



Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA

delivered on 9 February 2023¹

Joined Cases C-156/22 to C-158/22

TAP Portugal

v

flightright GmbH (C-156/22)

Myflyright GmbH (C-157/22 and C-158/22)

(Request for a preliminary ruling from the Landgericht Stuttgart (Regional Court, Stuttgart, Germany))

(Reference for a preliminary ruling – Air transport – Regulation (EC) No 261/2004 – Article 5(3) – Common rules on compensation and assistance to passengers in the event of cancellation or long delay of flights – Exemption from the obligation to pay compensation – Concept of ‘extraordinary circumstances’ – Cancellation of a flight – Sudden and unexpected death of a co-pilot – Event inherent in the normal exercise of an operating air carrier’s activities – Event entirely beyond the actual control of an operating air carrier – External event – Control over the event – Foreseeability of the event)

1. Walter Alexander Raleigh once said: ‘the engine is the heart of an airplane but the pilot is its soul’.
2. Both components are essential and must be monitored to an equal extent for any operating air carrier to run smoothly. As regards pilots, EU law has established a large number of requirements, including those concerning the health of pilots, in order to ensure uninterrupted provision of air transport services.
3. When, however, disruptions do occur, Regulation (EC) No 261/2004² (‘Regulation No 261/2004’), as is clear from recital 1, aims at ensuring a high level of protection of passengers’ rights, including the right to compensation in the event of flight cancellation.
4. The requests for a preliminary ruling from the Landgericht Stuttgart (Regional Court, Stuttgart, Germany) concern the interpretation of Article 5(3) of that regulation. The requests have been made in proceedings between companies providing legal assistance to air passengers,

¹ Original language: English.

² Regulation of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

flightright GmbH (Case C-156/22) and Myflyright GmbH (Cases C-157/22 and C-158/22), and TAP Portugal, an operating air carrier, concerning that carrier's refusal to compensate passengers for the cancellation of their flight. The three joined cases concern the same flight.

5. The Court is asked to clarify whether the sudden death of a co-pilot shortly before the scheduled flight may constitute an extraordinary circumstance under that provision.

I. Legal framework

A. Regulation No 261/2004

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

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

...

(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 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, 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) Regulation No 261/2004 provides for specific amounts of compensation according to the distance of the flight.

B. Regulation (EU) No 965/2012

9. Annex III to Regulation (EU) No 965/2012³ establishes organisation requirements for air operations that must be met by the operator related to flight crew training, experience and qualification (Part-ORO). Subsection ORO.FC.200 (Composition of flight crew) of Section 2 (Additional requirements for commercial air transport operations) of Subpart FC (Flight crew) provides:

'...

(c) Specific requirements for aeroplane operations under instrument flight rules (IFR) or at night.

- (1) The minimum flight crew shall be two pilots for all turbo-propeller aeroplanes with a maximum operational passenger seating configuration (MOPSC) of more than nine and all turbojet aeroplanes.

...'

10. Annex IV to Regulation No 965/2012 governs commercial air transport operations (Part-CAT). Subsections (b) and (c) of point CAT.GEN.MPA.100 (Crew Responsibilities) of Section 1 (Motor-powered aircraft) of Subpart A (General requirements) provide:

'(b) The crew member shall:

...

- (4) comply with all flight and duty time limitations (FTL) and rest requirements applicable to their activities;
- (5) when undertaking duties for more than one operator:

³ Commission Regulation (of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ 2012 L 296, p. 1), in the version in force at the time of facts in the main proceedings.

- (i) maintain his/her individual records regarding flight and duty times and rest periods as referred to in applicable FTL requirements; and
- (ii) provide each operator with the data needed to schedule activities in accordance with the applicable FTL requirements.

(c) The crew member shall not perform duties on an aircraft:

...

- (3) if applicable medical requirements are not fulfilled;
- (4) if he/she is in any doubt of being able to accomplish his/her assigned duties; or
- (5) if he/she knows or suspects that he/she is suffering from fatigue ...'

II. The facts of the main proceedings and the question referred for a preliminary ruling

11. On 17 July 2019, TAP Portugal was the operating air carrier of flight TP597, departing from Stuttgart (Germany) at 6.05 local time to Lisbon (Portugal) ('the flight concerned').

