Reports of Cases

OPINION OF ADVOCATE GENERAL
MARTÍN y PÉREZ DE NANCLARES
delivered on 26 November 2025 [1]

Case T-656/24

NI,
HZ
v
European Air Charter Aktiengesellschaft

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

(Reference for a preliminary ruling – Air transport – Regulation (EC) No 261/2004 – Article 5(3) – Article 7(1) – Compensation for air passengers in the event of long delays to flights – Exemption from the obligation to pay compensation – Extraordinary circumstances – Failures at the airport security check – Autonomous decision by the air carrier to wait for all the passengers who had passed through the security check – Aircraft rotation – Rescheduling of flights subsequent to the delayed flight – Causal link)

I. Introduction

1. '*Felix qui potuit rerum cognoscere causas*'. This famous passage from Virgil's Georgics, [2] which has become the motto of several universities, echoes the central discussion in the present case, although the conclusions which follow have nothing in common with Virgil's melancholic vision of olive trees and vines, and the resolution of the issues before the General Court cannot be entrusted to the designs of the sun and the stars.

2. By its request for a preliminary ruling, the Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany) asks the Court to clarify the concept of a '"direct" causal link' between the occurrence of an extraordinary circumstance, for the purpose of Article 5(3) of Regulation (EC) No 261/2004, [3] which affected a flight and the delay to a subsequent flight.

[1] Original language: French.

[2] The excerpt is from verse 490 of Book 2 of the Georgics, which was published in 29 BC and concerned with agricultural commentaries. Its full wording is as follows: '*Felix qui potuit rerum cognoscere causas; atque metus omnis et inexorabile fatum; subiecit pedibus, strepitumque Acherontis auari*' (Happy he who was able to know the causes of things and who trampled beneath his feet all fears, inexorable fate and the roar of devouring Acheron!).

[3] 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).

3. The dispute in the main proceedings is between two passengers and an air carrier concerning the latter's refusal to compensate them for the long delay to their flight.

4. The dispute between the parties to the main proceedings arises from the air carrier's decision to wait for the passengers from a preceding flight, all of whom had been delayed at the security check at Cologne/Bonn Airport (Germany). In essence, that carrier takes the view that that decision was the result of the occurrence of an extraordinary circumstance and therefore exempts it from its obligation to compensate the two passengers.

5. The referring court has doubts as to whether such a decision, which it describes as 'autonomous', can be regarded as a continuation of the extraordinary circumstance and is therefore capable of exempting the air carrier from its obligation to pay compensation. The flight departing from Cologne/Bonn Airport was ready to leave and could have taken off without the delayed passengers.

II. Legal framework

A. European Union law

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

'(14) … 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. …

(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 that regulation, entitled '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 …:

…

3. An operating air carrier shall not be obliged to pay compensation … 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 of that regulation, entitled 'Right to compensation', provides, in paragraph 1(b) thereof, that 'where reference is made to this Article, passengers shall receive compensation amounting to … 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'.

B. German law

9. The Luftsicherheitsgesetz (Law on aviation security) of 11 January 2005 (BGBl. I, p. 78), as amended by the Law of 22 April 2020 (BGBl. I, p. 840), provides, in Paragraph 2 thereof, entitled 'Tasks':

'The aviation security authority shall have the task of preventing breaches of air transport security within the meaning of Paragraph 1. To that end, it shall, in particular:

1. check passengers and their baggage in accordance with Paragraph 5,

…'

10. Paragraph 5 of that law, entitled 'Special powers of the authorities responsible for aviation security', provides in subparagraph 1 thereof that 'the aviation security authority may search or check in any other appropriate manner persons who have entered or wish to enter the security restricted area of the aerodrome [and that] it may search or inspect in any other appropriate manner objects which have been or are to be brought into those areas'.

III. Facts giving rise to the dispute and request for a preliminary ruling

11. The dispute in the main proceedings is between two passengers, NI and HZ, and the air carrier European Air Charter Aktiengesellschaft.

12. NI and HZ made a reservation with European Air Charter for a flight from Düsseldorf (Germany) to Varna (Bulgaria), scheduled to depart on 23 July 2022 at 15:00 and arrive on the same day at 17:50. ('the flight at issue in the main proceedings').

13. That flight was to be made by a European Air Charter aircraft used in a flight rotation. According to the initial schedule, a first flight was to take off from Cologne/Bonn on 23 July 2022 at 07:40 and arrive in Varna at 10:30 ('the first flight'). The second flight was scheduled to depart from Varna at 11:20 and arrive in Düsseldorf at 14:10 ('the second flight'). The flight at issue in the main proceedings was the third flight.

14. However, following an unusually long waiting time at Cologne/Bonn airport, which was caused by excessive work volumes for the personnel carrying out the security checks on 23 July 2022, all of the passengers of the first flight were delayed in arriving for boarding. European Air Charter took the decision to wait for the passengers who were at the security check and the first flight took off with a delay of 5 hours and 10 minutes.

