

BOGIATZI

JUDGMENT OF THE COURT (Fourth Chamber)

22 October 2009\*

In Case C-301/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de cassation (Luxembourg), made by decision of 26 June 2008, received at the Court on 7 July 2008, in the proceedings

**Irène Bogiatzi, married name Ventouras,**

v

**Deutscher Luftpool,**

**Société Luxair, société luxembourgeoise de navigation aérienne SA,**

**European Communities,**

\* Language of the case: French.

**Grand Duchy of Luxembourg,**

**Foyer Assurances SA,**

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting as President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,

Advocate General: J. Mazák,  
Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 19 March 2009,

after considering the observations submitted on behalf of:

— Ms Bogiatzi, married name Ventouras, by M. Thewes, avocat,

— Société Luxair, société luxembourgeoise de navigation aérienne SA, by L. Schaack and C. Brault, avocats,

- the Grand Duchy of Luxembourg, by J. Medernach, avocat,
  
- Foyer Assurances SA, by J. Medernach, avocat,
  
- the French Government, by G. de Bergues and J.S. Pilczer, acting as Agents,
  
- the Commission of the European Communities, by R. Vidal Puig and E. Cujo, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2009,

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents (OJ 1997 L 285, p. 1), in connection with the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the four additional protocols signed at Montreal on 25 September 1975 ('the Warsaw Convention').

- 2 The reference was made in the course of proceedings brought by Ms Bogiatzi, married name Ventouras, against Société Luxair, société luxembourgeoise de navigation aérienne SA ('Luxair'), and Deutscher Luftpool, an association under German law, concerning joint and several liability to compensate her for the injury she suffered as a result of an accident which occurred while boarding a Luxair aeroplane.

## **Legal background**

### *International rules*

- 3 The European Community is not party to the Warsaw Convention, to which the 15 Member States of the European Union at the material time had acceded.
- 4 The Warsaw Convention in its original version has been amended and supplemented on a number of occasions, by the Hague Protocol of 28 September 1955, the Guadalajara Convention of 18 September 1961, the Guatemala Protocol of 8 March 1971, and the four additional Montreal protocols of 25 September 1975.
- 5 Article 29 of the Warsaw Convention provides:

'1. The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating the period of limitation shall be determined by the law of the court seised of the case.’

*Community legislation*

6 The first five recitals in the preamble to Regulation No 2027/97 are worded as follows:

- ‘(1) ... in the framework of the common transport policy, it is necessary to improve the level of protection of passengers involved in air accidents;
  
- (2) ... the rules on liability in the event of accidents are governed by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, or that Convention as amended at The Hague on 28 September 1955 and the Convention done at Guadalajara on 18 September 1961, whichever may be applicable each being hereinafter referred to, as applicable, as the “Warsaw Convention”; ... the Warsaw Convention is applied worldwide for the benefit of both passengers and air carriers;
  
- (3) ... the limit set on liability by the Warsaw Convention is too low by today’s economic and social standards and often leads to lengthy legal actions which damage the image of air transport; ... as a result Member States have variously increased the liability limit, thereby leading to different terms and conditions of carriage in the internal aviation market;

- (4) ... in addition the Warsaw Convention applies only to international transport; ... in the internal aviation market, the distinction between national and international transport has been eliminated; ... it is therefore appropriate to have the same level and nature of liability in both national and international transport;
- (5) ... a full review and revision of the Warsaw Convention is long overdue and would represent, in the long term, a more uniform and applicable response, at an international level, to the issue of air carrier liability in the event of accidents; ... efforts to increase the limits of liability imposed in the Warsaw Convention should continue through negotiation at multilateral level’.

7 Recital 7 in the preamble to Regulation No 2027/97 states:

‘... it is appropriate to remove all monetary limits of liability within the meaning of Article 22(1) of the Warsaw Convention or any other legal or contractual limits, in accordance with present trends at international level’.