12. On the same day, at 4.15, the co-pilot who was to operate the flight concerned was found dead in his hotel room in Stuttgart. The entire crew was shocked and declared itself unfit to fly. No replacement staff were available, since the flight concerned was to take place from outside the 'TAP base'. That flight was cancelled.

13. A replacement crew left Lisbon on a flight departing at 11.25, arriving in Stuttgart at 15.20. The passengers were transported on replacement flight TP593, which departed for Lisbon on the same day at 16.40.

14. In all three cases, the applicants in the main proceedings seek compensation from TAP Portugal pursuant to Article 7 of Regulation No 261/2004.

15. TAP Portugal was ordered by the Amtsgericht Nürtingen (District Court, Nürtingen, Germany) to pay the compensation claimed by flightright and Myflyright, on the grounds that, similar to sudden serious illness, the sudden and unforeseeable death of a member of the crew does not constitute an external event affecting the operating air carrier in question, in so far as it comes within the scope of risks inherent in the activities of an air carrier.

16. TAP Portugal appealed against the decision to the Landgericht Stuttgart (Regional Court, Stuttgart, Germany). According to that court, the sudden death of the co-pilot, who was a middle-aged family man and had passed compulsory periodic medical examinations without any difficulty, was completely unforeseeable and surprising to everyone around him.

17. In those circumstances, the Landgericht Stuttgart (Regional Court, Stuttgart) decided to stay the proceedings in all three cases and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 5(3) of [Regulation No 261/2004] to be interpreted as meaning that an extraordinary circumstance within the meaning of that provision exists where a flight departing from an airport outside the base of the operating air carrier is cancelled because a crew member deployed on that flight (*in casu* the co-pilot), who has passed the prescribed regular medical examinations without restriction, dies suddenly and in a way that the air carrier is unable to foresee shortly before the flight or falls so seriously ill that he or she cannot perform the flight?’

18. By order of the President of the Court of 4 April 2022, Cases C-156/22 to C-158/22 were joined for the purposes of the written and oral parts of the procedure and of the judgment.

19. Written observations were submitted to the Court by flightright, TAP Portugal, the Polish and Portuguese Governments, and the European Commission.

III. Assessment

A. Preliminary observations

20. I observe, first, that the question for a preliminary ruling refers to a scenario where a crew member is ‘seriously ill’ to the effect that ‘he or she cannot perform the flight’. In that respect, I note that the present sets of proceedings concern the sudden death of a co-pilot. Therefore, despite the similar effects that the severe illness of a crew member would have on the performance of a flight, that scenario seems to be hypothetical in view of the facts in the main proceedings.

21. Second, since the present case concerns the death of a co-pilot, I recall that point (c)(1) of Subsection ORO.FC.200 of Regulation No 965/2012 requires the presence of at least two pilots in order to carry out a flight. Indeed, in the present case, even if the rest of the crew had been able to operate the flight concerned, the requirement of the presence of two pilots in the flight crew was not met and, for that reason, that flight could not have been operated. Moreover, the question put to the Court refers to the sudden death of the co-pilot concerned as the cause of the cancellation of the flight concerned.

22. Therefore, I suggest that the Court limit its answer to the cancellation of the flight on account of the sudden death of the co-pilot concerned without addressing the issue of the knock-on effect of that death on the other crew members. In any event, since the exact cause of the cancellation of the flight is a matter of fact, it is for the referring court to establish whether the flight concerned was cancelled *only* because of the death of the co-pilot concerned or because of the *combination* of that latter event with the crew’s inability to operate the flight concerned.

23. In those circumstances, in order to give a useful answer to the referring court, I suggest that the Court reword the question so that it asks essentially whether Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that the cancellation of a flight, meant to depart from an airport outside the base of the operating air carrier in question, due to the sudden death of the co-pilot who had passed the prescribed regular medical examinations without restriction,

comes within the scope of ‘extraordinary circumstances’ within the meaning of that provision on the ground that this event occurred shortly before the flight and was unforeseeable for that air carrier.