15. In order to avoid an excessively long wait for the passengers on the flight at issue in the main proceedings, European Air Charter decided to reschedule the flights following the first flight and rearranged the second flight and the flight at issue in the main proceedings on another aircraft. The second flight was therefore made by a replacement aircraft which, because of the need to

obtain landing clearance at the destination airport, was able to take off only at 14:10 and arrived in Düsseldorf at 17:33. The flight at issue in the main proceedings was operated by that replacement aircraft and took off at 18:39. NI and HZ arrived at 21:12, that is 3 hours and 22 minutes after the original scheduled arrival time.

16. NI and HZ brought an action before the Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany), which, by judgment of 19 February 2024, dismissed their claim for compensation for the delay to their flight in the amount of EUR 400 each.

17. NI and HZ appealed against that judgment before the referring court.

18. According to the referring court, the sudden, high level of absence of security check personnel could constitute an extraordinary circumstance, for the purposes of Article 5(3) of Regulation No 261/2004, since air passenger checks are a task which, in accordance with Paragraph 2(1) and Paragraph 5(1) of the Law on aviation security, is not assigned to air carriers. Accordingly, personnel shortages and delays are circumstances which lie outside the sphere of risk of the air carrier and cannot be controlled by that carrier.

19. In the light of the national and European case-law on the subject, the referring court considers that the delay in the arrival of the flight at issue in the main proceedings in Varna could be regarded as being directly caused not by delays at the security check at Cologne/Bonn airport, but by the autonomous decision taken by European Air Charter to wait for the passengers who were at that check and, consequently, to charter a replacement aircraft to operate the flight at issue in the main proceedings.

20. However, according to that court, it could be a different matter if the direct cause of the cancellation or long delay on arrival due to the extraordinary circumstance is considered primarily in the light of the objective of protecting passengers pursued by Regulation No 261/2004, on the basis of which the operating air carrier is required to take into account the interests of all passengers. Thus, if the rescheduling of the flight plan takes into account the interests of all passengers equally, 'simple' causality could be sufficient to establish the causal link between the extraordinary circumstance and the cancellation or long delay on arrival.

21. The referring court points out that, if the direct cause of the cancellation or long delay on arrival as a result of the extraordinary circumstances depended on balancing the interests of different groups of passengers affected by the same flight rotation, the case-law of the Court of Justice has not yet established any criteria for such a balancing exercise.

22. In those circumstances the Landgericht Düsseldorf (Regional Court, Düsseldorf) decided to stay the proceedings and, under the procedure provided for in Article 267 TFEU, to refer the following questions for a preliminary ruling:

'(1) Is the delayed arrival of a flight by at least three hours directly the result of an extraordinary circumstance within the meaning of Article 5(3) of [Regulation No 261/2004] even if, on a preceding flight on the same day, the operating air carrier decided, because of significant delays at the security check, to wait for passengers who had not yet been cleared and the resulting delay cannot be made up by the time of the flight [concerned]?

(2) If the answer to the first question depends on whether and how many passengers arrived for boarding of the delayed preceding flight, from what proportion of passengers booked on the flight who actually turned up is the (further) delay of the preceding flight no longer directly the result of extraordinary circumstances within the meaning of Article 5(3) of [Regulation No 261/2004], but [of] an autonomous decision by the air carrier which lies solely within its sphere of control?'

IV. Procedure before the Court of Justice and the General Court

23. The present request for a preliminary ruling was lodged at the Registry of the Court of Justice on 6 December 2024. Pursuant to Article 50b of the Statute of the Court of Justice of the European Union, the request was referred to the General Court.

24. Written observations were lodged by European Air Charter, the Netherlands Government and the European Commission. European Air Charter and the Commission participated at the hearing held on 17 October 2025.

V. Legal assessment

25. As a preliminary point, it should be recalled that the Court of Justice has established, on the basis of the principle of equal treatment, that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of Regulation No 261/2004 where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. [4]

26. Article 5(3) of Regulation No 261/2004, read in the light of recitals 14 and 15 thereof, releases the air carrier from that obligation to pay compensation if the carrier can prove that the cancellation or long delay is caused by 'extraordinary circumstances' and that it also satisfies the other conditions laid down by the case-law. [5]

27. Since Article 5(3) constitutes a derogation from the principle of the right to compensation for passengers and given the objective pursued by Regulation No 261/2004, which is to ensure a high level of protection for passengers, the concept of 'extraordinary circumstances' must be strictly interpreted. [6]

28. It is in the light of those initial considerations that I propose to examine in turn the two questions referred for a preliminary ruling.

[4] See, to that effect, judgment of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716, paragraph 69).

[5] See, to that effect, judgments of 4 April 2019, *Germanwings* (C-501/17, EU:C:2019:288, paragraph 19 and the case-law cited), and of 23 March 2021, *Airhelp* (C-28/20, EU:C:2021:226, paragraph 22 and the case-law cited).

[6] See, to that effect, 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:2018:258, paragraph 36 and the case-law cited).

