay caused).

(d) Passengers departing from Canada to the United Kingdom

Rule 87 has two subrules marked with (B). The present complaint concerns the one labelled as "APPLICABLE BETWEEN POINTS IN CANADA AND POINTS IN THE UNITED KINGDOM SERVED BY BRITISH AIRWAYS," and which contains Rule 87(B)(3)(B) that reads as follows:

> SUBJECT TO THE PROVISIONS OF PARAGRAPH (B)(3)(A) OF THIS RULE, CARRIER WILL TENDER LIQUIDATED DAMAGES IN THE AMOUNT OF 100 PERCENT OF THE SUM OF THE VALUES OF THE PASSENGER'S REMAINING FLIGHT COUPONS OF THE TICKET TO THE PASSENGER'S NEXT STOPOVER, OR IF NONE TO HIS DESTINATION, BUT NOT LESS THAN $50.00 AND NOT MORE THAN $200.00 PROVIDED THAT IF THE PASSENGER IS DENIED BOARDING IN THE UNITED KINGDOM, THE AMOUNT OF COMPENSATION IN THIS SUBPARAGRAPH WILL READ NOT LESS THAN UKL 10.00 NOR MORE THAN UKL 100.00. SUCH TENDER IF ACCEPTED BY THE PASSENGER AND PAID BY CARRIER, WILL CONSTITUTE FULL COMPENSATION FOR ALL ACTUAL OR ANTICIPATORY DAMAGES INCURRED OR TO BE INCURRED BY THE PASSENGER AS RESULT OF CARRIER'S FAILURE TO PROVIDE PASSENGER WITH CONFIRMED RESERVED SPACE.
>
> [Emphasis added.]

Complaint of Dr. Lukács (January 30, 2013), pp. 37-38, Exhibit "C"

(i) Rule 87(B)(3)(B) does not reflect British Airways' current practices

On July 16, 2013, the Applicant directed a number of questions to British Airways, including the following one, which concerns British Airways' current practices of denied boarding compensation with respect to passengers departing from Canada to the United Kingdom:

> Q6. Exhibit "B" lists amounts ranging from $375.00 to $4,563.00. These amounts are substantially higher than what is set out in British Airways' Rule 87(B)(3)(B).
>
> What method did British Airways use to determine these amounts?

Motion of Lukács (July 16, 2013), p. 4

In response to this question, British Airways stated that:

> For compensation for passengers rerouted to arrive at last destination not more than 4 hours after original STA, cash of GBP 125.00 is the amount. For compensation for passengers rerouted to arrive at last destination more than 4 hours after original STA, cash of GBP 250.00 is the amount.

British Airways' submissions (August 23, 2013), answer to Q6

On September 5, 2013, British Airways filed the list of denied boarding compensation amounts it paid to passengers departing from Canada to the United Kingdom in the years 2010, 2011, and 2012. This list also confirms that British Airways has paid 125.00 GBP or 250.00 GBP per passenger to such passengers. The amount of 250.00 GBP is approximately CAD$415.00, and it is more than double the maximum amount of denied boarding compensation stipulated by Rule 87(B)(3)(B).

Thus, Rule 87(B)(3)(B) does not reflect British Airways' current practices with respect to denied boarding compensation, and British Airways has been paying denied boarding compensation in amounts that are substantially higher than set out in Rule 87(B)(3)(B). In particular, British Airways will suffer no disadvantage (competitive, or otherwise) by amending its Rule 87(B)(3)(B) to reflect its current practices.

It is submitted that this in and on its own demonstrates that Rule 87(B)(3)(B) fails to strike the balance between the rights of passengers and the ability of British Airways to meet its statutory, commercial and operational obligations.

(ii) Lack of evidence about competitive disadvantage

British Airways provided no explanation or rationale as to how the denied boarding compensation amounts of 125.00 GBP or 250.00 GBP were established for passengers departing from Canada to the United Kingdom in the years 2010, 2011, and 2012, and British Airways made no submissions as to why these rates are reasonable within the meaning of the *ATR*.

British Airways stated on page 4 of its March 22, 2013 answer to the complaint that:

> With respect to competitive disadvantage that British Airways would suffer if British Airways were required to replace RULE 87(B)(3)(B) with the amounts prescribed by *Regulation (EC) No 261/2004*, as its primary competitor on the Canada/U.K. routes is Air Canada, it would suffer a competitive disadvantage because Air Canada only as to pay compensation of cash CAD 200 or voucher CAD 500 by the terms of its Tariff Rule 89(E)(2) for passengers departing from Canada to the U.K.

The Applicant submits that there is not a scintilla of evidence to support British Airways' claim that its primary competitor is Air Canada. British Airways is a European airline, and as such, its main competitors are the major European airlines, such as Lufthansa or Air France. Even if one considers only itineraries between Canada and the United Kingdom, both Lufthansa and Air France offer a wealth of such itineraries, via one of their hub cities (such as Frankfurt, Munich, or Paris).

It is important to observe that both Lufthansa and Air France pay denied boarding compensation to passengers departing from Canada to the European Community in accordance with the amounts prescribed by *Regulation (EC) No 261/2004*, that is, 300 EUR/600 EUR per passenger.

Complaint of Dr. Lukács (January 30, 2013), pp. 51-60, Exhibits "I" and "J"

British Airways has provided no evidence to demonstrate that it would suffer any competitive disadvantage vis-à-vis Lufthansa or Air France by raising its denied boarding compensation amounts for passengers departing from Canada to the United Kingdom to match the amounts prescribed by *Regulation (EC) No 261/2004*.

Even if Air Canada were British Airways' main competitor (a claim that the Applicant disputes, because it is not supported by any evidence), British Airways' submissions with respect to Air Canada's denied boarding compensation amounts are misleading and outdated for the following reasons.

First, as the Agency noted in *Lukács v. Air Canada*, 204-C-A-2013 (at para. 70):

> [T]he mere fact that a carrier's terms and conditions of carriage is comparable to that applicable to other carriers does not render that term and condition reasonable.

Indeed, as British Airways surely knows, the reasonableness of International Tariff Rule 89(E)(2) of Air Canada referenced by British Airways has been challenged before the Agency in *Azar v. Air Canada*, File No. M4120-3/12-02098.

Second, according to Air Canada's submissions to the Agency in the *Azar v. Air Canada* case, dated September 18, 2013 (Annex "G"), Air Canada intends to adopt denied boarding compensation amounts on flights between Canada and the European Union that are similar to the amounts prescribed by *Regulation (EC) No 261/2004*.

Thus, any alleged competitive disadvantage for British Airways will vanish as soon as the Agency renders its decision in *Azar v. Air Canada*, and Air Canada implements its new denied boarding compensation policy with respect to flights between Canada and the European Union.

Therefore, British Airways failed to demonstrate that raising its denied boarding compensation amounts for passengers departing from Canada to the United Kingdom to match the amounts prescribed by *Regulation (EC) No 261/2004* (300 EUR/600 EUR, depending on the length of the delay caused) would cause British Airways competitive disadvantage that would adversely affect its ability to meet its statutory, commercial and operational obligations.

Hence, Rule 87(B)(3)(B) fails to strike the balance between the rights of passengers and the statutory, commercial and operational obligations of British Airways. As such, Rule 87(B)(3)(B) is unreasonable, and ought to be disallowed.

(e) "Sole remedy" provision is unreasonable

On pages 24-25 of the Applicant's complaint of January 30, 2013, the Applicant submitted that the portion of Rule 87(B)(3)(B) that purports to extinguish the rights of passengers who accept denied boarding compensation is unreasonable.

British Airways chose not to address this aspect of the Applicant's complaint.

Therefore, it is submitted that the Agency ought to disallow this provision as unreasonable based on the arguments presented in the Applicant's complaint.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways

LIST OF AUTHORITIES

Legislation

1. *Air Transportation Regulations*, S.O.R./88-58.

2. *Canada Transportation Act*, S.C. 1996, c. 10.

3. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.

4. *Carriage by Air Act*, R.S.C. 1985, c. C-26.

International instruments

5. *Montreal Convention: Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 28 May 1999).

Case law

6. *Balakrishnan v. Aeroflot*, Canadian Transportation Agency, 328-C-A-2007.

7. *Cachafeiro v. Iberia*, Case C-321/11, European Court of Justice.

8. *Emirates Airlines v. Schenkel*, Case C-173-07, European Court of Justice.

9. *Finnair v. Lassooy*, Case C-22/11, European Court of Justice.

10. *Foord v. United Air Lines Inc.*, 2006 ABPC 103.

11. *Lukács v. Air Canada*, Canadian Transportation Agency, 208-C-A-2009.

12. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-29-2011.

13. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-129-2011.

14. *Lukács v. Air Canada*, Canadian Transportation Agency, 291-C-A-2011.

15. *Lukács v. Air Canada*, Canadian Transportation Agency, 251-C-A-2012.

16. *Lukács v. Air Canada*, Canadian Transportation Agency, 204-C-A-2013.

17. *Lukács v. Air Canada*, Canadian Transportation Agency, 342-C-A-2013.

18. *Lukács v. Porter*, Canadian Transportation Agency, 16-C-A-2013.

19. *Lukács v. Porter*, Canadian Transportation Agency, 344-C-A-2013.

20. *Lukács v. WestJet*, Canadian Transportation Agency, 483-C-A-2010.

21. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-42.

22. *Lukács v. WestJet*, Canadian Transportation Agency, 227-C-A-2012.

23. *McDonagh v. Ryanair Ltd*, Case C-12/11, European Court of Justice.

24. *Pinksen v. Air Canada*, Canadian Transportation Agency, 181-C-A-2007.

25. *Shetty v. Air Canada*, Canadian Transportation Agency, 353-C-A-2012.

26. *Thakkar v. Aeroflot*, Canadian Transportation Agency, 434-C-A-2007.

27. *M. X... Jean-Baptiste et Madame X... Pascale Marie-Françoise c. Air France*, Tribunal d'instance d'Aulnay-sous-Bois, Audience civile 8 octobre 2007, N° de RG: 07/00145.

28. *Wallentin-Hermann v. Alitalia*, Case C-549/07, European Court of Justice.

JUDGMENT OF THE COURT (Third Chamber)

31 January 2013 (*)

(Air transport – Regulation (EC) No 261/2004 – Notion of 'extraordinary circumstances' – Obligation to provide assistance to passengers in the event of cancellation of a flight due to 'extraordinary circumstances' – Volcanic eruption leading to the closure of air space – Eruption of the Icelandic volcano Eyjafjallajökull)

In Case C-12/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Dublin Metropolitan District Court (Ireland), made by decision of 10 November 2010, received at the Court on 10 January 2011, in the proceedings

Denise McDonagh

v

Ryanair Ltd,

THE COURT (Third Chamber),

composed of K. Lenaerts, acting as President of the Third Chamber, E. Juhász, G. Arestis, T. von Danwitz and D. Šváby (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 9 February 2012,

after considering the observations submitted on behalf of:

– Ms McDonagh, by J. Hennessy, Solicitor,

– Ryanair Ltd, by G. Berrisch, Rechtsanwalt, M. Hayden, Senior Counsel, and R. Aylward, Barrister-at-Law,

– the German Government, by T. Henze and J. Kemper, acting as Agents,

– the French Government, by G. de Bergues and M. Perrot, acting as Agents,

– the Polish Government, by M. Szpunar, acting as Agent,

– the United Kingdom Government, by S. Ossowski, acting as Agent,

– the European Parliament, by L.G. Knudsen and A. Troupiotis, acting as Agents,

– the Council of the European Union, by E. Karlsson and A. De Elera, acting as Agents,

– the European Commission, by K. Simonsson and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 March 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation and assessment of the validity of Articles 5(1)(b) and 9 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 request has been made in proceedings between Ms McDonagh and Ryanair Ltd ('Ryanair') regarding the airline company's refusal to give Ms McDonagh the care provided for in Article 5(1)(b) of Regulation No 261/2004 after the eruption of the Icelandic volcano Eyjafjallajökull had caused the cancellation of her flight and, more generally, closure of part of European airspace.

Legal context

International law

3 The Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38; 'the Montreal Convention').

4 The last paragraph of the preamble to the Montreal Convention states:

'Convinced that collective State action for further harmonisation and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests …'

5 Article 29 of the Convention states:

'In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.'

European Union law

6 Recitals 1, 2, 14 and 15 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.

...

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

(15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.'

7 Article 5 of Regulation No 261/2004, 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

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(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.

…'

8 Article 8 of Regulation No 261/2004 defines the manner in which assistance is provided by air carriers to passengers as regards their right to reimbursement or re-routing.

9 Article 9 of Regulation No 261/2004, headed 'Right to care', is worded as follows:

'1. Where reference is made to this Article, passengers shall be offered free of charge:

(a) meals and refreshments in a reasonable relation to the waiting time;

(b) hotel accommodation in cases

– where a stay of one or more nights becomes necessary, or

– where a stay additional to that intended by the passenger becomes necessary;

(c) transport between the airport and place of accommodation (hotel or other).

2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.

…'

10 Under the heading 'Further compensation', Article 12(1) of Regulation No 261/2004 provides that 'this Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.'

11 Article 16 of Regulation No 261/2004, headed 'Infringements', reads as follows:

'1. Each Member State shall designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers

are respected. The Member States shall inform the Commission of the body that has been designated in accordance with this paragraph.