B. The two conditions laid down by the case-law

24. At the outset, I recall that, when a flight is cancelled, Article 5(1)(c) of Regulation No 261/2004 provides that the passengers concerned have the right to compensation from the operating air carrier, in accordance with Article 7(1) thereof, unless they have been informed of the cancellation beforehand within the periods prescribed in Article 5(1)(c)(i) to (iii) of that regulation.

25. Article 5(3) of Regulation No 261/2004, read in the light of recitals 14 and 15, releases the operating air carrier from that obligation if it can prove that the cancellation was caused by extraordinary circumstances which could not have been avoided, even if all reasonable measures had been taken. In view of the objective of Regulation No 261/2004, set out in recital 1, of ensuring a high level of protection for passengers and in the light of the fact that Article 5(3) of the regulation allows a derogation from the principle that passengers have the right to compensation if their flight is cancelled, the concept of ‘extraordinary circumstances’ within the meaning of that provision must be interpreted strictly.⁴

26. According to settled case-law, events may be classified as ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004 if, by their nature or origin, they are not inherent in the normal exercise of the activity of the operating air carrier concerned (first condition) and are beyond that carrier’s actual control (second condition). While the Court recently recalled that those two conditions are cumulative and their fulfilment must be assessed on a case-by-case basis,⁵ I observe that, in its assessment, it examined each condition in turn, even though it considered that the first condition was not fulfilled.⁶ It seems, therefore, that the two conditions are, in fact, additional; the first relates, more generally, to the relationship between the area of activity affected and the operating air carrier’s activities⁷ and the second relates, more specifically, to whether the event in question is entirely beyond the actual control of the operating air carrier. However, since it is well-established case-law of the Court that the two conditions are cumulative, I will examine them as such.

27. Moreover, it should be pointed out that the case-law concerning the content of and relationship between the first and second conditions is not always consistent. Therefore, in the present case, I will examine those conditions as recalled and clarified by the Court in its recent Grand Chamber judgment, *Airhelp*.⁸

28. In the circumstances, it must be determined whether the sudden death of a co-pilot may constitute an ‘extraordinary circumstance’ within the meaning of Article 5(3) of Regulation No 261/2004.

⁴ See, to that effect, judgment of 23 March 2021, *Airhelp* (C-28/20, EU:C:2021:226, paragraph 24 and the case-law cited).

⁵ See, more recently, judgment of 23 March 2021, *Airhelp* (C-28/20, EU:C:2021:226, paragraph 23 and the case-law cited).

⁶ *Ibid.*, paragraphs 26 and seq.

⁷ See point 34 below.

⁸ Judgment of 23 March 2021 (C-28/20, EU:C:2021:226, paragraph 40).

1. *An event not inherent in the normal exercise of the operating air carrier's activity*

29. Under that condition, it is necessary to determine whether issues in relation to the staff of the operating air carrier are capable of constituting, by their nature or origin, an event which is not inherent in the normal exercise of that air carrier's activities.⁹

30. In that regard, it should be recalled that, with respect to the aircraft's technical problems, the Court held in *Wallentin-Hermann*¹⁰ that the circumstances surrounding the occurrence of an event can be described as 'extraordinary' within the meaning of Article 5(3) of Regulation No 261/2004 only if they relate to an event which, similarly to those listed in recital 14 of that regulation, is not inherent in the normal exercise of the activity of the operating air carrier concerned and is beyond the effective control of that carrier by virtue of its nature or origin. The Court ruled that, since the functioning of aircraft inevitably gives rise to technical problems, air carriers face such problems in the course of their activities. Therefore, technical problems, which become known during maintenance of aircraft or due to the failure to carry out such maintenance, cannot constitute, in themselves, 'extraordinary circumstances' under Article 5(3) of Regulation No 261/2004. Conversely, certain events, such as a hidden manufacturing defect, which impinges on flight safety, or damage to aircraft caused by acts of sabotage or terrorism, may not be inherent in the normal exercise of the activity of the operating air carrier concerned and are beyond its actual control.

31. The concept of inherency was later clarified by the Court in *van der Lans*,¹¹ where the Court held that a breakdown caused by the premature failure of certain components of an aircraft constitutes an unexpected event. However, the Court added that such a breakdown remains *intrinsically linked* to the very complex operating system of the aircraft, which is operated by the air carrier in question in conditions, particularly weather conditions, which are often difficult or even extreme, it being understood, moreover, that no part of an aircraft is unalterable. The Court concluded that, in the course of the activities of an operating air carrier, that unexpected event is inherent in the normal exercise of that carrier's activity, as air carriers are confronted as a matter of course with unexpected technical problems.