A. First question referred for a preliminary ruling

29. By its first question, the referring court asks whether an autonomous decision taken by an air carrier is capable of breaking the causal link between the occurrence of an extraordinary circumstance and the cancellation or long delay of a flight, in a situation where the cancellation or long delay of that flight occurred following a chain of events caused by the extraordinary circumstance. The referring court therefore asks the Court to consider the 'domino effect'[7] of the extraordinary circumstance.

30. In order to answer that question, I would like to begin my analysis with a few preliminary observations on its scope (1), before addressing briefly the question whether a generalised failure of the security check may be regarded as an 'extraordinary circumstance' (2) and focusing in greater depth on the issue of the causal link (3).

1. Preliminary observations on the scope of the first question

31. It seems useful to me to point out that, by its first question, the referring court asks the Court only whether there is a causal link between the occurrence of an extraordinary circumstance which affected a first flight and the delay to a subsequent flight.

32. Accordingly, it does not ask the Court whether a generalised failure of the security check may be regarded as an 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation No 261/2004. Nor does it ask the Court about the measures taken by European Air Charter to avoid the consequences of that circumstance.

33. On the contrary, it seems to me that, for the referring court, the resolution of those two questions does not raise any particular difficulty: the generalised failure of the security check may be regarded as an extraordinary circumstance and, subject to additional evidence to be taken, European Air Charter took all reasonable measures to reduce the delay on arrival of the flight at issue in the main proceedings.

34. In those circumstances, I am of the view that the Court's decision could – or even should?[8] – focus solely on the question of the causal link, which the referring court has, moreover, described as 'decisive' for resolving the dispute brought before it.

35. However, in the event that the Court considers it necessary to address the issue of the existence of an extraordinary circumstance as a preliminary to the issue of the causal link, I would say a few words on that subject. By contrast, I shall not address the issue of the measures

[7] The term used by some authors: Grard, L., 'Chronique Droit européen des transports', *Revue trimestrielle de droit européen*, 2021, No 2, p. 449; Luzak, J.A., 'HvJ EU 11-06-2020, C-74/19: noot', *Tijdschrift voor consumentenrecht en handelspraktijken*, 2020, No 6, pp. 341 to 344 (p. 341).

[8] The concept of 'extraordinary circumstances' has been sufficiently clarified by the case-law of the Court of Justice and, in my view, care must be taken not to apply, under the guise of wishing to clarify the scope of that concept, the criteria established by the case-law for determining the existence of such a circumstance. In that regard, I concur with the warnings given by Advocate General Bobek, in his Opinion in *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:291, points 139, 140, 143 and 149), and by Advocate General Emiliou, in his Opinions in *Austrian Airlines (Exoneration of air carrier from liability)* (C-589/20, EU:C:2022:47, point 77) and in *Austrian Airlines (First aid on board an aircraft)* (C-510/21, EU:C:2023:19, footnote 66). The case-by-case approach of the Court of Justice raises difficulties which have been highlighted by some authors: Correia, V., 'Cour de justice, 4e ch., 11 juin 2020, Transportes Aéreos Portugueses SA, aff. C-74/19, ECLI:EU:C:2020:460', in *Jurisprudence de la CJUE 2020. Décisions et commentaires*, Picod, F. (ed.), Bruylant, Brussels, 2021, pp. 1019 to 1036 (p. 1029).

taken by the air carrier, since that issue falls outside the scope of the first question referred, which concerns only the causal link between the occurrence of an extraordinary circumstance and the delay to a flight subsequent to the flight affected by that circumstance.

2. The generalised failure of the security check as an extraordinary circumstance

36. It should be noted that the two cumulative conditions which must be met for an event to be regarded as an 'extraordinary circumstance' were established by the Court of Justice a long time ago: first, it must be an event which, by its nature or origin, is not inherent in the normal exercise of the activity of the air carrier concerned and, secondly, it must be beyond the actual control of that carrier.[9]

37. Since then, the Court of Justice has delivered a considerable number of judgments aimed at determining, on a case-by-case basis, whether a particular event could fall within the concept of 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation No 261/2004.[10] Accordingly, there exists a fairly large and essentially casuistic body of case-law.

38. As regards the first condition, I endorse the position of Advocate General Pikamäe, set out in his Opinion in *Transportes Aéreos Portugueses*,[11] according to which the event in question must not be intrinsically, inseparably and typically connected with air passenger transport. In other words, it must be an event which does not normally take place in the context of the organisation and/or operation of air transport.

39. As for the second condition, the Court of Justice refined its meaning in its judgment in *Airhelp*.[12] Accordingly, an event over which the air carrier has control is an event which is foreseeable, for which it can prepare and the consequences of which, as the case may be, it can mitigate and, finally, the origin of which is not 'external' to it.[13]

40. The converse is an event which falls outside the scope of the risks that are reasonably foreseeable for the air carrier[14] and which is beyond its control.

[9] See, to that effect, the landmark judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 23); see also judgment of 23 March 2021, *Airhelp* (C-28/20, EU:C:2021:226, paragraph 23 and the case-law cited). See also Šváby, D., 'La responsabilité en matière de transport aérien de passagers à l'intersection de trois systèmes juridiques', in Petrlík, D., Bobek, M. and Passer, J.M. (eds), *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux. Liber amicorum Jiří Malenovský*, Bruylant, Brussels, 2020, pp. 469 to 493 (p. 485).