…

3. The sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate and dissuasive.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 On 11 February 2010, Ms McDonagh booked a flight with Ryanair from Faro (Portugal) to Dublin (Ireland) scheduled for 17 April 2010, for EUR 98. On 20 March 2010, the Eyjafjallajökull volcano in Iceland began to erupt. On 14 April 2010, it entered an explosive phase, casting a cloud of volcanic ash into the skies over Europe. On 15 April 2010, the competent air traffic authorities closed the airspace over a number of Member States because of the risks to aircraft.

13 On 17 April 2010, Ms McDonagh's flight was cancelled following the closure of Irish airspace. Ryanair flights between continental Europe and Ireland resumed on 22 April 2010 and Ms McDonagh was not able to return to Dublin until 24 April 2010.

14 During the period between 17 and 24 April 2010, Ryanair did not provide Ms McDonagh with care in accordance with the detailed rules laid down in Article 9 of Regulation No 261/2004.

15 Ms McDonagh brought an action against Ryanair before the referring court for compensation in the amount of EUR 1 129.41, corresponding to the costs which she had incurred during that period on meals, refreshments, accommodation and transport.

16 Ryanair claims that the closure of part of European airspace following the eruption of the Eyjafjallajökull volcano does not constitute 'extraordinary circumstances' within the meaning of Regulation No 261/2004 but 'super extraordinary circumstances', releasing it not only from its obligation to pay compensation but also from its obligations to provide care under Articles 5 and 9 of that regulation.

17 In light of its doubts as to whether the obligation to provide that care may be subject to limitations in circumstances such as those at issue in the main proceedings and taking the view that the Court of Justice has not yet ruled on that matter, the Dublin Metropolitan District Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do circumstances such as the closures of European airspace as a result of the eruption of the Eyjafjallajökull volcano in Iceland, which caused widespread and prolonged disruption to air travel, go beyond "extraordinary circumstances" within the meaning of Regulation No 261/2004?

(2) If the answer to Question 1 is yes, is liability for the duty to provide care

excluded under Articles 5 and 9 [of Regulation No 261/2004] in such circumstances?

(3) If the answer to Question 2 is no, are Articles 5 and 9 [of Regulation No 261/2004] invalid in so far as they violate the principles of proportionality and non-discrimination, the principle of an "equitable balance of interests" enshrined in the Montreal Convention, and Articles 16 and 17 of the Charter of Fundamental Rights of the European Union ["the Charter"]?

(4) Is the obligation in Articles 5 and 9 [of Regulation No 261/2004] to be interpreted as containing an implied limitation, such as a temporal and/or a monetary limit, to provide care in cases where cancellation is caused by "extraordinary circumstances"?

(5) If the answer to Question 4 is no, are Articles 5 and 9 [of Regulation No 261/2004] invalid in so far as they violate the principles of proportionality and non-discrimination, the principle of an "equitable balance of interests" enshrined in the Montreal Convention, and Articles 16 and 17 of the [Charter]?'

Consideration of the questions referred

Admissibility

18 The Council of the European Union claims, in essence, that the questions are inadmissible on the basis that they are not relevant to the dispute in the main proceedings, since, in the event of cancellation of a flight and regardless of the cause of that cancellation, air passengers cannot invoke before a national court failure of an air carrier to comply with its obligation, laid down in Articles 5(1)(b) and 9 of Regulation No 261/2004, to provide care in order to obtain compensation from that air carrier.

19 It is to be recalled that, under Article 5(1)(b) of Regulation No 261/2004, in the event of cancellation of a flight the passengers concerned are to be offered assistance by the air carrier, under the conditions laid down in that subparagraph, meeting the costs of meals, accommodation and communication as provided for in Article 9 of that regulation.

20 The Court has already had occasion to explain that, when an air carrier fails to fulfil its obligations under Article 9 of Regulation No 261/2004, an air passenger is justified in claiming a right to compensation on the basis of the factors set out in those provisions (see, to that effect, Case C-83/10 *Sousa Rodríguez and Others* [2011] ECR I-0000, paragraph 44) and that such a claim cannot be understood as seeking damages, by way of redress on an individual basis, for the harm resulting from the cancellation of the flight concerned in the conditions laid down, inter alia, in Article 22 of the Montreal Convention (see, to that effect, *Sousa Rodríguez and Others*, paragraph 38).

21 A claim such as that at issue in the main proceedings seeks to obtain, from the air carrier, equivalent compliance with its obligation to provide care arising from Articles 5(1)(b) and 9 of Regulation No 261/2004, an obligation which, it should be recalled, operates at an earlier stage than the system laid down by the

Montreal Convention (see Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 32, and Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECR I-0000, paragraph 57).

22 The fact, noted in this connection by the Council, that each Member State designates a body responsible for the enforcement of Regulation No 261/2004 which, where appropriate, takes the measures necessary to ensure that the rights of passengers are respected and which each passenger may complain to about an alleged infringement of that regulation, in accordance with Article 16 of the regulation, is not such as to affect the right of a passenger to such reimbursement.

23 Article 16 cannot be interpreted as allowing only national bodies responsible for the enforcement of Regulation No 261/2004 to sanction the failure of air carriers to comply with their obligation laid down in Articles 5(1)(b) and 9 of that regulation to provide care.

24 Consequently, it must be held that an air passenger may invoke before a national court the failure of an air carrier to comply with its obligation, laid down in Articles 5(1)(b) and 9 of Regulation No 261/2004, to provide care in order to obtain compensation from that air carrier for the costs which it should have borne under those provisions.

25 Since the questions are relevant to the outcome of the dispute, the request for a preliminary ruling is therefore admissible.

Substance

The first question

26 By its first question the referring court asks, in essence, whether Article 5 of Regulation No 261/2004 must be interpreted as meaning that circumstances such as the closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute 'extraordinary circumstances' within the meaning of that regulation which do not release air carriers from their obligation laid down in Articles 5(1)(b) and 9 of the regulation to provide care or, on the contrary and because of their particular scale, go beyond the scope of that notion, thus releasing air carriers from that obligation.

27 At the outset, it should be noted that the term 'extraordinary circumstances' is not defined in Article 2 of Regulation No 261/2004 or in the other provisions of that regulation, even though a non-exhaustive list of those circumstances can be derived from recitals 14 and 15 in the preamble to the regulation.

28 It is settled case-law that the meaning and scope of terms for which European Union law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (*Wallentin-Hermann*, paragraph 17).

29 In accordance with everyday language, the words 'extraordinary circumstances' literally refer to circumstances which are 'out of the ordinary'. In the context of air transport, they refer to an event which is not inherent in the normal exercise

of the activity of the carrier concerned and is beyond the actual control of that carrier on account of its nature or origin (*Wallentin-Hermann*, paragraph 23). In other words, as the Advocate General noted in point 34 of his Opinion, they relate to all circumstances which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity.

30 Regulation No 261/2004 contains nothing that would allow the conclusion to be drawn that it recognises a separate category of 'particularly extraordinary' events, beyond 'extraordinary circumstances' referred to in Article 5(3) of that regulation, which would lead to the air carrier being exempted from all its obligations, including those under Article 9 of the regulation.

31 Next, as for the context of and the aims pursued by Article 5 of Regulation No 261/2004, which prescribes the obligations of an air carrier in the event of cancellation of a flight, it must be noted, first, that when exceptional circumstances arise, Article 5(3) exempts the air carrier only from its obligation to pay compensation under Article 7 of that regulation. The European Union legislature thus took the view that the obligation on the air carrier to provide care under Article 9 of that regulation is necessary whatever the event which has given rise to the cancellation of the flight. Second, it is clear from recitals 1 and 2 of Regulation No 261/2004 that the regulation aims at ensuring a high level of protection for passengers and takes account of the requirements of consumer protection in general, inasmuch as cancellation of flights causes serious inconvenience to passengers (*Wallentin-Hermann*, paragraph 18, and *Nelson and Others*, paragraph 72).

32 If circumstances such as those at issue in the main proceedings went beyond the scope of 'extraordinary circumstances' within the meaning of Regulation No 261/2004 due in particular to their origin and scale, such an interpretation would go against not only the meaning of that notion in everyday language but also the objectives of that regulation.

33 Such an interpretation would in fact mean that air carriers would be required to provide care pursuant to Article 9 of Regulation No 261/2004 to air passengers who find themselves, due to cancellation of a flight, in a situation causing limited inconvenience, whereas passengers, such as the plaintiff in the main proceedings, who find themselves in a particularly vulnerable state in that they are forced to remain at an airport for several days would be denied that care.

34 In the light of the foregoing, the answer to the first question is that Article 5 of Regulation No 261/2004 must be interpreted as meaning that circumstances such as the closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute 'extraordinary circumstances' within the meaning of that regulation which do not release air carriers from their obligation laid down in Articles 5(1)(b) and 9 of the regulation to provide care.

35 It follows from the answer given to the first question that there is no need to answer the second and third questions.

The fourth and fifth questions

36 By its fourth and fifth questions, which should be examined together, the

referring court asks, in essence, whether Articles 5(1)(b) and 9 of Regulation No 261/2004 must be interpreted as meaning that, in the event of cancellation of a flight due to 'extraordinary circumstances' such as those at issue in the main proceedings, the obligation to provide care to passengers laid down in those provisions is limited in temporal or monetary terms and, if not, whether those provisions thus interpreted are invalid in the light of the principles of proportionality and non-discrimination, the principle of an 'equitable balance of interests' referred to in the Montreal Convention or Articles 16 and 17 of the Charter.

37 It should be noted that, in the case of cancellation of a flight on account of 'extraordinary circumstances', the European Union legislature sought to modify the obligations of air carriers laid down in Article 5(1) of Regulation No 261/2004.

38 Under recital 15 and Article 5(3) of Regulation No 261/2004, by way of derogation from the provisions of Article 5(1), the air carrier is thus exempted from its obligation to compensate passengers under Article 7 of that regulation if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances which are beyond the air carrier's actual control (*Nelson and Others*, paragraph 39).

39 In that regard, the Court has held that, in such circumstances, the air carrier is only released from its obligation to provide compensation under Article 7 of Regulation No 261/2004 and that, consequently, its obligation to provide care in accordance with Article 9 of that regulation remains (see, to that effect, Case C-294/10 *Eglītis and Ratnieks* [2011] ECR I-0000, paragraphs 23 and 24).

40 Furthermore, no limitation, whether temporal or monetary, of the obligation to provide care to passengers in extraordinary circumstances such as those at issue in the main proceedings is apparent from the wording of Regulation No 261/2004.

41 It follows from Article 9 of Regulation No 261/2004 that all the obligations to provide care to passengers whose flight is cancelled are imposed, in their entirety, on the air carrier for the whole period during which the passengers concerned must await their re-routing. To that effect, it is clear from Article 9(1)(b) that hotel accommodation is to be offered free of charge by the air carrier during the 'necessary' period.

42 Moreover, any interpretation seeking the recognition of limits, whether temporal or monetary, on the obligation of the air carrier to provide care to passengers whose flight has been cancelled would have the effect of jeopardising the aims pursued by Regulation No 261/2004 recalled in paragraph 31 of this judgment, in that, beyond the limitation adopted, passengers would be deprived of all care and thus left to themselves. As the Advocate General noted in point 52 of his Opinion, the provision of care to such passengers is particularly important in the case of extraordinary circumstances which persist over a long time and it is precisely in situations where the waiting period occasioned by the cancellation of a flight is particularly lengthy that it is necessary to ensure that an air passenger whose flight has been cancelled can have access to essential goods and services throughout that period.

43 Consequently, and contrary to what Ryanair claims, it cannot be deduced from Regulation No 261/2004 that, in circumstances such as those at issue in the main proceedings, the obligation referred to in Articles 5 and 9 of that regulation to provide care to passengers must be subject to a temporal or monetary limitation.

44 However, it is necessary to ensure that the interpretation in the preceding paragraph does not conflict with the principles of proportionality, of an 'equitable balance of interests' referred to in the Montreal Convention and of non-discrimination, or with Articles 16 and 17 of the Charter. Under a general principle of interpretation, a European Union measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole (Case C-149/10 *Chatzi* [2010] ECR I-8489, paragraph 43).

45 As regards, first, the principle of proportionality, it must be noted that the Court has already had occasion to find, in Case C-344/04 *IATA and ELFAA* [2010] ECR I-403, paragraphs 78 to 92, that Articles 5 to 7 of Regulation No 261/2004 are not invalid by reason of infringement of the principle of proportionality.

46 There is nothing to justify, even on the basis of the lack of a temporal or monetary limit on the obligation to provide care in circumstances such as those at issue in the main proceedings, the finding of validity made by the Court in that case being called into question.

47 The fact that the obligation defined in Article 9 of Regulation No 261/2004 to provide care entails, as Ryanair claims, undoubted financial consequences for air carriers is not such as to invalidate that finding, since those consequences cannot be considered disproportionate to the aim of ensuring a high level of protection for passengers.

48 The importance of the objective of consumer protection, which includes the protection of air passengers, may justify even substantial negative economic consequences for certain economic operators (*Nelson and Others*, paragraph 81 and the case-law cited).

49 In addition, as the Advocate General noted in points 58 and 60 of his Opinion, air carriers should, as experienced operators, foresee costs linked to the fulfilment, where relevant, of their obligation to provide care and, furthermore, may pass on the costs incurred as a result of that obligation to airline ticket prices.

50 It follows that Articles 5(1)(b) and 9 of Regulation No 261/2004 are not contrary to the principle of proportionality.

51 None the less, an air passenger may only obtain, by way of compensation for the failure of the air carrier to comply with its obligation referred to in Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care, reimbursement of the amounts which, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger, a matter which is for the national court to assess.