32. It follows from that case-law that the aircraft's technical problems are inherent in the normal exercise of the operating air carrier's activities, since that carrier is faced, in the normal course of those activities, with unexpected technical problems. I will go on to examine to what extent issues with respect to staff matters are inherent in the normal exercise of the operating air carrier's activity.

33. In the judgment in *Airhelp* referred to above,¹² the Court was called on to determine whether a pilots' strike organised within a legal framework is inherent in the normal exercise of an air transport undertaking's activity. The Court held that a strike whose objective is limited to obtaining from an air carrier transport undertaking an increase in the pilots' salary, a change in the work schedules of the crew and greater predictability as regards working hours, constitutes an event that is inherent in the normal exercise of that undertaking's activity, in particular where such a strike is organised within a legal framework. More specifically, the Court relied on the fact

⁹ See, by analogy, judgment of 23 March 2021, *Airhelp* (C-28/20, EU:C:2021:226).

¹⁰ See, to that effect, judgment of 22 December 2008 (C-549/07, EU:C:2008:771, paragraphs 20, 24, 25 and 26). I note that, when detailing those events, the Court does not distinguish between the first and the second condition.

¹¹ Judgment of 17 September 2015 (C-257/14, EU:C:2015:618, paragraphs 41 and 42).

¹² Judgment of 23 March 2021 (C-28/20, EU:C:2021:226, paragraphs 28, 29 and 30).

that a strike remains one of the ways in which collective bargaining may manifest itself and, therefore, must be regarded as an event inherent in the normal exercise of the activity of the employer concerned.

34. It is important to note that the Court emphasised that measures concerning the *operating air carrier's staff* fall within the normal management of that carrier's activities. It follows from that judgment that, for the purposes of establishing the first condition, the Court examines the relationship between the area of activity affected, that is, staff matters, and an operating air carrier's activities.

35. That interpretation should apply in the present case, since crew planning and staff matters are air carriers' bread and butter. With respect to crew planning, the companies must follow aviation legislation, contractual conditions and personal expectations.¹³ Crew planning entails complex operations, such as crew pairing, rostering, tracking, and training, to name a few, while taking into account aspects such as fatigue risk management.¹⁴ A sudden absence of a crew member, such as a co-pilot, should be foreseen, in principle, in the crew planning.¹⁵

36. In that respect, I emphasise that the exact cause of the sudden absence of the co-pilot should not be relevant for the purposes of characterising absence as an 'inherent' event. Indeed, since there is a likelihood of such an event occurring,¹⁶ it should be taken into account in the organisation and management of the operating air carrier's systems. Therefore, whether the sudden absence of a co-pilot is caused by health reasons, death or other causes, its *effect* is that the operating air carrier in question must either replace the absent person or cancel the flight.

37. Consequently, I am of the view that the sudden absence of a co-pilot is an ordinary part of an operating air carrier's activity and such an event, regardless of its cause, should be considered inherent in the normal exercise of the air carrier's activity. As the two conditions are cumulative,¹⁷ there will be no need to examine the second condition if the Court follows my reasoning. For the sake of completeness, I will nevertheless examine the second condition, that is, whether the death of a co-pilot is an event beyond the control of the operating air carrier in question.

2. *An event entirely beyond the actual control of the operating air carrier*

38. In the judgment in *Airhelp*, the Court examined four criteria for the purposes of establishing whether an event is to be regarded as an event entirely beyond the actual control of the operating air carrier concerned. In the present case, only three of those criteria are relevant, since the fourth

¹³ See, for example, Commission Regulation (EU) No 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ 2011 L 311, p. 1), in the version in force at the time of the facts in the main proceedings.

¹⁴ IATA, ICAO, IFALPA, 'Fatigue Management Guide for Airline Operators', 2015. [Online]. Available at <https://www.iata.org/en/publications/fatigue-management-guide/>. See, to the same effect, points (b) and (c) of Subsection CAT.GEN.MPA.100 (Crew Responsibilities) of Section 1 (Motor-powered aircraft) of Subpart A (General requirements) of Annex IV to Regulation No 965/2012, (Part-CAT).