[10] Without any claim to exhaustiveness, that concept thus encompasses a collision between an aircraft and a bird, damage to an aircraft tyre caused by a foreign object, such as loose debris lying on an airport runway, the presence of petrol on an airport runway which has led to the closure of the runway and a collision between the elevator of an aircraft in a parking position and the winglet of another airline's aircraft, caused by the movement of the latter aircraft, but also a hidden manufacturing defect or acts of sabotage or terrorism (see judgment of 23 March 2021, *Airhelp*, C-28/20, EU:C:2021:226, paragraph 40 and the case-law cited). Reference may be also be made to a lightning strike to an aircraft which led to mandatory safety inspections (judgment of 16 October 2025, *AirHelp Germany (Aircraft struck by lightning)*, C-399/24, EU:C:2025:791, paragraph 38).

[11] C-74/19, EU:C:2020:135, point 39.

[12] Judgment of 23 March 2021 (C-28/20, EU:C:2021:226). See also, in that regard, Opinion of Advocate General Medina in Joined Cases *TAP Portugal (Death of the co-pilot)* (C-156/22 to C-158/22, EU:C:2023:91, points 38 and 39).

[13] Judgment of 23 March 2021, *Airhelp* (C-28/20, EU:C:2021:226, paragraphs 32, 35 and 39 to 41). See also, to that effect, judgments of 7 July 2022, *SATA International – Azores Airlines (Failure of the refuelling system)* (C-308/21, EU:C:2022:533, paragraphs 25 and 26); of 13 June 2024, *D. (Engine design defect)* (C-411/23, EU:C:2024:498, paragraphs 35 and 38); and of 13 June 2024, *Finnair (Fuel gauge design defect)* (C-385/23, EU:C:2024:497, paragraphs 32 and 35).

[14] In her Opinion in Joined Cases *TAP Portugal (Death of the co-pilot)* (C-156/22 to C-158/22, EU:C:2023:91, point 51), Advocate General Medina considered that, with regard to the foreseeability of the event concerned, '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. However, the term "foreseeable" may also be defined as "being such as may be *reasonably* anticipated". The term "reasonable" entails an examination of likelihood.'

41. With regard to the event at issue in the main proceedings, it appears to me from the order for reference that the failure of the security check identified was a generalised failure, which did not therefore affect only the passengers on the European Air Charter aircraft.

42. In the first place, as regards the question whether the event in question is inherent in the normal exercise of the activity of the air carrier concerned, it is, in my view, a matter of common knowledge that all air passengers are required to undergo security checks before being allowed to enter the boarding area of the airport and board their flight. [15] Accordingly, the clearance of those passengers through security checks, in so far as it is part of the normal course of events in the organisation or operation of air transport, falls, in my view, within the scope of the normal exercise of the activity of the air carrier.

43. It also seems to me to be common knowledge that various incidents are likely to occur at the security check and may delay, to a greater or lesser extent, the moment at which an air passenger arrives in the boarding area. [16] By contrast, a generalised failure of the security check which affects all air passengers at the same airport and causes exceptional delays of several hours cannot, because of its exceptional nature – in so far as it is rare and has far-reaching consequences – be capable of constituting, by its nature or origin, an event which is inherent in the normal exercise of the activity of the air carrier concerned. [17]

44. In the second place, as regards whether the event in question is beyond the actual control of the air carrier, I consider, first, that a generalised failure of the security check is not a risk which is reasonably foreseeable for such a carrier. Secondly, it is apparent from the order for reference that security checks are a task which the law on aviation security does not assign to air carriers. According to the referring court, air carriers play no role in that task, which is, moreover, also the view of all the parties. The event in question is therefore clearly one whose origin is 'external' to the air carrier and which is therefore beyond its actual control.

45. In those circumstances, it seems to me possible to conclude that a generalised failure of the security check for which the air carrier concerned is not responsible may be regarded as an 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation No 261/2004.

3. The question of the existence of a direct causal link

46. In order to answer the first question referred for a preliminary ruling, it seems to me necessary to address, in the first place, the concept of '"direct" causal link' (a), before examining, in the second place, the impact which the autonomous decision by an air carrier may have on that causal link (b).

[15] Following criminal acts, such as aircraft hijackings, perpetrated in the 1970s, the International Civil Aviation Organisation adopted the 'International Standards and Recommended Practices' for aviation security on 22 March 1974. They are contained in Annex 17, 'Security – Safeguarding International Civil Aviation Against Acts of Unlawful Interference', to the Convention on International Civil Aviation and are intended, in particular, to establish security controls at airports.

[16] Consider, for example, passenger numbers on certain days of the week or year, passengers who are not very familiar with security rules and carry prohibited items on their person or in their cabin baggage, or – why not? – the failure of a security gate.