8 Article 2(1) of Regulation No 2027/97 defines the concepts of ‘air carrier’, ‘Community air carrier’, ‘person entitled to compensation’, ‘ecu’, ‘SDR’ and ‘Warsaw Convention’.

9 Article 2(2) of Regulation No 2027/97 provides:

‘Concepts contained in this Regulation which are not defined in paragraph 1 shall be equivalent to those used in the Warsaw Convention.’

10 Article 5(1) and (3) of Regulation No 2027/97 state:

‘1. The Community air carrier shall without delay, and in any event not later than 15 days after the identity of the natural person entitled to compensation has been established, make such advance payments as may be required to meet immediate economic needs on a basis proportional to the hardship suffered.

...

3. An advance payment shall not constitute recognition of liability and may be offset against any subsequent sums paid on the basis of Community air carrier liability, but is not returnable, except in the cases prescribed in Article 3(3) or in circumstances where it is subsequently proved that the person who received the advance payment caused, or contributed to, the damage by negligence or was not the person entitled to compensation.’

11 Regulation No 2027/97 was amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ 2002 L 140, p. 2), which is not applicable to the main proceedings.

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

12 On 21 December 1998, Ms Bogiatzi suffered a fall on the tarmac at Luxembourg airport while boarding a Luxair aeroplane.

13 On 22 December 2003, she brought proceedings for damages against Deutscher Luftpool — an association of aviation insurers which is governed by German civil law — and Luxair before the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg), relying on Regulation No 2027/97 and the Warsaw Convention. Ms Bogiatzi's claim, brought five years after the events at issue took place, was held inadmissible. The court held that the two-year limitation period provided for in Article 29 of the Warsaw Convention for bringing actions for damages is predetermined and may not be suspended or interrupted.

14 The inadmissibility of the claim was confirmed on appeal. Ms Bogiatzi then appealed on a point of law to the Cour de cassation (Court of Cassation).

15 In those circumstances, the Cour de cassation decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the [Warsaw] Convention, as amended at The Hague on 28 September 1955, to which Regulation ... No 2027/97 refers, form part of the rules of the Community legal order which the Court of Justice has jurisdiction to interpret under Article 234 EC?

(2) Must ... Regulation ... No 2027/97 ... in the version applicable at the time of the accident, namely 21 December 1998, be interpreted as meaning that, with regard to



issues for which no express provision is made, the provisions of the Warsaw Convention, in this case Article 29, continue to apply to a flight between Member States of the Community?

- (3) If the answer to the first and second questions is in the affirmative, is Article 29 of the Warsaw Convention, in conjunction with Regulation ... No 2027/97, to be interpreted as meaning that the period of two years laid down in that article can be suspended or interrupted or that the carrier or its insurer can waive that time-limit, by an act deemed by the national court to constitute recognition of liability?

### **Consideration of the questions referred for a preliminary ruling**

#### *The first question*

- 16 By its first question, the national court asks essentially whether the Warsaw Convention forms part of the rules of the Community legal order which the Court of Justice has jurisdiction to interpret under Article 234 EC.
- 17 As a preliminary point, it is appropriate to reply to the argument put forward by Luxair that, in the main proceedings, the Court is in fact required not to interpret the Warsaw Convention but to apply Article 307 EC, under which, in the event of conflict between a Community rule and an agreement which precedes the EC Treaty, the principle of primacy does not affect the obligations of a Member State with respect to third countries.
- 18 In that connection, it must be recalled that, in accordance with settled case-law, the purpose of the first paragraph of Article 307 EC is to make it clear, in accordance with the principles of international law, that application of the Treaty is not to affect the duty

of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations (see Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 8; Case C-216/01 *Budějovický Budvar* [2003] ECR I-13617, paragraphs 144 and 145; Case C-205/06 *Commission v Austria* [2009] ECR I-1301, paragraph 33; and Case C-249/06 *Commission v Sweden* [2009] ECR I-1335, paragraph 34).