¹⁵ See, for example, <https://www.easa.europa.eu/en/downloads/116532/en>. Ibid., points (b) and (c) of Subsection CAT.GEN.MPA.100 (Crew Responsibilities) of Section 1 (Motor-powered aircraft) of Subpart A (General requirements) of Annex IV to Regulation No 965/2012, (Part-CAT).

¹⁶ The World Bank Group, Mortality rate, adult, male (per 1,000 male adults) – European Union, 2018, available at: Mortality rate, adult, male (per 1,000 male adults) – European Union | Data (worldbank.org).

¹⁷ See point 26 above.

one related specifically to the legal issues arising from the fundamental right to strike enshrined in Article 28 of the Charter of Fundamental Rights of the European Union ('the Charter'), which was at issue in that case.¹⁸

39. By those three criteria, the Court examined, more specifically, first, whether the event is foreseeable, second, whether the employer retains control to a certain extent over that event, and, third, whether the event is external to the operating air carrier. Those three criteria appear to be cumulative and constitute minimum criteria for the purposes of defining an event that is entirely beyond the actual control of the air carrier concerned. I shall examine those criteria in reverse order to the order set out by the Court in the judgment in *Airhelp*, since, logically speaking, the question whether an event is external or internal to the operating air carrier precedes the question whether that event can be controlled by that air carrier.

(a) *An external event*

40. In the judgment in *Airhelp*, the Court states that, for the purposes of establishing the concept of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004, events whose origin is 'internal' must be distinguished from those whose origin is 'external' to the operating air carrier.

41. In the first place, regarding external events, those events include, according to the Court, a collision between an aircraft and a bird;¹⁹ damage to an aircraft's tyre by a foreign object, such as mobile debris on an airport runway;²⁰ the presence of petrol on an airport runway leading to its closure;²¹ a collision between the elevator of a parked aircraft and the aileron of another airline's aircraft, caused by the latter's movement;²² a latent manufacturing defect or acts of sabotage or terrorism.²³

42. The Court infers that the feature shared by external events is that they 'arise from a natural event or an act of a third party, such as another air carrier or a public or private operator interfering with flight or airport activity'.²⁴ With regard to events that arise from a natural event, the Court held that the closure of part of European airspace because of a volcanic eruption, such as that of the Eyjafjallajökull volcano, constitute 'extraordinary circumstances'.²⁵ With regard to events caused by an act of a third party, the Court emphasises that strike action taken by air traffic controllers or airport staff may constitute an 'extraordinary circumstance' within the meaning of Article 5(3) of that regulation in so far as such strike action does not come within the scope of the exercise of that carrier's activity and is thus beyond its actual control.²⁶

¹⁸ The fourth of those criteria concerned the balancing act between the fundamental freedom to strike and the air carrier's fundamental freedoms to conduct a business and its right to property, which are guaranteed by Articles 16 and 17 of the Charter.

¹⁹ Judgment of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342, paragraph 26).

²⁰ Judgment of 4 April 2019, *Germanwings* (C-501/17, EU:C:2019:288, paragraph 34).

²¹ Judgment of 26 June 2019, *Moens* (C-159/18, EU:C:2019:535, paragraph 29).

²² Order of 14 January 2021, *Airhelp* (C-264/20, not published, EU:C:2021:26, paragraph 26).

²³ Judgments of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 26), and of 17 September 2015, *van der Lans* (C-257/14, EU:C:2015:618, paragraph 38).

²⁴ Judgment of 23 March 2021, *Airhelp* (C-28/20, EU:C:2021:226, paragraph 41), emphasis added.

²⁵ Judgment of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43).

²⁶ See, to that effect, judgment of 4 October 2012, *Finnair* (C-22/11, EU:C:2012:604), cited in *Airhelp* (C-28/20, EU:C:2021:226, paragraph 42).