[17] See, by analogy, judgments of 7 July 2022, *SATA International – Azores Airlines (Failure of the refuelling system)* (C-308/21, EU:C:2022:533, paragraph 23), and of 16 May 2024, *Touristic Aviation Services* (C-405/23, EU:C:2024:408, paragraph 30).

(a) Concept of '"direct" causal link'

47. The concept of 'causation', which is one of the most classic legal questions, and more specifically its application in cases where the damage appears to be the result of a chain of events, has been,[18] and continues to be,[19] the subject of much debate both in the legal literature and in the EU Courts and national courts.

48. In the field of air transport, the Court of Justice has already had occasion to examine, as the referring court has, in essence, recalled in its request for a preliminary ruling, the issue of the causal link in the context of 'knock-on delays'.

49. The landmark judgment in that regard is the judgment in *Transportes Aéreos Portugueses*.[20] In paragraph 55 of that judgment, the Court of Justice held that Article 5(3) of Regulation No 261/2004, read in the light of recital 14 of that regulation, must be interpreted as meaning that, in order to be exempted from its obligation to compensate passengers in the event of a long delay or cancellation of a flight, an operating air carrier may rely on an 'extraordinary circumstance' which affected a previous flight which it operated using the same aircraft. That exemption is subject to the condition that there is a direct causal link between the occurrence of that circumstance and the delay or cancellation of the subsequent flight, which is for the national court to determine, having regard in particular to the conditions of operation of the aircraft in question.

50. In the judgment in *Austrian Airlines*,[21] the Court of Justice extended that possibility to a situation in which the extraordinary circumstance affected a previous flight operated by the operating air carrier using the same aircraft three flights back in the rotation sequence of that aircraft.

51. That solution is intended to be a balanced one, since it seeks to strike a proper balance between the interests of air passengers on the one hand and the interests of air carriers on the other. Accordingly, in adopting a pragmatic approach based on the reality on the ground, the Court of Justice allows air carriers to rely on an extraordinary circumstance which affected an aircraft when it was to be used in a flight rotation. However, wishing to limit the possibility for air carriers to rely on that interpretation, which is beneficial to them, the Court of Justice made that possibility conditional upon the existence of a 'direct' causal link.

52. To my knowledge, the Court of Justice has not ruled on the requirements relating to the direct nature of the causal link required by Regulation No 261/2004. However, it has done so in connection with the non-contractual liability of the European Union. The direct nature which

[18] For example, de Cossio, A., 'La causalidad en la responsabilidad civil: Estudio del Derecho español', *Anuario de Derecho Civil*, 1966, Vol. 19, No 3, pp. 527 to 554.

[19] See, for example, Musielak, H-J., 'Kausalität und Schadenszurechnung im Zivilrecht', *Juristische Arbeitsblätter*, 2013, No 4, pp. 241 to 248; Forster, N., 'Chapitre 2 – L'appréciation incertaine du lien de causalité', *La responsabilité sans faute de l'Union européenne*, Bruylant, Brussels, 2021, pp. 297 to 352; Saison, J., 'De la plasticité à l'élasticité du lien de causalité', *AJDA*, 2025, No 11, p. 562 to 569. I would also refer to the recent Opinion of Advocate General Ćapeta in *WS and Others* v *Frontex (Joint return operation)* (C-679/23 P, EU:C:2025:427, points 101 to 112). With specific regard to Regulation No 261/2004, see Achilles-Pujol, C., 'Völlig losgelöst? Ursachenzusammenhang und Beurteilungsspielraum des Luftfahrtunternehmens bei außergewöhnlichen Umständen nach Art. 5 Abs. 3 Fluggastrechte-VO', *ReiseRecht aktuell*, 2025, No 1, pp. 2 to 4.

[20] Judgment of 11 June 2020 (C-74/19, 'the judgment in *Transportes Aéreos Portugueses*', EU:C:2020:460). In his Opinion in *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:135, point 57), Advocate General Pikamäe stated, in essence, that the judgments of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342), and of 4 April 2019, *Germanwings* (C-501/17, EU:C:2019:288), had answered a similar question of law only implicitly. See Pazos, R., 'The Extraordinary Circumstances Defence in Regulation (EC) 261/2004', *Air and Space Law*, 2021, Vol. 46, No 6, pp. 739 to 762 (p. 753).

[21] Judgment of 22 April 2021 (C-826/19, 'the judgment in *Austrian Airlines*', EU:C:2021:318).

the causal link must have is to be interpreted strictly: the mere fact that the allegedly unlawful conduct of the institution, body, office or agency of the European Union constituted a necessary condition (a *sine qua non*) for the damage, in the sense that it would not have occurred without such conduct, is not sufficient to establish a sufficiently direct causal link. [22]

53. In other words, with respect to the two main theories developed in relation to liability, namely the theory of 'equivalence of conditions' [23] and the theory of 'adequate causation', [24] I have the impression that the EU Courts have ruled in favour of the theory of 'adequate causation'. [25]

54. In my view, the concept of 'direct' causal link in the field of air transport must be understood in a similar way. On the one hand, this ensures the coherence of the concept of '"direct" causal link' in EU case-law. On the other hand, such an interpretation seems to me to be consistent with the Court of Justice's conception, as recalled in point 51 of this Opinion, that air carriers are not to be exempted from their obligation to pay compensation in every situation in which an extraordinary circumstance has affected an aircraft involved in a flight rotation.