19 However, it is equally settled case-law that the provisions of an agreement concluded prior to the entry into force of the Treaty cannot be relied on in intra-Community relations (see, in particular, Case 286/86 *Deserbais* [1988] ECR 4907, paragraph 18; Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743, paragraph 84; and Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, paragraph 40).

20 Therefore, Article 307 EC does not fall to be applied.

21 In those circumstances, it is necessary to return to the question referred, relating to the jurisdiction of the Court to interpret the Warsaw Convention.

22 In that connection, it must be stated at the outset that, pursuant to Article 234 EC, the Court has jurisdiction to give preliminary rulings concerning the interpretation of the EC Treaty and on the validity and interpretation of acts of the institutions of the Community.

23 According to settled case-law, an agreement concluded by the Council, in accordance with Articles 300 EC and 310 EC, is, as far as the Community is concerned, an act of one of the institutions of the Community, within the meaning of subparagraph (b) of the first paragraph of Article 234 EC. The provisions of such an agreement form an integral part of the Community legal order as from its entry into force and, within the

framework of that order, the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 4 to 6; Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7; Case C-321/97 *Andersson and Wåkerås-Andersson* [1999] ECR I-3551, paragraph 26; and Case C-431/05 *Merck Genéricos — Produtos Farmacêuticos* [2007] ECR I-7001, paragraph 31).

- 24 In the main proceedings, it is common ground that the Community is not a contracting party to the Warsaw Convention. Accordingly, the Court does not, in principle, have jurisdiction to interpret the provisions of that convention in preliminary ruling proceedings (see Case 130/73 *Vandeweghe and Others* [1973] ECR 1329, paragraph 2, and the order in Case C-162/98 *Hartmann* [1998] ECR I-7083, paragraph 9).
- 25 However, the Court has also held that, where and in so far as, pursuant to the Treaty, the Community has assumed the powers previously exercised by the Member States in the field to which an international convention applies and, therefore, its provisions have the effect of binding the Community, the Court has jurisdiction to interpret such a convention, even though it has not been ratified by the Community (see, to that effect, Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraph 18; Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 16; and Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraph 48).
- 26 In the case in the main proceedings, it is common ground that all the Member States of the Community were parties to the Warsaw Convention at the material time.
- 27 It should therefore be considered whether, in that case, the Community has, pursuant to the Treaty, assumed the powers previously exercised by the Member States in the field to which the Warsaw Convention applies, a convention which covers all international carriage by air of persons, baggage and cargo.

28 At the material time, the Community had adopted, on the basis of Article 80(2) EC, three regulations in the field to which the Warsaw Convention applies.

29 First of all, mention should be made of Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport (OJ 1991 L 36, p. 5). The purpose of that regulation is limited however to establishing certain common minimum rules with respect to compensation from air carriers, applicable to passengers who are denied access to an overbooked scheduled flight. Unlike that regulation, which covers only denied boarding, the Warsaw Convention covers the liability of air carriers, including for flight delays.

30 Next, Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1) lays down, in Article 7, an obligation for air carriers to have civil liability insurance cover in case of accidents causing inter alia injury to passengers or damage to baggage. However, unlike the Warsaw Convention, the conditions for liability of the air carriers are not governed by that regulation.

31 Finally, Regulation No 2027/97, unlike the Warsaw Convention, covers only damage suffered as a result of death, wounding or other bodily injury, and not material damage to baggage and cargo.

32 It follows that the Community has not assumed all the powers previously exercised by the Member States in the field to which the Warsaw Convention applies.

- 33 In the absence of a full transfer of the powers previously exercised by the Member States to the Community, the latter cannot, simply because at the material time all those States were parties to the Warsaw Convention, be bound by the rules set out therein, which it has not itself approved (see, by analogy, *Intertanko and Others*, paragraph 49).
- 34 In the light of the foregoing, the answer to the first question is that the Warsaw Convention does not form part of the rules of the Community legal order which the Court of Justice has jurisdiction to interpret under Article 234 EC.