52 As regards, second, the principle of an 'equitable balance of interests' referred

to in the last paragraph of the preamble to the Montreal Convention, suffice it to note that the standardised and immediate compensatory measures laid down by Regulation No 261/2004, which include the obligation to provide care to passengers whose flight has been cancelled, are not among those whose institution is governed by the Montreal Convention (see, to that effect, *Wallentin-Hermann*, paragraph 32 and the case-law cited).

53 Therefore, there is no need to assess the validity of the aforesaid provisions in the light of the principle of an 'equitable balance of interests' referred to in that Convention.

54 As regards, third, the general principle of non-discrimination or equal treatment, Ryanair claims that the obligation laid down in Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care in a situation such as that as issue in the main proceedings imposes obligations on air carriers which, in circumstances similar to those at issue in the main proceedings, do not fall upon other modes of transport governed by Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ 2007 L 315, p. 14), Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ 2010 L 334, p. 1) and Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ 2011 L 55, p. 1), even though passengers stranded by widespread and prolonged disruption of transport find themselves in an identical situation whatever their mode of transport.

55 In that respect, it should be noted that the Court has already held in *IATA and ELFAA*, paragraphs 93 to 99, that Articles 5 to 7 of Regulation No 261/2004 do not infringe the principle of equal treatment.

56 The situation of undertakings operating in the different transport sectors is not comparable since the different modes of transport, having regard to the manner in which they operate, the conditions governing their accessibility and the distribution of their networks, are not interchangeable as regards the conditions of their use (*IATA and ELFAA*, paragraph 96).

57 In those circumstances, the European Union legislature was able to establish rules providing for a level of customer protection that varied according to the transport sector concerned.

58 It follows that Articles 5(1)(b) and 9 of Regulation No 261/2004 do not infringe the principle of non-discrimination.

59 As regards, fourth, Articles 16 and 17 of the Charter, guaranteeing freedom to conduct a business and the right to property respectively, Ryanair claims that the obligation to provide care to passengers imposed on air carriers in circumstances such as those at issue in the main proceedings has the effect of depriving air carriers of part of the fruits of their labour and of their investments.

60 In that regard, it must be noted, first, that freedom to conduct a business and

the right to property are not absolute rights but must be considered in relation to their social function (see, to that effect, Case C-544/10 *Deutsches Weintor* [2012] ECR I-0000, paragraph 54 and the case-law cited).

61 Next, Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights enshrined by it as long as the limitations are provided for by law, respect the essence of those rights and freedoms, and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

62 Lastly, when several rights protected by the European Union legal order clash, such an assessment must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and striking a fair balance between them (see, to that effect, Case C-275/06 *Promusicae* [2008] ECR I-271, paragraphs 65 and 66, and *Deutsches Weintor*, paragraph 47).

63 In this case, the referring court mentions Articles 16 and 17 of the Charter. However, it is also necessary to take account of Article 38 thereof which, like Article 169 TFEU, seeks to ensure a high level of protection for consumers, including air passengers, in European Union policies. As has been noted in paragraph 31 of this judgment, protection of those passengers is among the principal aims of Regulation No 261/2004.

64 It follows from paragraphs 45 to 49 of this judgment relating to the principle of proportionality that Articles 5(1)(b) and 9 of Regulation No 261/2004, as interpreted in paragraph 43 of this judgment, must be considered to comply with the requirement intended to reconcile the various fundamental rights involved and strike a fair balance between them.

65 Therefore, those provisions do not breach Articles 16 and 17 of the Charter.

66 Consequently, the answer to the fourth and fifth questions is that Articles 5(1)(b) and 9 of Regulation No 261/2004 must be interpreted as meaning that, in the event of cancellation of a flight due to 'extraordinary circumstances' of a duration such as that in the main proceedings, the obligation to provide care to air passengers laid down in those provisions must be complied with, and the validity of those provisions is not affected.

However, an air passenger may only obtain, by way of compensation for the failure of the air carrier to comply with its obligation referred to in Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care, reimbursement of the amounts which, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger, a matter which is for the national court to assess.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Third Chamber) hereby rules:

1. **Article 5 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 circumstances such as the closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute 'extraordinary circumstances' within the meaning of that regulation which do not release air carriers from their obligation laid down in Articles 5(1)(b) and 9 of the regulation to provide care.**

2. **Articles 5(1)(b) and 9 of Regulation No 261/2004 must be interpreted as meaning that, in the event of cancellation of a flight due to 'extraordinary circumstances' of a duration such as that in the main proceedings, the obligation to provide care to air passengers laid down in those provisions must be complied with, and the validity of those provisions is not affected.**

   However, an air passenger may only obtain, by way of compensation for the failure of the air carrier to comply with its obligation referred to in Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care, reimbursement of the amounts which, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger, a matter which is for the national court to assess.

[Signatures]

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* Language of the case: English.

JUDGMENT OF THE COURT (Fourth Chamber)

22 December 2008 (*)

(Carriage by air – Regulation (EC) No 261/2004 – Article 5 – Compensation and assistance to passengers in the event of cancellation of flights – Exemption from the obligation to pay compensation – Cancellation due to extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken)

In Case C-549/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Handelsgericht Wien (Austria), made by decision of 30 October 2007, received at the Court on 11 December 2007, in the proceedings

Friederike Wallentin-Hermann

v

Alitalia – Linee Aeree Italiane SpA,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, E. Juhász, G. Arestis and J. Malenovský (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mrs Wallentin-Hermann, by herself, Rechtsanwältin,

– Alitalia – Linee Aeree Italiane SpA, 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 Polish Government, by M. Dowgielewicz, acting as Agent,

– the Portuguese Government, by L. Fernandes, acting as Agent,

– the United Kingdom Government, by C. Gibbs, acting as Agent, and D. Beard, Barrister,

– the Commission of the European Communities, by R. Vidal Puig and M.

Vollkommer, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

2 The reference was made in the course of proceedings between Mrs Wallentin-Hermann and Alitalia – Linee Aree Italiane SpA ('Alitalia') following Alitalia's refusal to pay compensation to the applicant in the main proceedings whose flight had been cancelled.

Legal context

International law

3 The Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999 ('the Montreal Convention'), was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38). That convention entered into force so far as concerns the Community on 28 June 2004.

4 Articles 17 to 37 of the Montreal Convention comprise Chapter III thereof, headed 'Liability of the carrier and extent of compensation for damage'.

5 Article 19 of the Convention, headed 'Delay', provides:

'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.'

Community law

6 Regulation No 261/2004 includes, inter alia, the following recitals:

'(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.

…

(12) The trouble and inconvenience to passengers caused by cancellation of flights should … be reduced. This should be achieved by inducing carriers to inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable re-routing, so that the passengers can make other arrangements. Air carriers should compensate passengers if they fail to do this, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

…

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

(15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.'

7 Article 5 of Regulation No 261/2004, 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

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(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.

…'

8 Article 7(1) of Regulation No 261/2004, headed 'Right to compensation', provides:

'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).

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 It is apparent from the order for reference that Mrs Wallentin-Hermann booked three seats on a flight with Alitalia from Vienna (Austria) to Brindisi (Italy) via Rome (Italy) for herself, her husband and her daughter. The flight was scheduled to depart from Vienna on 28 June 2005 at 6.45 a.m. and to arrive at Brindisi on the same day at 10.35 a.m.

10 After checking in, the three passengers were informed, five minutes before the scheduled departure time, that their flight had been cancelled. They were subsequently transferred to an Austrian Airlines flight to Rome, where they arrived at 9.40 a.m., that is 20 minutes after the time of departure of their connecting flight to Brindisi, which they therefore missed. Mrs Wallentin-Hermann and her family arrived at Brindisi at 2.15 p.m.

11 The cancellation of the Alitalia flight from Vienna resulted from a complex engine defect in the turbine which had been discovered the day before during a

check. Alitalia had been informed of the defect during the night preceding that flight, at 1.00 a.m. The repair of the aircraft, which necessitated the dispatch of spare parts and engineers, was completed on 8 July 2005.

12 Mrs Wallentin-Hermann requested that Alitalia pay her EUR 250 compensation pursuant to Articles 5(1)(c) and 7(1) of Regulation No 261/2004 due to the cancellation of her flight and also EUR 10 for telephone charges. Alitalia rejected that request.

13 In the judicial proceedings that Mrs Wallentin-Hermann then brought, the Bezirksgericht für Handelssachen Wien (District Commercial Court, Vienna) upheld her application for compensation, in particular on the ground that the technical defects which affected the aircraft concerned were not covered by the 'extraordinary circumstances' provided for in Article 5(3) of Regulation No 261/2004 which exempt from the obligation to pay compensation.

14 Alitalia lodged an appeal against that decision before the Handelsgericht Wien (Commercial Court, Vienna), which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are there extraordinary circumstances within the meaning of Article 5(3) of Regulation … No 261/2004 … , having regard to recital 14 in the preamble to the regulation, if a technical defect in the aeroplane, in particular damage to the engine, results in the cancellation of the flight, and must the grounds of excuse under Article 5(3) of [that] regulation be interpreted in accordance with the provisions of Article 19 of the Montreal Convention?

(2) If the answer to the first question is in the affirmative, are there extraordinary circumstances within the meaning of Article 5(3) of Regulation [No 261/2004] where air carriers cite technical defects as a reason for flight cancellations with above average frequency, solely on the basis of their frequency?

(3) If the answer to the first question is in the affirmative, has an air carrier taken all "reasonable measures" in accordance with Article 5(3) of Regulation [No 261/2004] if it establishes that the minimum legal requirements with regard to maintenance work on the aeroplane have been met and is that sufficient to relieve the air carrier of the obligation to pay compensation provided for by Article 5 in conjunction with Article 7 of [that] regulation?

(4) If the answer to the first question is in the negative, are extraordinary circumstances within the meaning of Article 5(3) of Regulation [No 261/2004] cases of *force majeure* or natural disasters, which were not due to a technical defect and are thus unconnected with the air carrier?'

The questions referred for a preliminary ruling

The first and fourth questions

15 By its first and fourth questions, which it is appropriate to examine together, the referring court is essentially asking whether Article 5(3) of Regulation No

261/2004, read in the light of recital 14 in the preamble to that regulation, must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is covered by the concept of 'extraordinary circumstances' within the meaning of that provision or whether, conversely, that concept covers situations of a different kind which are not due to technical problems. The referring court is also asking whether the grounds of exemption under that provision must be interpreted in accordance with the provisions of the Montreal Convention, in particular Article 19 thereof.

16 It must be stated that the concept of extraordinary circumstances is not amongst those which are defined in Article 2 of Regulation No 261/2004. Moreover, that concept is not defined in the other articles of that regulation.

17 It is settled case-law that the meaning and scope of terms for which Community law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. Moreover, when those terms appear in a provision which constitutes a derogation from a principle or, more specifically, from Community rules for the protection of consumers, they must be read so that that provision can be interpreted strictly (see, to that effect, Case C-336/03 *easyCar* [2005] ECR I-1947, paragraph 21 and the case-law cited). Furthermore, the preamble to a Community measure may explain the latter's content (see, to that effect, inter alia, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 76).

18 In this respect, the objectives pursued by Article 5 of Regulation No 261/2004, which lays down the obligations owed by an operating air carrier in the event of cancellation of a flight, are clear from recitals 1 and 2 in the preamble to the regulation, according to which action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers and take account of the requirements of consumer protection in general, inasmuch as cancellation of flights causes serious inconvenience to passengers (see, to that effect, *IATA and ELFAA*, paragraph 69).

19 As is apparent from recital 12 in the preamble to, and Article 5 of, Regulation No 261/2004, the Community legislature intended to reduce the trouble and inconvenience to passengers caused by cancellation of flights by inducing air carriers to announce cancellations in advance and, in certain circumstances, to offer re-routing meeting certain criteria. Where those measures could not be adopted by air carriers, the Community legislature intended that they should compensate passengers, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

20 In that context, it is clear that, whilst Article 5(1)(c) of Regulation No 261/2004 lays down the principle that passengers have the right to compensation if their flight is cancelled, Article 5(3), which determines the circumstances in which the operating air carrier is not obliged to pay that compensation, must be regarded as derogating from that principle. Article 5(3) must therefore be interpreted strictly.

21 In this respect, the Community legislature indicated, as stated in recital 14 in

the preamble to Regulation No 261/2004, that such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an air carrier.

22 It is apparent from that statement in the preamble to Regulation No 261/2004 that the Community legislature did not mean that those events, the list of which is indeed only indicative, themselves constitute extraordinary circumstances, but only that they may produce such circumstances. It follows that all the circumstances surrounding such events are not necessarily grounds of exemption from the obligation to pay compensation provided for in Article 5(1)(c) of that regulation.

23 Although the Community legislature included in that list 'unexpected flight safety shortcomings' and although a technical problem in an aircraft may be amongst such shortcomings, the fact remains that the circumstances surrounding such an event can be characterised as 'extraordinary' within the meaning of Article 5(3) of Regulation No 261/2004 only if they relate to an event which, like those listed in recital 14 in the preamble to that regulation, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.

24 In the light of the specific conditions in which carriage by air takes place and the degree of technological sophistication of aircraft, it must be stated that air carriers are confronted as a matter of course in the exercise of their activity with various technical problems to which the operation of those aircraft inevitably gives rise. It is moreover in order to avoid such problems and to take precautions against incidents compromising flight safety that those aircraft are subject to regular checks which are particularly strict, and which are part and parcel of the standard operating conditions of air transport undertakings. The resolution of a technical problem caused by failure to maintain an aircraft must therefore be regarded as inherent in the normal exercise of an air carrier's activity.