55. This means that, in order for an operating air carrier to be exempted from its obligation to pay compensation, it is not sufficient that the extraordinary circumstance affected the aircraft preceding the flight concerned; it must also be possible to demonstrate that that extraordinary circumstance is the 'determining' cause of the delay of the flight concerned. [26]

(b) Impact of the autonomous decision by an air carrier on the existence of a causal link

56. In the main proceedings, the air carrier concerned took the decision to wait for the air passengers of the first flight, which was affected by the extraordinary circumstance, even though it was ready for take-off on time. Recognising that the delay to the first flight would be very long, it also decided to charter a replacement aircraft to make the second flight and the flight at issue in the main proceedings.

57. This therefore means that at least one event, namely the decision taken by the air carrier to wait for the passengers of the first flight, occurred between the occurrence of the extraordinary circumstance and the delay of the flight at issue in the main proceedings. [27]

[22] Order of 12 December 2007, *Atlantic Container Line and Others* v *Commission* (T-113/04, not published, EU:T:2007:377, paragraphs 39 and 40), and judgment of 23 May 2019, *Remag Metallhandel and Jaschinsky* v *Commission* (T-631/16, not published, EU:T:2019:352, paragraph 52). See also Lenaerts, K., Gutman, K., Nowak, J.T., *EU Procedural Law*, Oxford University Press, Oxford, 2023, pp. 512 and 513 (point 11.59).

[23] According to the theory of 'equivalence of conditions' or '*sine qua non*' causation, all the elements which were preconditions for the damage are equivalent. In other words, each of the elements without which the damage would not have occurred is the cause of the damage. See Julien, J., 'Chapitre 2131 – Généralités sur le lien de causalité', in le Tourneau, P. (ed.), Bloch, C., Giudicelli, A., Guettier, C., Krajeski, D., Poumarède, M., *Droit de la responsabilité et des contrats – Régimes d'indemnisation*, 14th edition, 2025, Lefebvre Dalloz, Paris, paragraph 2131.51; Díez-Picazo, L. and Gullón, A., *Sistema de derecho civil*, Vol. II, 12th edition, 2018, Tecnos, Madrid, p. 312.

[24] According to the theory of 'adequate causation', the elements which were preconditions for the damage are not all equivalent. The preceding element which must be taken into account is the one which increased the probability that the damage would occur. See Julien, J., *op. cit.* (footnote 23), paragraph 2131.55; Díez-Picazo, L. and Gullón, A., *op. cit.* (footnote 23), p. 312.

[25] See, to that effect, judgment of 7 December 2017, *Missir Mamachi di Lusignano and Others* v *Commission* (T-401/11 P RENV-RX, EU:T:2017:874, paragraphs 64 to 71). See also, in that regard, Opinion of Advocate General Ćapeta in *WS and Others* v *Frontex (Joint return operation)* (C-679/23 P, EU:C:2025:427, points 101 to 112).

[26] See, by analogy, order of 31 March 2011, *Mauerhofer* v *Commission* (C-433/10 P, not published, EU:C:2011:204, paragraph 127). See also Lenaerts, K., Gutman, K., Nowak, J.T., *op. cit.* (footnote 22). See also, in relation to State aid, judgment of 9 June 2021, *Ryanair* v *Commission (Condor; Covid-19)* (T-665/20, EU:T:2021:344, paragraph 45).

[27] This is what distinguishes the case in the main proceedings from the cases which gave rise to the judgments in *Transportes Aéreos Portugueses* and in *Austrian Airlines*. In those two cases, the air carriers had not taken any particular decision.

58. In that regard, the extraordinary circumstance comprising the generalised failure of the security check at Cologne/Bonn airport, European Air Charter's autonomous decision to wait for the passengers of the first flight and the period necessary to mobilise a replacement aircraft are 'links' in the causal chain which led to the delay of the flight at issue in the main proceedings.

59. Accordingly, it is for the referring court to examine whether the 'links' between the extraordinary circumstance and the delay of the flight at issue in the main proceedings are such as to weaken the causal link between those two events, with the result that that link is no longer sufficiently direct and the extraordinary circumstance can no longer be regarded as the determining cause of the delay, in accordance with the principle set out in point 55 of this Opinion. It seems to me that, for the purposes of that examination, it will be necessary for the referring court to take into account several elements.

60. In the first place, I consider it important to recall that the referring court is hearing a dispute between NI and HZ, passengers on the flight at issue in the main proceedings, and European Air Charter.

61. That reminder, while obvious, is important in order to highlight that the decision taken by European Air Charter to wait for the passengers of the first flight was, in relation to the passengers of the flight at issue in the main proceedings, not a measure taken to minimise the delay which they would experience on account of the late arrival of the aircraft that was to operate the flight rotation, but an event which contributed to their flight arriving more than three hours late.