*The second question*

- 35 By its second question, given that Regulation No 2027/97 operates in the sphere governed by the Warsaw Convention, to which, at the material time, all the Member States of the Community were parties, and taking account of the principle of primacy of Community law, the national court asks essentially whether Regulation No 2027/97 must be interpreted as not precluding the application of the various provisions of that convention, in particular Article 29 thereof, to a situation in which a passenger seeks to establish the liability of the air carrier on account of harm suffered by him when flying between Member States of the Community.
- 36 It must be noted at the outset that, under Article 29 of the Warsaw Convention, the right to damages in the case of an accident is to be extinguished if an action is not brought against the air carrier within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. On the other hand, Regulation No 2027/97 does not contain any explicit provision relating to the limitation period for such an action for damages, nor does it expressly refer to Article 29 of the Warsaw Convention.

37 Ms Bogiatzi submits essentially that, since Regulation No 2027/97 does not expressly refer to the provisions of the Warsaw Convention applicable in the main proceedings and does not expressly render the provisions of the convention, in particular Article 29 thereof, applicable to those proceedings, that regulation must be applied and interpreted autonomously.

38 It must be stated that an answer cannot be given to the question referred by the national court on the basis of just the wording of Regulation No 2027/97 and its context.

39 In those circumstances, it is to be recalled that, according to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording and the context in which it occurs, but also the objective pursued by the rules of which it is part (see, to that effect, inter alia, Case C-301/98 *KVS International* [2000] ECR I-3583, paragraph 21; Case C-300/05 *ZVK* [2006] ECR I-11169, paragraph 15; and Case C-466/07 *Klarenberg* [2009] ECR I-803, paragraph 37).

40 As regards the objective pursued by Regulation No 2027/97, it is clear from recital 1 in its preamble that it aims to improve, in the framework of the common transport policy, the level of protection of passengers involved in air accidents.

41 It is also apparent, both from the *travaux préparatoires* in respect of Regulation No 2027/97 and from recitals 3, 5 and 15 in its preamble, that the desire to improve the level of protection for passengers involved in air accidents takes the form of the introduction of provisions intended to replace, as regards air transport between the Member States of the Community, certain provisions of the Warsaw Convention, pending a full review and revision of that convention.

- 42 In particular, the Community legislature took the view that the limits of liability of air carriers, as laid down by the Warsaw Convention, were too low having regard to the economic and social conditions prevailing when Regulation No 2027/97 was drafted. Accordingly, it sought to increase a number of those limits.
- 43 On the other hand, it is clear from recitals 2 and 4 in the preamble to Regulation No 2027/97 and Article 2(2) thereof that, where the regulation does not preclude the application of the Warsaw Convention in order to raise the level of protection of passengers, that protection involves the regulation and the system established by the convention being complementary and equivalent to each other.
- 44 Since Article 29 of the Warsaw Convention simply governs a procedural rule for bringing an action for damages against an air carrier in the event of an accident, it is not in the category of provisions whose application the Community legislature sought to preclude.
- 45 Having regard to the foregoing considerations, the answer to the second question is that Regulation No 2027/97 must be interpreted as not precluding the application of Article 29 of the Warsaw Convention to a situation in which a passenger seeks to establish the liability of the air carrier on account of harm suffered by him when flying between Member States of the Community.

### *The third question*

- 46 Having regard to the answer given to the first question, it is not necessary to answer the third question.

## Costs

<sup>47</sup> Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the four additional protocols signed at Montreal on 25 September 1975, does not form part of the rules of the Community legal order which the Court of Justice has jurisdiction to interpret under Article 234 EC.**
- 2. Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents must be interpreted as not precluding the application of Article 29 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the four additional protocols signed at Montreal on 25 September 1975, to a situation in which a passenger seeks to establish the liability of the air carrier on account of harm suffered by him when flying between Member States of the European Community.**

[Signatures]