25 Consequently, technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves, 'extraordinary circumstances' under Article 5(3) of Regulation No 261/2004.

26 However, it cannot be ruled out that technical problems are covered by those exceptional circumstances to the extent that they stem from events which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. That would be the case, for example, in the situation where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism.

27 It is therefore for the referring court to ascertain whether the technical problems cited by the air carrier involved in the case in the main proceedings stemmed from events which are not inherent in the normal exercise of the activity

of the air carrier concerned and were beyond its actual control.

28 As regards the question whether the ground of exemption set out in Article 5(3) of Regulation No 261/2004 must be interpreted in accordance with the provisions of the Montreal Convention, in particular Article 19 thereof, it must be stated that that convention forms an integral part of the Community legal order. Moreover, it is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation (see Case C-173/07 *Emirates Airlines* [2008] ECR I-0000, paragraph 43).

29 Under Article 19 of the Montreal Convention, a carrier may be exempted from its liability for damage occasioned by delay 'if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures'.

30 In this respect, it must be observed that Article 5(3) of Regulation No 261/2004 refers to the concept of 'extraordinary circumstances', whereas that concept does not appear in either Article 19 or any other provision of the Montreal Convention.

31 It should also be noted that that Article 19 relates to delays, whereas Article 5(3) of Regulation No 261/2004 deals with flight cancellations.

32 Moreover, as is clear from paragraphs 43 to 47 of *IATA and ELFAA*, Article 19 of the Montreal Convention and Article 5(3) of Regulation No 261/2004 relate to different contexts. Article 19 et seq. of that convention governs the conditions under which, if a flight has been delayed, the passengers concerned may bring actions for damages by way of redress on an individual basis. By contrast, Article 5 of Regulation No 261/2004 provides for standardised and immediate compensatory measures. Those measures, which are unconnected with those whose institution is governed by the Montreal Convention, thus intervene at an earlier stage than the convention. It follows that the carrier's grounds of exemption from liability provided for in Article 19 of that convention cannot be transposed without distinction to Article 5(3) of Regulation No 261/2004.

33 In those circumstances, the Montreal Convention cannot determine the interpretation of the grounds of exemption under that Article 5(3).

34 In the light of the above, the answer to the first and fourth questions referred must be 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. The Montreal Convention is not decisive for the interpretation of the grounds of exemption under Article 5(3) of Regulation No 261/2004.

The second question

35 In the light of all the questions referred, it must be considered that, by this question, the referring court is essentially asking whether the frequency alone of

the technical problems precludes them from being covered by 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 where air carriers cite those problems as a reason for flight cancellations with above average frequency.

36 As was stated at paragraph 27 of this judgment, it is for the referring court to ascertain whether the technical problems cited by the air carrier in question in the main proceedings stem from events which are not inherent in the normal exercise of its activity and are beyond its actual control. It is apparent from this that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded.

37 In view of the foregoing, the answer to the second question referred must be that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded.

The third question

38 By its third question, the referring court is essentially asking whether it must be considered that an air carrier has taken 'all reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004 if it establishes that the minimum legal requirements with regard to maintenance work have been met on the aircraft the flight of which was cancelled and whether that evidence is sufficient to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.

39 It must be observed that the Community legislature intended to confer exemption from the obligation to pay compensation to passengers in the event of cancellation of flights not in respect of all extraordinary circumstances, but only in respect of those which could not have been avoided even if all reasonable measures had been taken.

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

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

42 It is for the referring court to ascertain whether, in the circumstances of the case in the main proceedings, the air carrier concerned took measures

appropriate to the situation, that is to say measures which, at the time of the extraordinary circumstances whose existence the air carrier is to establish, met, inter alia, conditions which were technically and economically viable for that carrier.

43 In view of the foregoing, the answer to the third question referred must be that the fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken 'all reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004 and, therefore, to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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. **Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, 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. The Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, is not decisive for the interpretation of the grounds of exemption under Article 5(3) of Regulation No 261/2004.**

2. **The frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded.**

3. **The fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken 'all reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004 and, therefore, to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.**

[Signatures]

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* Language of the case: German.

JUDGMENT OF THE COURT (Third Chamber)

4 October 2012 (*)

(Air transport – Regulation (EC) No 261/2004 – Compensation for passengers in the event of denied boarding – Concept of 'denied boarding' – Exclusion from characterisation as 'denied boarding' – Cancellation of a flight caused by a strike at the airport of departure – Rescheduling of flights after the cancelled flight – Right to compensation of the passengers on those flights)

In Case C-22/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Korkein oikeus (Finland), made by decision of 13 January 2011, received at the Court on 17 January 2011, in the proceedings

Finnair Oyj

v

Timy Lassooy,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, E. Juhász, T. von Danwitz and D. Šváby (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 1 March 2012,

after considering the observations submitted on behalf of:

– Finnair Oyj, by T. Väätäinen, asianajaja,

– Mr Lassooy, by M. Wilska, kuluttaja-asiamies, and P. Hannula and J. Suurla, lakimiehet,

– the Finnish Government, by H. Leppo, acting as Agent,

– the French Government, by G. de Bergues and M. Perrot, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Aiello, avvocato dello Stato,

– the Austrian Government, by A. Posch, acting as Agent,

– the Polish Government, by M. Szpunar, acting as Agent,

– the European Commission, by I. Koskinen and K. Simonsson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 April 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(j), 4 and 5 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 reference has been made in proceedings between, on the one hand, the airline Finnair Oyj ('Finnair') and, on the other, Mr Lassooy, following Finnair's refusal to compensate Mr Lassooy for not allowing him to board a flight from Barcelona (Spain) to Helsinki (Finland) on 30 July 2006.

Legal framework

Regulation (EEC) No 295/91

3 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), which was in force until 16 February 2005, provided at Article 1:

'This Regulation establishes common minimum rules applicable where passengers are denied access to an overbooked scheduled flight for which they have a valid ticket and a confirmed reservation departing from an airport located in the territory of a Member State to which the [EC] Treaty applies, irrespective of the State where the air carrier is established, the nationality of the passenger and the point of destination.'

Regulation No 261/2004

4 Recitals 1, 3, 4, 9, 10, 14 and 15 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.

…

(3) While [Regulation No 295/91] 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.

…

(9) The number of passengers denied boarding against their will should be reduced by requiring air carriers to call for volunteers to surrender their reservations, in exchange for benefits, instead of denying passengers boarding, and by fully compensating those finally denied boarding.

(10) Passengers denied boarding against their will should be able either to cancel their flights, with reimbursement of their tickets, or to continue them under satisfactory conditions, and should be adequately cared for while awaiting a later flight.

…

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

(15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.'

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

'For the purposes of this Regulation:

…

(j) "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;

…'

6 Article 3 of that regulation, entitled 'Scope', provides in paragraph 2:

‘Paragraph 1 shall apply on the condition that passengers:

(a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in:

– as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,

or, if no time is indicated,

– not later than 45 minutes before the published departure time; or

…’

7 Article 4 of Regulation No 261/2004, entitled ‘Denied boarding’, reads as follows:

‘1. When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph.

2. If an insufficient number of volunteers comes forward to allow the remaining passengers with reservations to board the flight, the operating air carrier may then deny boarding to passengers against their will.

3. If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9.’

8 Article 5 of Regulation No 261/2004, entitled ‘Cancellation’, provides in paragraph 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.’

9 Article 7 of Regulation No 261/2004, entitled ‘Right to compensation’, provides in paragraph 1:

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

…

(b) EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 kilometres;

…’

10 Articles 8 and 9 of that regulation, read in conjunction with Article 4 thereof,

provide a right to reimbursement or re-routing and a right to care for passengers who are denied boarding.

11 Article 13 of Regulation No 261/2004, 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.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 Following a strike by staff at Barcelona Airport on 28 July 2006, the scheduled 11.40 flight from Barcelona to Helsinki operated by Finnair had to be cancelled. In order that the passengers on that flight should not have too long a waiting time, Finnair decided to reschedule subsequent flights.

13 Accordingly, those passengers from the flight in question were taken to Helsinki on the 11.40 flight the following day, 29 July 2006, and also on a specially arranged flight departing later that day at 21.40. The consequence of that rescheduling was that some of the passengers who had bought their tickets for the 11.40 flight on 29 July 2006 had to wait until 30 July 2006 to go to Helsinki on the scheduled 11.40 flight and on a 21.40 flight specially arranged for the occasion. Similarly, some passengers, like Mr Lassooy, who had bought their tickets for the 11.40 flight on 30 July 2006 and who had duly presented themselves for boarding, went to Helsinki on the special 21.40 flight later that day.

14 Taking the view that Finnair had for no valid reason denied him boarding, within the meaning of Article 4 of Regulation No 261/2004, Mr Lassooy brought an action before the Helsingin käräjäoikeus (Helsinki District Court) for an order against Finnair to pay him the compensation provided for in Article 7(1)(b) of that regulation. By decision of 19 December 2008, the Helsingin käräjäoikeus dismissed Mr Lassooy's application for compensation on the ground that the regulation only concerned compensation where boarding is denied as a result of overbooking for economic reasons. That court held that Article 4 of Regulation No 261/2004 did not apply in this case, since the airline company had rescheduled its flights as a result of a strike at Barcelona airport and that strike amounted to an extraordinary circumstance in respect of which Finnair had taken all the measures that could be required of it.

15 By a judgment of 31 August 2009, the Helsingin hovioikeus (Helsinki Court of Appeal) set aside the judgment of the Helsingin käräjäoikeus and ordered Finnair to pay Mr Lassooy the sum of EUR 400. To that effect, the Helsingin hovioikeus

held that Regulation No 261/2004 applies not only to overbooking but also in some instances to operational reasons for denying boarding, and thus prevents an air carrier from being exempted, for reasons connected with a strike, from its obligation to pay compensation.

16 In the context of Finnair's appeal to the Korkein oikeus (Supreme Court), that court relates its doubts concerning the scope of the obligation to compensate passengers who have been 'denied boarding', as referred to in Article 4 of Regulation No 261/2004, the grounds that may justify 'denied boarding' within the meaning of Article 2(j) of that regulation, and whether an air carrier may rely on the extraordinary circumstances referred to in Article 5(3) of that same regulation, with respect to flights after the flight which was cancelled because of those circumstances.

17 In that context, the Korkein oikeus decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Regulation No 261/2004 and in particular Article 4 thereof to be interpreted as meaning that its application is limited only to cases where boarding is denied because of overbooking by [an] air carrier for economic reasons, or is [that] regulation applicable also to situations in which boarding is denied for other reasons, such as operational reasons?

2. Is Article 2(j) of [Regulation No 261/2004] to be interpreted as meaning that the reasonable grounds laid down therein are limited only to factors relating to passengers, or may a denial of boarding be reasonable on other grounds? If the regulation is to be interpreted as meaning that a denial of boarding may be reasonable on grounds other than those relating to passengers, is it to be interpreted as meaning that such a denial may also be reasonable on the grounds of the rescheduling of flights as a result of the extraordinary circumstances mentioned in recitals 14 and 15?

3. Is [Regulation No 261/2004] to be interpreted as meaning that an air carrier may be exempted from liability under Article 5(3) in extraordinary circumstances not only with respect to a flight which it cancelled, but also with respect to passengers on later flights, on the ground that by its actions it attempts to spread the negative effects of the extraordinary circumstances it encounters in its operations, such as a strike, among a wider class of passengers than the cancelled flight's passengers by rescheduling its later flights so that no passenger's journey was unreasonably delayed? In other words, may an air carrier rely on extraordinary circumstances also with respect to a passenger on a later flight whose journey was not directly affected by that factor? Does it make a significant difference whether the passenger's situation and right to compensation are assessed in accordance with Article 4 of the regulation, which concerns denied boarding, or with Article 5, which relates to flight cancellation?'

Consideration of the questions referred

The first question

18 By its first question the referring court asks, in essence, whether the concept of

'denied boarding', within the meaning of Articles 2(j) and 4 of Regulation No 261/2004, must be interpreted as relating exclusively to cases where boarding is denied because of overbooking or whether it applies also to cases where boarding is denied on other grounds, such as operational reasons.

19 It should be noted that the wording of Article 2(j) of Regulation No 261/2004, which defines the concept of 'denied boarding', does not link that concept to an air carrier's 'overbooking' the flight concerned for economic reasons.

20 As regards the context of that provision and the objectives pursued by the legislation of which it is part, it is apparent not only from recitals 3, 4, 9 and 10 of Regulation No 261/2004, but also from the *travaux préparatoires* for that regulation – and in particular from the Proposal for a regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights, presented by the Commission of the European Communities on 21 December 2001 (COM(2001) 784 final) – that the European Union ('EU') legislature sought, by the adoption of that regulation, to reduce the number of passengers denied boarding against their will, which was too high at that time. This would be achieved by filling the gaps in Regulation No 295/91 which confined itself to establishing, in accordance with Article 1 thereof, common minimum rules applicable where passengers are denied access to an overbooked scheduled flight.

21 It is in that context that by means of Article 2(j) of Regulation No 261/2004 the EU legislature removed from the definition of 'denied boarding' any reference to the ground on which an air carrier refuses to carry a passenger.

22 In so doing, the EU legislature expanded the scope of the definition of 'denied boarding' beyond merely situations where boarding is denied on account of overbooking referred to previously in Article 1 of Regulation No 295/91, and construed 'denied boarding' broadly as covering all circumstances in which an air carrier might refuse to carry a passenger.