62. In the second place, as recalled in point 51 of this Opinion, the case-law deriving from the judgments in *Transportes Aéreos Portugueses* and *Austrian Airlines* requires a 'direct' causal link.

63. In the third place, while it is true that, in the absence of the extraordinary circumstance, the air carrier would not have had to take a decision, however, by deciding to wait for the passengers of one flight, it necessarily takes the risk of affecting passengers on subsequent flights, since those flights are operated using the same aircraft. In the words of Advocate General Emiliou in his Opinion in *Austrian Airlines (First aid on board an aircraft)*,[28] it was 'foreseeable' that the autonomous decision by the air carrier would have an impact on the organisation of subsequent flights, since the same aircraft was to be used to make them.

64. In the fourth place, when it became apparent to European Air Charter that its decision to wait for the passengers of the first flight meant that the aircraft would be able to operate the subsequent flights only with a significant delay for the passengers of the second flight and the flight at issue in the main proceedings, it chartered a replacement aircraft.

65. In the context set out in points 60 and 62 of this Opinion, the elements referred to in points 63 and 64 above suggest that the delay of the flight at issue in the main proceedings is linked to the air carrier's response to the extraordinary circumstance which affected a previous flight rather than to the extraordinary circumstance itself. In other words, the delay of the flight subsequent to that directly affected by the extraordinary circumstance does not appear to be an 'inevitable

[28] C-510/21, EU:C:2023:19, point 73.

consequence' of the extraordinary circumstance alone.[29] The latter therefore does not appear to be the determining cause of the delay, which precludes the air carrier from being exempted from its obligation to pay compensation.

66. I am aware that this solution may appear 'inequitable' or 'unfair' to the air carrier, in so far as it seems to disregard the reasons which guided its decisions, namely, in the present case, taking into account the interests of all the passengers for which it was responsible.

67. In that regard, the fact that European Air Charter's decision to wait for the passengers delayed at the security check was based on their interests does not specifically appear to be disputed between the parties. The same is true of the decision to charter a replacement aircraft, which was taken in the interests of the passengers of the flight at issue in the main proceedings.

68. Both European Air Charter and the Commission have also emphasised, in writing and orally, that the alternatives to the decisions taken by the air carrier were not satisfactory. What, indeed, should European Air Charter have done? Abandon the passengers of the first flight or some of them, and fly empty or almost empty, to ensure that the flight at issue in the main proceedings was operated with a delay of less than three hours?

69. However reasonable that question may be, I do not believe that it should be taken into consideration in the analysis of the causal link, simply because that issue seems to me to be unrelated to Regulation No 261/2004.

70. First, Regulation No 261/2004 is silent as to the possibility or necessity of striking a balance between the interests of different groups of passengers. In that regard, nothing in that regulation, in the objectives which it pursues or in the context in which it was adopted suggests that the EU legislature intended to entrust air carriers with the task of striking a balance between those interests. Moreover, it is the regulation itself which constitutes the expression of the balancing of passengers' interests, on the one hand, with those of air carriers, on the other,[30] with the result that this cannot be the task of air carriers.

71. Secondly, in a case concerning compensation for passengers in the event of denied boarding, the Court of Justice has already had occasion to state that 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. Such a balancing of interests 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.[31]

72. Thirdly, Article 5(3) of Regulation No 261/2004 is intended to exempt an air carrier from its obligation to pay compensation only in the event of the occurrence of an extraordinary circumstance.

[29] See, by analogy, judgment of 25 November 2014, *Safa Nicu Sepahan* v *Council* (T-384/11, EU:T:2014:986, paragraph 109). See also Julien, J., 'Chapitre 2132 – Caractères du lien de causalité', *op. cit.* (footnote 23), paragraph 2132.192.

[30] See, to that effect, judgments of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716, paragraph 67), and of 23 October 2012, *Nelson and Others* (C-581/10 and C-629/10, EU:C:2012:657, paragraph 39).

[31] Judgment of 4 October 2012, *Finnair* (C-22/11, EU:C:2012:604, paragraph 34).

73. Consequently, permitting an air carrier to rely on a balancing of the interests of different groups of passengers affected by a flight rotation in order to circumvent its obligation to compensate one of those groups would be tantamount to adding an exemption clause to the obligation to compensate laid down in Article 5(3) of Regulation No 261/2004. The air carrier would be released from that obligation not because of the occurrence of an extraordinary circumstance, but because of a decision it made in response to the occurrence of that extraordinary circumstance and by reference to the interests of passengers other than those claiming compensation.

74. The same conclusion applies, in my view, as regards the risk of encouraging empty aircraft flights, as highlighted both by the Commission and by European Air Charter. It is clear that such flights are not an optimal solution, in particular from an environmental perspective, just as it is clear that Regulation No 261/2004 cannot be interpreted as requiring air carriers to operate empty flights in order to ensure that passengers arrive at their destination with less than three hours' delay. However, it is not possible to infer what is not stated in the wording of the provision. The aim of avoiding an empty flight does not constitute an exemption from the obligation to pay compensation laid down in Article 5(3) of Regulation No 261/2004.