43. In the second place, regarding internal events, the Court held that a strike set in motion and observed by members of the relevant air transport undertaking's own staff, including in the case of a strike set in motion upon a call by trade unions, is an event 'internal' to that undertaking since they are acting in the interest of that undertaking's workers.²⁷ I note that the Court had already ruled in the past that a strike, without the participation of trade unions or staff representatives, caused by the announcement of the company's restructuring does not constitute an 'extraordinary circumstance'.²⁸

44. In the present case, the carrier could be considered to be responsible for organising its staff in order to prevent any disruption due to illness or other incapacities. As already stated, the organisation of its staff constitutes normal day-to-day management of the air carrier.²⁹ It follows that the normal day-to-day management falls under the category of 'internal' events. Therefore, when the death of a co-pilot arises out of the action (or neglect) of the operating air carrier, that is, when the death of a co-pilot is work-related, it is an entirely internal event. By contrast, when the death of a co-pilot occurs outside of work and is not caused by it. I am of the view, similarly to the Commission, that it should be regarded as a 'natural event' and, therefore, characterised as an 'external' event.

(b) Control, to a certain extent, over the event in question

45. In the judgment in *Airhelp*, the Court explained that an event that is entirely within the actual control of the air carrier concerned is an event where that carrier has, in principle, the means to prepare for it and, as the case may be, to mitigate its consequences, with the result that the employer retains control over events to a certain extent.³⁰

46. In that respect, I observe that, in the area of commercial air transport, air carriers must meet strict technical and administrative procedures when carrying out their activities. Therefore, in principle, an operating air carrier cannot claim that it does not have any control over its organisation and staff management. In fact, an air carrier must take all the necessary measures to prevent any issue that might affect its crew members, especially anything that might affect the pilots.

47. In particular, I should point out that a pilot must hold a medical certificate in order to fly. Annex IV to Regulation No 1178/2011 provides, inter alia, that 'when exercising the privileges of a commercial pilot licence (CPL), a multi-crew pilot licence (MPL) or an airline transport pilot licence (ATPL), the pilot shall hold a valid class 1 medical certificate', which must be renewed by

²⁷ Judgment of 23 March 2021, *Airhelp* (C-28/20, EU:C:2021:226, points 44).

²⁸ Judgment of 17 April 2018, *Krüsemann and Others* (C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:2588).

²⁹ See points 34 to 36 above.

³⁰ Judgment of 23 March 2021, *Airhelp* (C-28/20, EU:C:2021:226, paragraph 35).

an aero-medical centre or aero-medical examiner.³¹ Class 1 medical certificates are valid for a period of 12 months.³² I emphasise that the purpose of regular aero-medical assessment is to ensure the medical fitness of a pilot or minimise the risk of medical unfitness.³³

48. Nevertheless, even regular medical examinations do not guarantee that the person who undergoes them does not die between examinations. Even where the air carrier has put in place and carried out all the necessary procedures, certain events – such as the sudden and unexpected death of a normally healthy co-pilot outside the usual hub of the air carrier – may constitute an event for which the air carrier cannot prepare and which cannot be mitigated.

49. I take the view that it is for the referring court to verify whether the cause of death of the co-pilot was due to a factor within the control of the operating air carrier in question. In that respect, the national court should assess whether the safety procedures and requirements in relation to the health of the co-pilot concerned were complied with by the operating air carrier, whether the prescribed health examinations were carried out correctly, and whether, in the course of regular checks, there was anything to show that the state of health of the co-pilot concerned was not good enough to carry out his duties. If those three points are confirmed, it can be concluded, in my opinion that, in the present case, the death of the co-pilot was entirely beyond the operating air carrier's control.

(c) *The foreseeability of the event in question*

50. In the judgment in *Airhelp*, the Court notes that a strike is, for workers, a right guaranteed by Article 28 of the Charter, and the fact that they invoke that right and consequently launch strike action must be regarded as foreseeable for any employer, in particular where notice of the strike is given.³⁴

51. By doing so, the Court applies the classic dictionary definition that a foreseeable event or situation is one that can be known about or guessed before it happens.³⁵ However, the term 'foreseeable' may also be defined as 'being such as may be *reasonably* anticipated'.³⁶ The term 'reasonable' entails an examination of likelihood. Thus, the Court must determine how likely it was that an air carrier could have anticipated the results of the events in question. It is essentially a case-by-case determination that requires the context of the occurrence of the event to be established, which requires an examination of abstract statistical data and a specific examination of the person in question.