23 That interpretation is supported by the finding that limiting the scope of 'denied boarding' exclusively to cases of overbooking would have the practical effect of substantially reducing the protection afforded to passengers under Regulation No 261/2004 and would therefore be contrary to the aim of that regulation – referred to in recital 1 in the preamble thereto – of ensuring a high level of protection for passengers. Consequently, a broad interpretation of the rights granted to passengers is justified (see, to that effect, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 69, and C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 18).

24 As the Advocate General observed in point 37 of his Opinion, to accept that only situations of overbooking are covered by the concept of 'denied boarding' would have the effect of denying all protection to passengers who, like the applicant in the main proceedings, find themselves in a situation for which, as in the case of overbooking for economic reasons, they are not responsible, by precluding them from relying on Article 4 of Regulation No 261/2004; paragraph 3 of that article refers to the provisions of that regulation relating to rights to compensation, reimbursement or re-routing and to care, as laid down in Articles 7 to 9 of that

regulation.

25 Consequently, an air carrier's refusal to allow the boarding of a passenger who has presented himself for boarding in accordance with the conditions laid down in Article 3(2) of Regulation No 261/2004, on the basis that the flights arranged by that carrier have been rescheduled, must be characterised as 'denied boarding' within the meaning of Article 2(j) of that regulation.

26 In the light of the foregoing, the answer to the first question is that the concept of 'denied boarding', within the meaning of Articles 2(j) and 4 of Regulation No 261/2004, must be interpreted as relating not only to cases where boarding is denied because of overbooking but also to those where boarding is denied on other grounds, such as operational reasons.

The second and third questions

27 By its second and third questions, which should be examined together, the referring court asks, in essence, whether the occurrence of 'extraordinary circumstances' resulting in an air carrier rescheduling flights after those circumstances occurred can give grounds for denying boarding to a passenger on one of those later flights and for exempting that carrier from its obligation, under Article 4(3) of Regulation No 261/2004, to compensate a passenger to whom it denies boarding on such a flight.

28 In the first place, the referring court seeks to establish whether characterisation as 'denied boarding', within the meaning of Article 2(j) of Regulation No 261/2004, may be precluded solely on grounds relating to passengers as such, or whether grounds unrelated to them and, in particular, relating to an air carrier's rescheduling of its flights as a result of 'extraordinary circumstances' which affected it, may also preclude such characterisation.

29 In that connection, it should be noted that the wording of Article 2(j) of Regulation No 261/2004 precludes characterisation as 'denied boarding' on two sets of grounds. The first relates to the failure of the passenger presenting himself for boarding to comply with the conditions laid down in Article 3(2) of that regulation. The second concerns cases where there are reasonable grounds to deny boarding 'such as reasons of health, safety or security, or inadequate travel documentation'.

30 The first set of grounds does not apply to the case in the main proceedings. As regards the second set of grounds, it must be noted that none of the reasons specifically referred to in Article 2(j) is relevant to the main proceedings. However, in using the expression 'such as', the EU legislature intended to provide a non-exhaustive list of the situations in which there are reasonable grounds for denying boarding.

31 None the less, it cannot be inferred from such wording that there are reasonable grounds to deny boarding on the basis of an operational reason such as that in question in the main proceedings.

32 The situation in question in the main proceedings is comparable to cases where boarding is denied because of 'initial' overbooking, since the air carrier had reallocated the applicant's seat in order to transport other passengers, and it

therefore chose itself between several passengers to be transported.

33 Admittedly, that reallocation was done in order to avoid the passengers affected by flights cancelled on account of extraordinary circumstances having excessively long waiting times. However, that ground is not comparable to those specifically mentioned in Article 2(j) of Regulation No 261/2004, since it is in no way attributable to the passenger to whom boarding is denied.

34 It cannot be accepted that an air carrier may, relying on the interest of other passengers in being transported within a reasonable time, increase considerably the situations in which it would have reasonable grounds for denying a passenger boarding. That would necessarily have the consequence of depriving such a passenger of all protection, which would be contrary to the objective of Regulation No 261/2004 which seeks to ensure a high level of protection for passengers by means of a broad interpretation of the rights granted to them.

35 In the second place, the referring court asks the Court of Justice whether an air carrier may be exempted from its obligation to compensate a passenger for 'denied boarding', laid down in Articles 4(3) and 7 of Regulation No 261/2004, on the ground that boarding is denied due to the rescheduling of that carrier's flights as a result of 'extraordinary circumstances'.

36 In that connection, it is to be noted that, unlike Article 5(3) of Regulation No 261/2004, Articles 2(j) and 4 of that regulation do not provide that, in the event of 'denied boarding' owing to 'extraordinary circumstances' which could not have been avoided even if all reasonable measures had been taken, an air carrier is exempted from its obligation to compensate passengers denied boarding against their will (see, by analogy, *IATA and ELFAA*, paragraph 37). It follows that the EU legislature did not intend that compensation may be precluded on grounds relating to the occurrence of 'extraordinary circumstances'.

37 In addition, it is apparent from recital 15 in the preamble to Regulation No 261/2004 that 'extraordinary circumstances' may relate only to 'a particular aircraft on a particular day', which cannot apply to a passenger denied boarding because of the rescheduling of flights as a result of extraordinary circumstances affecting an earlier flight. The concept of 'extraordinary circumstances' is intended to limit the obligations of an air carrier – or even exempt it from those obligations – when the event in question could not have been avoided even if all reasonable measures had been taken. As the Advocate General observed in point 53 of his Opinion, if such a carrier is obliged to cancel a scheduled flight on the day of a strike by airport staff and then takes the decision to reschedule its later flights, that carrier cannot in any way be considered to be constrained by that strike to deny boarding to a passenger who has duly presented himself for boarding two days after the flight's cancellation.

38 Consequently, having regard to the requirement to interpret strictly the derogations from provisions granting rights to passengers, which follows from the settled case-law of the Court (see, to that effect, *Wallentin-Hermann*, paragraph 17 and the case-law cited), an air carrier cannot be exempted from its obligation to pay compensation in the event of 'denied boarding' on the ground that its flights were rescheduled as a result of 'extraordinary circumstances'.

39 Furthermore, it must be reiterated that the discharge of obligations by air carriers pursuant to Regulation No 261/2004 is without prejudice to their rights to seek compensation from any person who has caused the 'denied boarding', including third parties, as Article 13 of the regulation provides. Such compensation accordingly may reduce or even remove the financial burden borne by the air carriers in consequence of those obligations (*IATA and ELFAA*, paragraph 90).

40 In the light of the foregoing considerations, the answer to the second and third questions is that Articles 2(j) and 4(3) of Regulation No 261/2004 must be interpreted as meaning that the occurrence of 'extraordinary circumstances' resulting in an air carrier rescheduling flights after those circumstances arose cannot give grounds for denying boarding on those later flights or for exempting that carrier from its obligation, under Article 4(3) of that regulation, to compensate a passenger to whom it denies boarding on such a flight.

Costs

41 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 (Third Chamber) hereby rules:

1. **The concept of 'denied boarding', within the meaning of Articles 2(j) and 4 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 relating not only to cases where boarding is denied because of overbooking but also to those where boarding is denied on other grounds, such as operational reasons.**

2. **Articles 2(j) and 4(3) of Regulation No 261/2004 must be interpreted as meaning that the occurrence of 'extraordinary circumstances' resulting in an air carrier rescheduling flights after those circumstances arose cannot give grounds for denying boarding on those later flights or for exempting that carrier from its obligation, under Article 4(3) of that regulation, to compensate a passenger to whom it denies boarding on such a flight.**

[Signatures]

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* Language of the case: Finnish.

JUDGMENT OF THE COURT (Third Chamber)

4 October 2012 (*)

(Air transport – Regulation (EC) No 261/2004 – Compensation for passengers in the event of denied boarding – Concept of 'denied boarding' – Cancellation of a passenger's boarding card by an air carrier because of the anticipated delay to an earlier flight also operated by it which included check-in for the flight concerned)

In Case C-321/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil No 2, A Coruña (Spain), made by decision of 29 March 2011, received at the Court on 28 June 2011, in the proceedings

Germán Rodríguez Cachafeiro,

María de los Reyes Martínez-Reboredo Varela-Villamor

v

Iberia, Líneas Aéreas de España SA,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, E. Juhász, T. von Danwitz and D. Šváby (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Iberia, Líneas Aéreas de España SA, by J. Bejerano Fernández, procurador,

– the French Government, by G. de Bergues and M. Perrot, acting as Agents,

– the Finnish Government, by H. Leppo, acting as Agent,

– the European Commission, by K. Simonsson and R. Vidal Puig, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(j), 3(2) and 4(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

2 The reference has been made in proceedings between, on the one hand, Mr Rodríguez Cachafeiro and Ms Martínez-Reboredo Varela-Villamor and, on the other, the airline Iberia, Líneas Aéreas de España SA ('Iberia'), following Iberia's refusal to compensate them for not allowing them to board a flight from Madrid (Spain) to Santo Domingo (Dominican Republic).

Legal framework

Regulation (EEC) No 295/91

3 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), which was in force until 16 February 2005, provided at Article 1:

'This Regulation establishes common minimum rules applicable where passengers are denied access to an overbooked scheduled flight for which they have a valid ticket and a confirmed reservation departing from an airport located in the territory of a Member State to which the [EC] Treaty applies, irrespective of the State where the air carrier is established, the nationality of the passenger and the point of destination.'

Regulation No 261/2004

4 Recitals 1, 3, 4, 9 and 10 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.

…

(3) While [Regulation No 295/91] 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.

…

(9) The number of passengers denied boarding against their will should be reduced by requiring air carriers to call for volunteers to surrender their reservations, in exchange for benefits, instead of denying passengers boarding, and by fully compensating those finally denied boarding.

(10) Passengers denied boarding against their will should be able either to cancel their flights, with reimbursement of their tickets, or to continue them under satisfactory conditions, and should be adequately cared for while awaiting a later flight.'

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

'For the purposes of this Regulation:

…

(j) "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;

…'

6 Article 3 of that regulation, entitled 'Scope', provides in paragraph 2:

'Paragraph 1 shall apply on the condition that passengers:

(a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in:

– as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,

or, if no time is indicated,

– not later than 45 minutes before the published departure time; or

…'

7 Article 4 of Regulation No 261/2004, entitled 'Denied boarding', reads as follows:

'1. When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph.

2. If an insufficient number of volunteers comes forward to allow the

remaining passengers with reservations to board the flight, the operating air carrier may then deny boarding to passengers against their will.

3. If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9.'

8 Article 7 of that regulation, entitled 'Right to compensation', provides in paragraph 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).

…'

9 Articles 8 and 9 of that regulation, read in conjunction with Article 4 thereof, provide a right to reimbursement or re-routing and a right to care for passengers who are denied boarding.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 The applicants in the main proceedings, Mr Rodríguez Cachafeiro and Ms Martínez-Reboredo Varela-Villamor (or 'the applicants'), both bought airline tickets from Iberia for the journey from Corunna (Spain) to Santo Domingo. That ticket comprised two flights: flight IB 513 Corunna-Madrid on 4 December 2009 (from 13.30 to 14.40), and flight IB 6501 Madrid-Santo Domingo the same day (from 16.05 to 19.55).

11 At the Iberia check-in counter at Corunna airport, the applicants checked their luggage in – direct to their final destination – in accordance with the conditions laid down in Article 3(2) of Regulation No 261/2004, and were given two boarding cards for the two successive flights.

12 The first flight was delayed by 1 hour and 25 minutes. In anticipation that that delay would result in the two passengers missing their connection in Madrid, at 15.17 Iberia cancelled their boarding cards for the second flight scheduled for 16.05. The referring court notes that, on arrival in Madrid, the applicants presented themselves at the departure gate in the final boarding call to passengers. The Iberia staff did not, however, allow them to board on the grounds that their boarding cards had been cancelled and their seats allocated to other passengers.

13 The applicants waited until the following day in order to be taken to Santo Domingo on another flight and they reached their final destination 27 hours late.

14 On 23 February 2010, Mr Rodríguez Cachafeiro and Ms Martínez-Reboredo Varela-Villamor brought an action before the Juzgado de lo Mercantil No 2, A Coruña (Commercial Court No 2, Corunna), seeking a decision ordering Iberia to pay them the sum of EUR 600 each by way of compensation for 'denied boarding', pursuant to Articles 4(3) and 7(1)(c) of Regulation No 261/2004. Iberia disputed those claims, contending that the facts on the basis of which the action had been brought before that court did not amount to a case of 'denied boarding', but should rather be construed as a missed connection, since the decision to deny the applicants boarding was not attributable to overbooking, but was caused by the delay to the earlier flight.

15 The referring court also notes that Iberia paid the compensation provided for under Articles 4(3) and 7 of Regulation No 261/2004 to seven passengers for denied boarding on the Madrid-Santo Domingo flight in question.

16 In that context, the referring court seeks to ascertain whether the concept of 'denied boarding' refers exclusively to situations in which flights have been overbooked initially or whether that concept may be extended to cover other situations such as that of the applicants.

17 In those circumstances the Juzgado de lo Mercantil No 2, A Coruña, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'May the concept of "denied boarding" contained in Article 2(j), in conjunction with Articles 3(2) and 4(3), of [Regulation No 261/2004], be regarded as including a situation in which an airline refuses to allow boarding because the first flight included in the ticket is subject to a delay attributable to the airline and the latter mistakenly expects the passengers not to arrive in time to catch the second flight, and so allows their seats to be taken by other passengers?'