75. In my view, the answer to the first question referred should therefore be that Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that the autonomous decision by the operating air carrier, relating to a preceding flight on the same day, to wait for passengers who had not yet been cleared through the security check because of a generalised failure of that check, which must be regarded as an extraordinary circumstance, is capable of breaking the direct causal link between the extraordinary circumstance and the delayed arrival of the flight concerned by at least three hours.

B. Second question referred for a preliminary ruling

76. By its second question, the referring court seeks to ascertain from what proportion of passengers booked on the flight who actually arrived for boarding is the delay of the preceding flight no longer directly the result of extraordinary circumstances within the meaning of Article 5(3) of Regulation (EC) No 261/2004, but the result of an autonomous decision by the air carrier which lies solely within its sphere of control.

77. That question is raised only in the event that the answer to the first question depended on whether passengers arrived for boarding of the delayed preceding flight and how many passengers there were.

78. In the light of the answer I propose to give to the first question, not only is the number of passengers arriving for boarding of the delayed flight irrelevant, but it is also unnecessary to answer the second question referred. However, in the event that the Court does not concur with my analysis of the first question, I shall provide the following guidance.

79. As a preliminary point, it seems to me important to clarify that, notwithstanding the reference to the delay of the 'preceding' flight in the second question referred, the Court should not, in my view, answer the question whether the delay of the 'preceding' flight was actually caused by an extraordinary circumstance or by the air carrier's decision to wait for passengers delayed at the security check.

80. The referring court raises the question of the causal link between the generalised failure at the security check and the delay of the flight at issue in the main proceedings, that is to say the flight subsequent to the flight affected by the extraordinary circumstance, and the elements which it must take into consideration in that context.

81. In particular, the second question referred is intended to assist it in assessing the air carrier's weighing up of the interests of the different groups of passengers.

82. It is therefore necessary to reformulate the question and to consider that the referring court is asking whether Article 5(3) of Regulation No 261/2004 precludes, when weighing up the interests of different groups of passengers, the setting of a proportion of passengers, who are booked on a flight affected by an extraordinary circumstance and who actually arrived to board that flight, above which the delay to a flight subsequent to the affected flight is no longer directly the result of the extraordinary circumstance but the result of an autonomous decision of the air carrier.

83. If the Court should accept that the autonomous decision by the air carrier to wait for all the passengers delayed at the security check is not, as a matter of principle, capable of breaking the causal link between the occurrence of the extraordinary circumstance and the delay to a subsequent flight, I consider that there is no reason to take into account a proportion of passengers.

84. Such a position would seem to me to be inconsistent with the initial assumption that an air carrier may rely on a decision taken in the interests of one *group* of passengers, understood as comprising all passengers on the same flight, in order to be exempted from its obligation to compensate another group of passengers.

85. If the Court does not share that view, I do not consider that there is a need, in any event, to set a particular proportion or, more generally, to focus solely on the number of passengers present. Such a solution would necessarily be arbitrary and contrary to the idea developed in the case-law that it is necessary to examine each case on the basis of the particular circumstances of the case. [32]

86. It seems to me that, in those circumstances, rather than the number of passengers, the referring court should verify whether the air carrier had available to it other alternatives which would have enabled it to transport the different groups and sub-groups of passengers in such a way as to minimise the inconvenience caused to each of them.

87. In that regard, it seems clear from the order for reference that the referring court considers, subject, however, to additional evidence to be taken, that European Air Charter took all reasonable measures to reduce the delay on arrival of the flight at issue in the main proceedings. It is therefore for the referring court to verify whether European Air Charter had other alternatives for transporting the passengers of the first flight to Varna.

88. In those circumstances, the answer to the second question referred should be that Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that it precludes, when weighing up the interests of different groups of passengers, the setting of a proportion of passengers, who are booked on a flight affected by an extraordinary circumstance and who actually arrived to board

[32] See, to that effect, judgments in *Transportes Aéreos Portugueses* (paragraph 54) and in *Austrian Airlines* (paragraph 56).

that flight, above which the delay to a flight subsequent to the affected flight is no longer directly the result of the extraordinary circumstance but the result of an autonomous decision of the air carrier.

VI. Conclusion

89. In the light of the foregoing, I propose to respond to the Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany) as follows:

(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 the autonomous decision by the operating air carrier, relating to a preceding flight on the same day, to wait for passengers who had not yet been cleared through the security check because of a generalised failure of that check, which must be regarded as an extraordinary circumstance, is capable of breaking the direct causal link between the extraordinary circumstance and the delayed arrival of the flight concerned by at least three hours.

(2) Article 5(3) of Regulation No 261/2004

must be interpreted as meaning that it precludes, when weighing up the interests of different groups of passengers, the setting of a proportion of passengers, who are booked on a flight affected by an extraordinary circumstance and who actually arrived to board that flight, above which the delay to a flight subsequent to the affected flight is no longer directly the result of the extraordinary circumstance but the result of an autonomous decision of the air carrier.

Mr José Martín y Pérez de Nanclares

Delivered in open court in Luxembourg on 26 November 2025.

[Signatures]