³¹ Ibid., points MED.A.030 'Medical certificates', (c)(4) and MED.A.040 'Issuance, revalidation and renewal of medical certificates', (c)(1) of Section 2, 'Requirements for medical certificates', of Subpart A, 'General requirements', of Annex IV (Part-MED), in the version in force at the time of facts in the main proceedings.

³² Ibid., point MED.A.045 'Validity, revalidation and renewal of medical certificates' (a)(1) and (2) of Section 2, 'Requirements for medical certificates', of Subpart A, 'General requirements', of Annex IV (Part-MED). For pilots who are engaged in single-pilot commercial air transport operations carrying passengers and have reached the age of 40, and for pilots over the age of 60, the Class 1 medical certificate is valid for a period of six months and may be renewed after further aero-medical examinations or assessments.

³³ As regards the operator's responsibilities and personnel requirements, see points ORO.GEN.110, 'Operator responsibilities', (e) and (g) of Section 1 'General' and ORO.GEN.210 'Personnel requirements', (c) and (e) of Section 2 'Management', of Subpart GEN, 'General requirements', of Annex III 'PART-ORO' to Regulation No 965/2012.

³⁴ Judgment of 23 March 2021 (C-28/20, EU:C:2021:226, paragraph 32).

³⁵ See, for example, the online *Cambridge Dictionary*, definition available at <https://dictionary.cambridge.org/fr/dictionnaire/anglais/foreseeable>.

³⁶ See the online *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/foreseeable>, emphasis added.

52. In the present case, it should be observed that it is for the national court to establish, by taking into account the statistical data available to it, whether the death of a man in his early 40s constitutes a likely event. In that respect, it should be borne in mind that the frequency of aero-medical examinations increases with age. For example, the period of validity of Class 1 medical certificates is reduced to 6 months for licence holders who have reached the age of 60. Those certificates may be renewed further only after aero-medical examinations or assessments.³⁷ It can be inferred from that requirement that the health risks of pilots increase with age.

53. As to the specific data concerning the co-pilot in question, the request for a preliminary ruling does not contain any details as to the cause of his death. The question referred mentions that the co-pilot had fully completed the prescribed regular medical examinations. It also states that the sudden death of a father in his early 40s was a severe shock to the crew.

54. In that respect, I observe that, in the present circumstances, the Class 1 medical certificates referred to above are valid for 12 months³⁸ and, after their expiry, their holder must apply for renewal of that certificate. Therefore, while it could be presumed that, in the present case, the co-pilot in question had passed the necessary medical checks and was in a good state of health, it is for the referring court to establish those facts.

55. Consequently, it seems that, in the present case, the death of the co-pilot constitutes an event, which had a low likelihood of occurrence, and thus should be considered, in the present circumstances, as unforeseeable to the air carrier.

3. *Interim conclusion*

56. In the light of the foregoing, I suggest that the Court answer that Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that the cancellation of a flight meant to depart from an airport outside the base of the operating air carrier in question, due to the sudden death of the co-pilot who had passed the prescribed regular medical examinations without restriction, does not come within the scope of ‘extraordinary circumstances’ within the meaning of that provision.

57. Should the Court nevertheless find that the death of the co-pilot is an extraordinary circumstance, it must examine the concept of reasonable measures that an air carrier must take.

C. *The concept of reasonable measures according to the case-law*

58. In order to be released from its obligation to pay compensation, the carrier must demonstrate that it took all reasonable measures that were required of it. In the judgment in *Germanwings*,³⁹ the Court held that it is for the operating air carrier to implement the personnel, material and financial means at its disposal. In the judgment in *Wallentin-Hermann*,⁴⁰ the Court ruled that the fact that the operating air carrier has complied with the minimum rules for the maintenance of an aircraft is not sufficient to establish that the carrier has taken all reasonable measures.

³⁷ See footnote 32 above. Similarly, Class 1 certificates must be renewed every six months by licence holders who are engaged in single-pilot commercial transport operations and have reached the age of 40.

³⁸ See point 47 above.

³⁹ Judgment of 4 April 2019 (C-501/17, EU:C:2019:288).