The question referred for a preliminary ruling

18 By its question, the referring court asks, in essence, whether Article 2(j) of Regulation No 261/2004, read in conjunction with Article 3(2) of that regulation, must be interpreted as meaning that the concept of 'denied boarding' includes a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies some passengers boarding on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight.

19 In that regard, it is to be noted that, pursuant to Article 2(j) of Regulation No 261/2004, characterisation as 'denied boarding' presupposes that an air carrier refuses to carry a passenger on a flight for which he had a reservation and presented himself for boarding in accordance with the conditions laid down in Article 3(2) of that regulation, unless there are reasonable grounds for denying that passenger boarding, such as the reasons mentioned in Article 2(j).

20 In the main proceedings, the question raised by the referring court is based on

the premiss that the applicants presented themselves for boarding on the Madrid-Santo Domingo flight in accordance with the conditions laid down in Article 3(2) of Regulation No 261/2004. In addition, it is apparent from the file that the applicants were prevented from boarding that flight not because of an alleged failure to comply with those conditions, but because their reservations had been cancelled as a result of the delay on the earlier Corunna-Madrid flight.

21 Without prejudging the possible consequences of the fact that, as a result of that delay, the applicants reached their final destination (Santo Domingo) 27 hours after the scheduled arrival time indicated when they reserved their travel, the Court observes that, as regards the reasons for a carrier denying boarding to a passenger who holds a reservation and has duly presented himself for boarding, the wording of Article 2(j) of Regulation No 261/2004 does not link 'denied boarding' to a carrier's 'overbooking' the flight concerned for economic reasons.

22 As regards the context of that provision and the objectives pursued by the legislation of which it is part, it is apparent not only from recitals 3, 4, 9 and 10 of Regulation No 261/2004, but also from the *travaux préparatoires* for that regulation – and in particular from the Proposal for a regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights, presented by the Commission of the European Communities on 21 December 2001 (COM(2001) 784 final) – that the European Union ('EU') legislature sought, by the adoption of that regulation, to reduce the number of passengers denied boarding against their will, which was too high at that time. This would be achieved by filling the gaps in Regulation No 295/91 which confined itself to establishing, in accordance with Article 1 thereof, common minimum rules applicable where passengers are denied access to an overbooked scheduled flight.

23 It is in that context that by means of Article 2(j) of Regulation No 261/2004 the EU legislature removed from the definition of 'denied boarding' any reference to the ground on which an air carrier refuses to carry a passenger.

24 In so doing, the EU legislature expanded the scope of the definition of 'denied boarding' beyond merely situations where boarding is denied on account of overbooking referred to previously in Article 1 of Regulation No 295/91, and construed 'denied boarding' broadly as covering all circumstances in which an air carrier may refuse to carry a passenger.

25 That interpretation is supported by the finding that limiting the scope of 'denied boarding' exclusively to cases of overbooking would have the practical effect of substantially reducing the protection afforded to passengers under Regulation No 261/2004 and would therefore be contrary to the aim of that regulation – referred to in recital 1 in the preamble thereto – of ensuring a high level of protection for passengers. Consequently, a broad interpretation of the rights granted to passengers is justified (see, to that effect, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 69, and Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 18).

26 Accordingly, to accept that only situations of overbooking are covered by the

concept of 'denied boarding' would have the effect of denying all protection to passengers who find themselves in a situation such as that of the applicants, by precluding them from relying on Article 4 of Regulation No 261/2004, paragraph 3 of which refers to the provisions of that regulation relating to rights to compensation, reimbursement or re-routing and to care, as laid down in Articles 7 to 9 of that regulation.

27 In the light of the foregoing, denial of boarding by an air carrier in circumstances such as those of the main proceedings must, in principle, be included in the concept of 'denied boarding' within the meaning of Article 2(j) of Regulation No 261/2004.

28 Nevertheless, it must be confirmed that, as laid down in that provision, there are not reasonable grounds to deny boarding, 'such as reasons of health, safety or security, or inadequate travel documentation'.

29 In that regard, it is to be noted that, in using the expression 'such as', the EU legislature intended to provide a non-exhaustive list of the situations in which there are reasonable grounds for denying boarding.

30 None the less, it cannot be inferred from such wording that there are reasonable grounds to deny boarding on the basis of an operational reason such as that in question in the main proceedings.

31 The referring court states that, in the context of a single contract of carriage involving a number of reservations on two immediately connected flights and a single check-in, the first of those flights was subject to a delay attributable to the carrier in question, that the latter mistakenly expected the passengers in question not to arrive in time to board the second flight and that, as a consequence, it allowed other passengers to take the seats on that second flight which were to have been occupied by the passengers to whom boarding was denied.

32 However, such a reason for denying boarding is not comparable to those specifically mentioned in Article 2(j) of Regulation No 261/2004, since it is in no way attributable to the passenger to whom boarding is denied.

33 In addition, it cannot be accepted that an air carrier may increase considerably the situations in which it would have reasonable grounds for denying a passenger boarding. That would necessarily have the consequence of depriving such a passenger of all protection, which would be contrary to the objective of Regulation No 261/2004 which seeks to ensure a high level of protection for passengers by means of a broad interpretation of the rights granted to them.

34 In a situation such as that in the main proceedings, that would, moreover, result in the passengers concerned suffering the serious trouble and inconvenience inherent in a denial of boarding, even though that denial is attributable, in any event, to the carrier alone, which either caused the delay to the first flight operated by it, mistakenly considered that the passengers concerned would not be able to present themselves in time to board the following flight or sold tickets for successive flights for which the time available for catching the following flight was insufficient.

35 Consequently, there are no reasonable grounds for a denial of boarding such as that at issue in the main proceedings which must therefore be characterised as ‘denied boarding’ within the meaning of Article 2(j) of Regulation No 261/2004.

36 In the light of the foregoing, the answer to the question referred is that Article 2(j) of Regulation No 261/2004, read in conjunction with Article 3(2) of that regulation, must be interpreted as meaning that the concept of ‘denied boarding’ includes a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies boarding to some passengers on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight.

Costs

37 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 (Third Chamber) hereby rules:

Article 2(j) 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, read in conjunction with Article 3(2) of Regulation No 261/2004, must be interpreted as meaning that the concept of ‘denied boarding’ includes a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies boarding to some passengers on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight.

[Signatures]

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* Language of the case: Spanish.

Tribunal d'instance d'Aulnay-sous-Bois
ct0367
Audience publique du 8 octobre 2007
N° de RG: 07/00145

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

JURIDICTION DE PROXIMITE
...
93600 AULNAY-SOUS-BOIS

Tél : 01.48.66.09.08

RG N 91-07-000145
Minute :
SL

Monsieur X... Jean-Baptiste
Madame X... Pascale Marie-Francoise

C/

S.A. AIR FRANCE

Exécutoire, copie, dossier
délivrés à :
SCPA BUISSON et ASSOCIES
Copie, dossier délivrés à :
Me PRADON Fabrice

le :

AUDIENCE CIVILE

Jugement rendu et mis à disposition au Greffe de la Juridiction de Proximité en date du HUIT OCTOBRE DEUX MILLE SEPT

par Monsieur CORBU Jean, Juge de Proximité,
Assisté de Madame MARTIN Esther, Adjoint Administratif Assermenté faisant fonction de Greffier

Après débats à l'audience publique du 10 Septembre 2007
tenue sous la Présidence de Monsieur CORBU Jean, Juge de Proximité,
Assisté de Madame LENART Sonia, Greffier audiencier

ENTRE DEMANDEURS :

Monsieur X... Jean-Baptiste demeurant ...,

Madame X... Pascale Marie-Francoise née Z... demeurant ...,
représentés par la SCPA BUISSON et ASSOCIES, avocats au barreau de PONTOISE domiciliés 29 rue Pierre Butin 95300 PONTOISE

D'UNE PART

ET DEFENDERESSE :

S.A. AIR FRANCE dont le siège social est 45 rue de Paris, 95747 ROISSY CDG CEDEX, agissant poursuites et diligences de son représentant légal domicilié en cette qualité audit siège représentée par Maître PRADON Fabrice, avocat au barreau de PARIS domicilié 4 rue de Castellane, 75008 PARIS,

D'AUTRE PART

.../...

FAITS ET PROCEDURE :

Par acte d'huissier en date du 17 avril 2007, Monsieur Jean Baptiste X... et Madame Pascale Marie-Françoise Z... épouse X... sollicitent la condamnation de la Société Air France (RCS Bobigny B420495178) à devoir leur payer les sommes de:

1288 euro au titre de l'article 1142 du Code Civil,

1000 euro en application de l 'article 1147 du Code Civil,

500 euro au titre de l'article 700 du NCPC.

Il est demandé que soit prononcée l'exécution provisoire de la présente décision et la condamnation de la société AIR FRANCE aux entiers dépens sur le fondement de l'article 696 du NCPC.

La société AIR FRANCE conclue au débouté des demandes et sollicite 1000 euro au titre de l'article 700 du NCPC et la condamnation des demandeurs aux entiers dépens.

A l'audience du 10 septembre 2007, les demandeurs précisent que les 1288 euro demandés correspondent à 125 euro de remboursement de taxi, 1143 pour l'achat rendu nécessaires de nouveau billets le 30/12/06 et 20 euro pour le véhicule ayant dû être réservé en Ecosse.

Ils réitèrent également leurs autres demandes susvisées.

La Société AIR FRANCE renouvelle sa demande reconventionnelle de 1000 euro au titre de l'article 700 du NCPC.

MOYENS ET PRETENTIONS :

Les époux X... indiquent avoir réservé et payé le 25 novembre 2005, quatre billets aller-retour Paris/Edimbourg sur le site de la compagnie AIR France pour un montant total de 1100,24 euro, pour eux et leurs deux filles.

Ils précisent que les dates étaient le 29/12/06 à 7H20 pour le départ et au 1er janvier pour le retour.

Ils ajoutent avoir enregistré leurs bagages au comptoir AIR FRANCE le 29/12 vers 06H30, pour un embarquement prévu à 06H45.

Ils allèguent que la présence d'un groupe d'adolescent au passage du contrôle de police les a retardé alors qu'ils tentaient de se rendre vers la salle d'embarquement et qu'ils se trouvaient contraints de laisser passer ledit groupe sur ordre des forces de l'ordre.

Ils affirment avoir pu regagner la salle d'embarquement peu après 07H00 et soulignent qu'aucun personnel de la compagnie AIR France n'était présent et une personne employée par la société ADP les a alors avertis que l'embarquement était fermé.

Ils ajoutent s'être vus refuser l'accès à bord alors même que ce vol n'avait fait l'objet d'aucun appel pour l'embarquement et que l'avion était toujours sur le tarmac.

Ils allèguent que la compagnie AIR FRANCE à préféré décharger leurs bagages déjà placés dans la soute de l'avion ainsi que ceux de dix huit clients se trouvant dans la même situation qu'eux, c'est-à-dire dans la salle d'embarquement.

Ils soulignent qu'à l'instar des dix huit autres personnes, ils ont été contraints de payer une nouvelle fois d'autres billets, soit 1143 euro pour partir le 30 décembre 2005 à 07H20, sans remboursement du 1er vol. Ils ajoutent avoir du faire face à des frais supplémentaires d'aller-retour en taxi pour rentrer chez eux et revenir le lendemain à hauteur de 125 euro et 20 euro de supplément sur la location d'une voiture en Ecosse d'une catégorie supérieure, celle initialement prévue n'étant plus disponible.

Les époux X... rappellent que selon l'article L322-1 du Code de l'aviation civile : « le contrat de transport des passagers doit être constaté par la délivrance d'un billet. » Ils se considèrent à ce titre contractuellement liés avec la compagnie AIR France et versent aux débats leurs quatre billets aller-retour.

Ils considèrent que la société défenderesse n'a pas respecté ses obligations contractuelles et a fait montre d'une désorganisation interne ne pouvant leur être préjudiciable.

Ils allèguent que la société AIR FRANCE à reconnu sa responsabilité dans une lettre du 30 janvier 2006 où elle écrit : « je vous remercie d'avoir pris la peine de nous écrire et vous présente au nom d'AIR FRANCE, mes excuses pour les dérangements que vous avez connus. Toutefois, dans le cas que vous évoquez, je suis au regret de vous informer qu'il n'est pas prévu de compensation. Je tiens néanmoins à vous assurer que les remarques que vous avez bien voulu faire ont été portées à la connaissance des responsables concernés, ainsi que de nos correspondants chargés du suivi de la qualité du service… »

Les demandeurs font également état de courriers de la défenderesse en date du 07 avril 2006 dans lesquels ils indiquent que cette dernière précise ne pouvoir être tenue pour responsable de longueurs excessives des contrôles de sécurité mettant ensuite les passagers en difficulté pour embarquer. Les demandeurs considèrent qu'il s'agit d'un argument de mauvaise foi et qu'il appartient à la société de faire concorder les horaires d'enregistrement des bagages et ceux des passagers et non d'imputer ses propres dysfonctionnements aux différents contrôles de Police.

Les époux X... produisent une lettre adressée le 16/02/07 par la défenderesse à une autre passagère, Madame B..., lequel, affirment-ils, indique que s'il y a eu effectivement 17 autres annulations, il s'agissait de passagers en correspondance n'ayant pu embarquer suite à un retard du vol d'apport, ce qu'ils considèrent comme mensonger puisque eux-mêmes, soit quatre passagers, ne pouvaient faire partie des passagers prétendus en correspondance.