⁴⁰ Judgment of 22 December 2008 (C-549/07, EU:C:2008:771).

59. However, in the judgment in *Eglītis and Ratnieks*,⁴¹ the Court considered that the operating air carrier could not be required to plan, in a general and undifferentiated manner, a minimum time reserve applicable indiscriminately in all situations where extraordinary circumstances arise. The extent of the time reserve required should not result in the carrier making unbearable sacrifices with regard to its business capacities.

60. Moreover, in the judgment in *Pešková and Peška*,⁴² the Court stated that the operating air carrier is not responsible for the failure of other entities, such as air traffic controllers, to comply with their obligations to take preventive measures within their jurisdiction. In addition, the Court held in the judgment in *Moens*,⁴³ that the presence of gasoline on an airport runway, resulting in its closure, is a circumstance that could not have been avoided even if all reasonable measures had been taken.

61. It was, lastly, in the judgment in *Transportes Aéreos Portugueses*,⁴⁴ concerning the landing and interruption of a flight on account of an unruly passenger's behaviour, that the Court gave the clearest definition of the 'reasonable measures' defence. The Court stated that reasonable measures cannot, in principle, amount to merely offering to re-route the passengers concerned to their final destination on the next flight operated by that airline which arrives at their destination on the day following the day originally scheduled for their arrival. Indeed, the care and attention required of that air carrier in order to enable it to be exempted from its obligation to pay compensation presupposes that it deploys all the resources at its disposal to ensure reasonable, satisfactory and timely re-routing, including seeking alternative direct or indirect flights which may be operated by other air carriers, whether or not belonging to the same airline alliance, arriving at a scheduled time that is not as late as the next flight of the air carrier concerned. However, it is for the national court to assess whether such rerouting could have constituted an unbearable sacrifice for the airline in view of its capacity at the relevant time.

62. I must point out that the death of a co-pilot, irrespective of the specific circumstances in which it occurred, would lead in any event to the cancellation of the flight if no replacement pilot were available. Indeed, as stated above, Regulation No 965/2012 provides that, for the type of aeroplanes used on such flights, the operating air carrier must make available a crew composed of at least two pilots. This means that the commander would not have been authorised to operate the return flight alone, without a co-pilot.⁴⁵

63. In addition, as explained by the Commission,⁴⁶ aviation safety provisions do not allow every pilot to act as a replacement pilot. The replacement pilot must be fully qualified and have sufficient training and experience in relation to the aeroplane and route concerned. This means that it is not sufficient for operating air carriers using different aircraft to make additional crew available at each destination and that stand-by crews must be available for all types of aeroplanes used and for all routes at any destination served by that air carrier. Such an obligation would entail disproportionate costs and does not appear to be reasonable should the Court find that the circumstances are extraordinary.

⁴¹ Judgment of 12 May 2011 (C-294/10, EU:C:2011:303, paragraphs 31 and 35), and similarly, see the Opinion of Advocate General Tanchev in *Moens* (C-159/18, EU:C:2018:1040, point 33).

⁴² Judgment of 4 May 2017 (C-315/15, EU:C:2017:342, paragraphs 43 and 44).

⁴³ Judgment of 26 June 2019 (C-159/18, EU:C:2019:535).

⁴⁴ Judgment of 11 June 2020 (C-74/19, EU:C:2020:460, paragraphs 58, 59 and 61).

⁴⁵ That regulation also contains indications on the importance of the good mental condition of other crew members. It appears that, in the present case, the latter did not immediately consider themselves able to carry out the flight following the potentially traumatic news of the death of their colleague.

⁴⁶ Paragraph 31 of the Commission's observations.

64. Consequently, in order to be released from its obligation to pay compensation, the air carrier must demonstrate that it took all of the proportionate and reasonable measures that were required of it.

IV. Conclusion

65. On the basis of the analysis set out above, I propose that the Court answer the question referred by the Landgericht Stuttgart (Regional Court, Stuttgart, Germany) as follows:

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 the cancellation of the flight meant to depart from an airport outside the base of the operating air carrier in question, due to the sudden death of the co-pilot who had passed the prescribed regular medical examinations without restriction, does not come within the scope of ‘extraordinary circumstances’ within the meaning of that provision.