Ils soulignent que leur séjour, visant à faire oublier la maladie dont est atteinte Madame X... a été réduit d'un tiers et considèrent que la compagnie AIR FRANCE, malgré sa notoriété, est condamnable au titre de sa non-réactivité.

La compagnie AIR FRANCE réplique que les billets dont il s'agit étaient non remboursables et non échangeables. Elle rappelle que les demandeurs ont été enregistrés à 6H31 et que l'article 6 des conditions générales de transport, qu'elle produit en pièce No 5, précise en son alinéa 4 : « le passager doit être présent à la porte d'embarquement au plus tard à l'heure indiquée lors de l'enregistrement. Le transporteur pourra annuler la réservation du passager si celui-ci ne s'est pas présenté à la porte d'embarquement à l'heure indiquée, sans aucune responsabilité envers le passager.

Elle rappelle que sur chaque carte d'accès à bord figurait l'information de devoir être présent à 6H45, porte F43, pour un départ au plus tard prévu à 07H20.

Elle souligne que les demandeurs indiquent s'être présentés à la porte d'embarquement peu après 07H00 et qu'à cette heure le vol était clôturé.

Elle souligne également n'être pas propriétaire des infrastructures de l'aéroport, ni responsable des contrôle de police, de sorte que le retard de la famille X... ne peut lui être imputée.

Elle indique que d'autres passagers ayant procédé à leur enregistrement à 06H48, ont pu néanmoins prendre place dans l'avion, compte tenu de quelques minutes supplémentaires dégagés par l'embarquement de tous les autres passagers. Elle illustre son propos par le client de la place 5A (pièce No6) et 4F (pièce No7) dont elle soutient que malgré un enregistrement 17 minutes après les demandeurs, soit à 06H48, ceux-ci n'ont eu aucune difficulté pour se présenter à temps à la porte F43 pour embarquer sur le vol AF5050 dont il s'agit.

Elle rappelle que les bagages des demandeurs ont été enregistrés à 06H31 et dirigés avec les autres bagages pour être placés dans les soutes de l'appareil. Elle ajoute que pour des raisons de sécurité, ceux-ci ont été automatiquement retirés pour être rendus aux demandeurs car ils n'étaient pas présents à l'embarquement.

La défenderesse conteste sa responsabilité et estime que si les demandeurs allèguent et prouvent que leur retard a bien pour origine le contrôle de police, il leur incombe alors de rechercher la responsabilité de l'Etat pour les défaillances commises éventuellement par ses services ou ses délégataires. Elle ajoute n'avoir nullement vocation à demander une quelconque garantie de l'Etat en l'espèce, d'autant que la juridiction judiciaire est incompétente pour en connaître.

Elle estime que ses conditions d'exploitations au regard des heures limites d'enregistrement et d'embarquement ne sont pas en cause.

L'affaire a été mise en délibéré au 08 octobre 2007.

EXPOSE DES MOTIFS :

Il est constant que la société AIR FRANCE a procédé à l'enregistrement de la famille X... à 06H31 sur le vol Paris-Edimbourg du 29 décembre 2006 de 07H20 et l'a invitée à se présenter à la porte d'embarquement 14 minutes plus tard, soit à 06H45.

La pièce No11des demandeurs démontre que la compagnie AIR FRANCE admet par ce courrier du 16 février 2006, qu'il y a bien eu 18 annulations de passagers sur ce vol dont il s'agit. Elle démontre également que la société AIR FRANCE use d'une explication pour le moins erronée lorsqu'elle s'adresse à Madame B..., passager destinataire dudit courrier en ces termes : « effectivement, comme vous le dites dans votre lettre, il y a eu aussi 17 autres annulations mais de passagers en correspondances suite à un retard du vol d'apport, ce qui n'est pas votre cas. » Force est de constater que ce n'est également pas le cas des quatre membres de la famille X..., pourtant manifestement comptabilisés ici par la défenderesse parmi les 17 autres passagers prétendument en correspondance.

Il convient en outre de constater que la société AIR FRANCE ne produit pas la liste définitive, donc complète, des passagers ayant effectivement voyagés sur le vol en question, permettant dès lors de constater son occupation effective et la détermination des sièges occupés ou non. Ces indications nécessairement éclairantes pour la solution du présent litige, notamment au regard dudit courrier du 16 février 2006 précité, lequel n'a appelé aucune observation en défense, ne peuvent être compensées par la production par la société AIR FRANCE de documents partiels, masqués (pièces No6/7/8) ou pour l'essentiel incomplets, codifiés et ne présentant aucune garantie de précision, car ni circonstanciés, ni explicites (pièces No2/3/4/6/7).

Compte tenu du nombre anormalement important d'annulations avérées sur ce vol de fin d'année, n'ayant également appelé aucune réponse de la société AIR FRANCE en défense sur ce point, compte tenu du temps anormalement court imparti de 14 minutes entre les opérations d'enregistrement de toute la famille et le délai maximal accordé pour embarquer, compte tenu de la possibilité matérielle manifeste d'embarquer l'ensemble des passagers en attente mais de l'absence de Personnel de la compagnie pour ce faire, l'avion se trouvant visible à quelques mètres, encore immobile sur le tarmac peu après 07H00 et susceptible de décoller environ vingt minutes plus tard, il y a lieu de constater que les époux X... ne peuvent être tenus pour responsables de procédés nécessairement inhabituels et inattendus de la part de professionnels réputés compétents et diligents. Il convient enfin d'observer que la défenderesse tout en alléguant ne pouvoir faire monter à bord lesdits passagers pour des raisons d'horaires, prendra curieusement le temps nécessairement plus long de retrouver et décharger chaque bagage y afférent.

A la lumière des circonstances anormales ainsi observées et telles que démontrées par les explications et pièces produites par les demandeurs, il ne peut leur être sérieusement reproché de ne pas avoir été en mesure de respecter l'article 6 alinéa 4 des conditions générales de transport dont se prévaut la défenderesse.

La société AIR FRANCE ne pouvant ignorer avoir enregistré deux adultes et deux enfants ne pouvait sérieusement vingt minutes avant le départ les laisser ainsi en errance aux portes de l'appareil dans les circonstances susvisées. Il lui appartenait de mettre en œuvre tous moyens requis pour assurer dans les délais nécessaires et adaptés, eu égard notamment au contrôle de police, l'acheminement des demandeurs dans des conditions normales.

Le présent litige ne peut que s'analyser en un refus d'embarquement dommageable, et imputable à la société AIR France devant en répondre.

Le règlement Européen No261/2004 applicable en l'espèce dispose qu'en cas de refus d'embarquement involontaire,

le transporteur est tenu de verser une indemnisation dans les conditions établies dans l'article

7 dudit règlement,

D'assurer une prise en charge des passagers au titre de l'article 9 de ce même règlement,

D'assurer dans le cas où le passager ne renonce pas à son voyage, son re-acheminement vers sa destination finale dans les meilleurs délais et dans les conditions de transport comparables au titre de l'article 8 du présent règlement.

Il ne peut être retenu de circonstances extraordinaires exonératoires de responsabilité pour la société AIR France, laquelle en imposant un délai trop réduit entre l'enregistrement qu'elle accepte sans réserve et l'embarquement qu'elle refuse, tout en ne pouvant ignorer l'alea de temps que représentent les contrôles de police, a été directement à l'origine du dommage subi par la famille X....

L'article 7-1 du règlement précité prévoit une indemnisation de 250 euro par passager pour les vols inférieurs à 1500 Km, comme en l'espèce.

La société AIR France doit donc indemniser les demandeurs à hauteur de 1000 euro de ce chef.

L'article 12 du Règlement susvisé traite de l'indemnisation complémentaire.

Il indique en paragraphe 1 que « le présent règlement s'applique sans préjudice du droit d'un passager à une indemnisation complémentaire. L'indemnisation accordée en vertu du présent règlement peut être déduite d'une telle indemnisation ;

Le paragraphe 2 ajoute : « sans préjudice des principes et règles pertinents du droit national, y compris la jurisprudence, le paragraphe 1 ne s'applique pas aux passagers qui ont volontairement renoncé à leur réservation conformément à l'article 4, paragraphe 1. »

Les demandeurs n'ayant nullement renoncé à leur réservation mais s'étant vue contraints de ne pas embarquer peuvent se voir appliquer la disposition de cet article 12 susvisée. S'agissant d'un transport international, le droit applicable au présent litige sur ce second point est la Convention de Montréal, entrée en vigueur en France depuis le 28 juin 2004 par décret du 17 juin 2004.

(article 1er), et non les articles 1142 et 1147 du Code Civil, laquelle précise que : « en cas de dommage subi par des passagers résultant d'un retard, aux termes de l'article 19 (lequel précise que le transporteur est responsable du dommage résultant d'un retard dans le transport aérien des passagers, bagages ou marchandises), la responsabilité du transporteur est limitée à la somme de 4150 droits de tirage spéciaux par passager.

Il convient de constater que les époux X... ont subi du fait de ce retard, un préjudice spécial et particulièrement accru par le fait d'avoir dû, par leurs propres moyens et sans assistance, rentrer chez eux, réorganiser leur départ pour le lendemain et à leurs frais, se voir réduire leur séjour d'un tiers du temps prévu, changer la réservation, du véhicule de location initialement prévue. Ils doivent en être indemnisés à hauteur de 1431,90 droits de tirage spéciaux du fonds monétaire (au taux de change actuel de 0,899499 XDR pour un euro). Cette indemnisation s'ajoute donc à celle des 1000 euro précédemment indiquée.

Il n'est pas inéquitable de condamner la société AIR France à 500 euro en application de l'article 700 du NCPC.

La société AIR FRANCE, partie perdante, doit assumer les dépens en application de l'article 696 du NCPC.

PAR CES MOTIFS :

Statuant publiquement par jugement contradictoire rendu en dernier ressort :

Condamne la société AIR France à payer aux époux X... les sommes de :

1000 euro au titre du refus d'embarquement,

1431,90 droits de tirage spéciaux du fonds monétaire (au taux actuel de 0,899499 XDR pour un euro) au titre de l'indemnisation complémentaire du préjudice,

500 euro en application de l'article 700 du NCPC,

Condamne la Société AIR FRANCE aux dépens.

Ainsi jugé, prononcé par mise à disposition au greffe le 08 octobre 2007, la minute étant signée par :

Le Juge de Proximité Le Greffier

JUDGMENT OF THE COURT (Fourth Chamber)

10 July 2008 (*)

(Carriage by air – Regulation (EC) No 261/2004 – Compensation for passengers in the event of cancellation of a flight – Scope – Article 3(1)(a) – Concept of 'flight')

In Case C-173/07,

REFERENCE for a preliminary ruling under Article 234 EC by the Oberlandesgericht Frankfurt am Main (Germany), made by decision of 7 March 2007, received at the Court on 2 April 2007, in the proceedings

Emirates Airlines – Direktion für Deutschland

v

Diether Schenkel,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis, R. Silva de Lapuerta, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Emirates Airlines – Direktion für Deutschland, by C. Leffers, Rechtsanwältin,

– Dr Schenkel, by M. Scheffels, Rechtsanwalt,

– the Greek Government, by M. Apessos, O. Patsopoulou and V. Karra, acting as Agents,

– the French Government, by G. de Bergues and A. Hare, acting as Agents,

– the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,

– the Swedish Government, by A. Falk, acting as Agent,

– the Commission of the European Communities, by R. Vidal Puig and G. Braun, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 March

2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3(1)(a) 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 reference was made in the course of proceedings between the airline company Emirates Airlines – Direktion für Deutschland ('Emirates') and Dr Schenkel concerning Emirates' refusal to compensate him following the cancellation of a flight departing from Manila (Philippines).

Legal context

International law

3 The Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), concluded by the European Community, was approved by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38).

4 The Montreal Convention aims in particular to ensure protection of the interests of consumers in international carriage by air and equitable compensation based on the principle of restitution.

5 Article 1(2) and (3) of the convention, relating to its scope, provides:

'2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.'

Community law

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

'For the purposes of this Regulation:

…

(g) "reservation" means the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator;

(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;

…'

7 In accordance with Article 3 of the regulation, 'Scope':

'1. This Regulation shall apply:

(a) to passengers departing from an airport located in the territory of a Member State to which the [EC] 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.

…'

8 Under Article 4 of Regulation No 261/2004, 'Denied boarding':

'1. When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph.

…'

9 Article 5 of Regulation No 261/2004, 'Cancellation', provides:

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

…

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

…'

10 Article 7 of Regulation No 261/2004, '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.

…'

11 Article 8 of Regulation No 261/2004, 'Right to reimbursement or re-routing', provides:

'1. Where reference is made to this Article, passengers shall be offered the choice between:

(a) – reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant,

– a return flight to the first point of departure, at the earliest opportunity;

(b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or

(c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.

2. Paragraph 1(a) shall also apply to passengers whose flights form part of a package, except for the right to reimbursement where such right arises under [Council] Directive 90/314/EEC [of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59)].

…'

12 Under Article 17 of Regulation No 261/2004, 'Report':

'The Commission shall report to the European Parliament and the Council by 1 January 2007 on the operation and the results of this Regulation, in particular regarding:

– …

– the possible extension of the scope of this Regulation to passengers having a contract with a Community carrier or holding a flight reservation which forms part of a "package tour" to which Directive 90/314/EEC applies and who depart from a third-country airport to an airport in a Member State, on flights not operated by Community air carriers,

– …'

The main proceedings and the order for reference

13 Dr Schenkel booked in Germany, with Emirates, an outward and return journey from Düsseldorf (Germany) to Manila via Dubai (United Arab Emirates).

14 For the return journey Dr Schenkel had a reservation on the flight of 12 March 2006 from Manila. The flight was cancelled because of technical problems. Dr Schenkel eventually departed from Manila on 14 March 2006 and arrived at Düsseldorf on the same day.

15 Dr Schenkel brought an action against Emirates in the Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main), claiming compensation of EUR 600 in reliance on Articles 5(1)(c) and 7(1)(c) of Regulation No 261/2004.

16 He argued that the compensation provided for in those provisions in the event of the cancellation of a flight applied to him in the present case. He submitted that the outward and return flights were non-independent parts of a single flight. Since the point of departure of that single flight was Düsseldorf, he was thus a passenger 'departing from an airport located in the territory of a Member State' of the European Community within the meaning of Article 3(1)(a) of that regulation.

17 Emirates submitted that the outward and return flights were to be regarded as two separate flights. Furthermore, Emirates did not have a licence granted by a Member State in accordance with Article 2(c) of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1).

18 It submitted that it was not therefore a 'Community carrier' referred to in Article 3(1)(b) of Regulation No 261/2004, and was not obliged to compensate Dr Schenkel for the cancelled flight.

19 The Amtsgericht Frankfurt am Main allowed Dr Schenkel's claim. Emirates appealed to the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main).

20 Although the Oberlandesgericht Frankfurt am Main is inclined to consider that a journey out and back constitutes a single flight for the purposes of Regulation No 261/2004, it is uncertain whether that interpretation of the concept of flight is correct.

21 In those circumstances the Oberlandesgericht Frankfurt am Main decided to stay the proceedings and refer the following question to the Court for a

preliminary ruling:

'Is Article 3(1)(a) of [Regulation No 261/2004] to be interpreted as meaning that "a flight" includes the flight from the point of departure to the destination and back, at any rate where the outward and return flights are booked at the same time?'

The question referred for a preliminary ruling

22 The referring court asks essentially whether Article 3(1)(a) of Regulation No 261/2004 is to be interpreted as applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the Treaty applies travel back to that airport on a flight departing from an airport located in a non-member country. The referring court also asks whether the fact that the outward and return flights are the subject of a single booking affects the interpretation of that provision.

23 In its question the referring court uses the term 'flight' and refers to the concept of journey or travel which appears in Regulation No 261/2004, and asks whether a 'flight' includes a journey by air from the point of departure to the destination and back.

24 The concept of 'flight' is of decisive importance for answering the question put, despite the fact that, although it appears in the German language version of Article 3(1)(a) of Regulation No 261/2004, a clear majority of the other language versions of that provision do not refer to it or use a term derived from the word 'flight'.

25 As the Advocate General observes in point 8 of her Opinion, passengers departing from an airport located in the territory of a Member State or in a non-member country are necessarily passengers embarking on a flight departing from such an airport. That divergence between the various language versions therefore has no effect on the actual meaning to be given to the provisions concerned, which determine the scope of the regulation.

26 Consequently, the Court must begin by interpreting the term 'flight'.

27 It should be noted, in this respect, that that term is not among those defined in Regulation No 261/2004, in Article 2, headed 'Definitions'. Nor is it defined in the other articles of the regulation.

28 In those circumstances, the term 'flight' must be interpreted in the light of the provisions of Regulation No 261/2004 as a whole and the objectives of that regulation.

29 Before undertaking that analysis, however, it should be observed that Article 3(1)(a) of Regulation No 261/2004, the provision to which the national court refers, must be read together with Article 3(1)(b) of the regulation.

30 It follows from Article 3(1) as a whole that the regulation applies to situations in which passengers use a flight either departing from an airport located in the

territory of a Member State (indent (a)) or departing from an airport located in a non-member country and flying to an airport located in the territory of a Member State if the air carrier operating the flight concerned is a Community carrier (indent (b)).

31 It follows that a situation in which passengers depart from an airport located in a non-member country cannot be regarded as a situation covered by Article 3(1)(a) of Regulation No 261/2004, and therefore falls within the scope of that regulation only subject to the condition in Article 3(1)(b), namely that the air carrier operating the flight is a Community carrier.

32 As regards, next, the interpretation of the relevant provisions of Regulation No 261/2004, it must be observed, first, that Article 8(2) of the regulation refers to a flight which forms part of a package, implying that a flight is not the same as a tour or journey, which may consist of several flights. Article 8(1) expressly refers to a 'return flight', thus pointing to the existence of an outward flight in the course of the same journey.

33 That is borne out by Article 2(h) of Regulation No 261/2004, which defines 'final destination' as 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.

34 Next, Article 8(1) of Regulation No 261/2004 distinguishes between the first point of departure and the final destination of passengers, thus referring to two different places. If a 'flight' within the meaning of Article 3(1)(a) of the regulation were to be regarded as an outward and return journey, that would amount to considering that the final destination of a journey was the same as its first point of departure. In those circumstances, that provision would make no sense.

35 Finally, to regard a 'flight' within the meaning of Article 3(1)(a) of Regulation No 261/2004 as an outward and return journey would in fact have the effect of reducing the protection to be given to passengers under the regulation, which would be contrary to its objective of ensuring a high level of protection for passengers (see, to that effect, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 69).

36 In addition, first, Articles 4(1), 5(1) and 8(1) of Regulation No 261/2004 provide for redress for various kinds of damage that may occur in connection with a flight, but do not contemplate that one of those occasions of damage may occur several times during a single flight. In those circumstances, passengers departing originally from an airport located in a Member State could claim the benefit of that protection only once if they were to suffer the same damage on the outward and the return legs.

37 Second, to interpret Article 3(1)(a) of Regulation No 261/2004 in such a way that a flight includes an outward and return journey would further amount to depriving passengers of their rights in a situation in which the flight departing from an airport located in the territory of a Member State is not operated by a Community carrier.

38 Passengers on such a flight who had originally departed from an airport located

in a non-member country would not be able to enjoy the protection provided by Regulation No 261/2004. By contrast, passengers starting their journey on the same flight would be able to enjoy that protection, as they would be regarded as passengers departing from an airport located in the territory of a Member State. Passengers on the same flight whose protection in respect of harmful consequences must be the same would then be treated differently.

39 It is settled case-law, however, that the principle of equal treatment or non-discrimination 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 (see *IATA and ELFAA*, paragraph 95; Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57; and Case C-227/04 P *Lindorfer* v *Council* [2007] ECR I-6767, paragraph 63).

40 In the light of all the above considerations, the concept of 'flight' within the meaning of Regulation No 261/2004 must be interpreted as consisting essentially in an air transport operation, being as it were a 'unit' of such transport, performed by an air carrier which fixes its itinerary.

41 By contrast, the concept of 'journey' attaches to the person of the passenger, who chooses his destination and makes his way there by means of flights operated by air carriers. A journey, which normally comprises 'outward' and 'return' legs, is determined above all by the personal and individual purpose of travelling. Since the term 'journey' does not appear in the wording of Article 3(1)(a) of Regulation No 261/2004, it has in principle no effect on the interpretation of that provision.

42 In those circumstances, it must be ascertained whether other relevant legal instruments may affect the interpretation of the term 'flight'. In this respect, it must be examined whether, as the referring court appears to have found, the Montreal Convention is decisive. That convention defines the obligations of air carriers towards passengers with whom they have concluded a contract for transport, and fixes in particular the terms on which passengers may obtain individualised compensation in the form of damages for losses arising from a delay.

43 It is true that the Montreal Convention forms an integral part of the Community legal order (see, to that effect, *IATA and ELFAA*, paragraphs 35 and 36). Moreover, it is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation (see, to that effect, Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52).

44 However, the Montreal Convention does not in any way determine the extent of the obligations mentioned above by any reference to the concept of 'flight', a term which does not appear in the text of the convention.

45 Moreover, as the referring court rightly points out, successive carriages are regarded under the Montreal Convention as 'one undivided carriage', inter alia if they have been agreed upon in the form of a single contract. In so far as that concept of undivided carriage refers to a succession of several stages chosen by the passenger, it resembles rather the concept of 'journey' as defined in

paragraph 41 above.

46 The Montreal Convention is not therefore decisive for the interpretation of the concept of 'flight' within the meaning of Regulation No 261/2004.

47 It follows from paragraphs 32 to 41 above that a journey out and back cannot be regarded as a single flight. Consequently, Article 3(1)(a) of Regulation No 261/2004 cannot apply to the case of an outward and return journey such as that at issue in the main proceedings, in which passengers who have originally departed from an airport located in the territory of a Member State travel back to that airport on a flight departing from an airport located in a non-member country.

48 That interpretation is also supported by the second indent of Article 17 of Regulation No 261/2004, as seen in the light of recital 23 in the preamble to the regulation, in which the Community legislature envisages the possibility of extending the scope of the regulation in future to passengers on flights from a non-member country to a Member State not operated by Community carriers.

49 If Article 3(1)(a) of Regulation No 261/2004 referred also to the case of an outward and return journey in which passengers who originally departed from an airport located in the territory of a Member State embark on a flight departing from an airport located in a non-member country, the passengers referred to in the second indent of Article 17 of the regulation would already fall within its scope. That provision would therefore be pointless.

50 As to the question concerning the fact that the outward and return flights are the subject of a single booking, this has no effect on the conclusion stated in point 47 above.

51 There is nothing in the definition of 'reservation' in Article 2(g) of Regulation No 261/2004 which makes it possible to identify the scope of Article 3(1)(a) of that regulation. The fact that passengers make a single booking has no effect on the independent nature of the two flights.

52 Consequently, the method of reservation cannot be regarded as a relevant factor in determining the scope of Article 3(1)(a) of Regulation No 261/2004.

53 In the light of the above considerations, the answer to the question must be that Article 3(1)(a) of Regulation No 261/2004 must be interpreted as not applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the Treaty applies travel back to that airport on a flight from an airport located in a non-member country. The fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision.

Costs

54 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:

Article 3(1)(a) 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 not applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the EC Treaty applies travel back to that airport on a flight from an airport located in a non-member country. The fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision.

[Signatures]

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* Language of the case: German.

AIR CANADA

Julianna Fox
Counsel
Regulatory & Litigation

Air Canada Center
P.O. Box 7000, Station Airport
Dorval QC H4Y 1J2

By Email

September 18, 2013

The Secretary
CANADIAN TRANSPORTATION AGENCY
Complaints and Investigation Division
Air & Marine Investigations Directorate
15, Eddy Street, 19th Floor,
Hull/Ottawa, Canada
K1A 0N9

Attention: Ms. Alison Fraser

Re: Complaint by Dr. Rima Azar against Air Canada
CTA File No. M 4120-3/12-02098
Our file: 4402.0649

On September 11, 2013, we were notified by email that the Agency will pursue the portion of the present complaint dealing with involuntary denied boarding compensation amounts on flights between Canada and the E.U. Air Canada was afforded the opportunity to file additional submissions in light of the Agency's decision 342-C-A-2013 pertaining to involuntary denied boarding compensation for domestic travel onboard Air Canada. We thank the Agency for the opportunity to file additional submissions in this regard.

We note that on July 10, 2013, Air Canada informed the Agency that it had conducted a global review of its denied boarding amounts, including international denied boarding amounts for flights departing from Canada, which impacted denied boarding amounts for flights departing from Canada and going to the E.U. At this time and in light of decision 342-C-A-2013, Air Canada's changes to its international tariff regarding international denied boarding amounts is no longer feasible as such changes would no longer be comprehensive and cohesive or harmonious with the conditions set for flights within Canada. Furthermore, as the proposed international changes were percentage based, this would require significant IT development, the costs of which would no longer be commercially justifiable if applicable only to a portion of international flights (Air Canada will be implementing the amounts set out in decision 342-C-A-2013 for domestic flights as well as for international flights departing out of Canada to North American destinations as of September 18, 2013). As such, Air Canada requests that the denied boarding compensation amounts included in its submissions dated June 28 and July 10, 2013 not be considered by the Agency.

At this time, Air Canada proposes that the involuntary denied boarding compensation amounts for flights between Canada and the E.U. be established as follows:

Delay at arrival caused by involuntary denied boarding	Cash or equivalent
0-4 hours	CAD 400
Over 4 hours	CAD 800

Air Canada considers this proposal as reasonable for the following reasons:

- This proposal was established considering the amounts set out under EC Regulation 261/2004 as well as the amounts established by decision 342-C-A-2013.

- The proposal significantly streamlines the amounts already established for domestic travel.

- These denied boarding compensation amounts will be easily understood by passengers as denied boarding compensation amounts for all flights within or departing out of Canada will be significantly harmonized.

- These denied boarding compensation amounts will be egalitarian (as opposed to percentage based) in that all affected passengers will receive the same amount, a principle set out in the Agency's decision 666-C-A-2001 and which was upheld in decision 342-C-A-2013.

- Finally, we note that this proposal establishes denied boarding compensation amounts that closely resemble those established under EC Regulation 261/2004, which we understand to meet Dr. Azar's request as formulated on page 24 of her Main Reply filed on April 2, 2013.

The present in no way constitutes an admission by Air Canada that Dr. Azar's complaint was well founded. Rather, the present proposal is transmitted to the Agency in order to propose a compensation regime based on the principles set out in decision 342-C-A-2013 as well as to harmonize Air Canada's involuntary denied boarding compensation regime.

Although unrelated to the present matter, and without concession to enlarging the scope of the present file, please note that Air Canada intends on extending the application of the proposed amounts as involuntary denied boarding compensation for flights departing out of Canada to all other foreign destinations for which no other specific amount is established under the tariff.

Sincerely,

Julianna Fox
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