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# Consumers, Air Carriers and Workers in the European Union: Two Sides of the Triangle

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*While consumers in the European Union (EU) are generally afforded a high level of protection, the law on air passenger rights, by example, draws debate over the cost of such protection. In the absence of a clear definition of ‘extraordinary circumstances’ in Regulation (EC) 261/2004, the Court of Justice of the European Union (CJEU) has not always balanced consumer interests with business realities in its many preliminary rulings on interpretation of these words. Workers joined this picture in the case of Airhelp/SAS [2021], in which the CJEU held that a lawful strike by an air carrier’s own pilot unions does not amount to ‘extraordinary circumstances’. This article explores this ruling in the light of EU air passenger rights and social dialogue objectives.*

**Keywords:** air passenger rights, compensation, collective bargaining, social dialogue

## 1 INTRODUCTION

### 1.1 AIRHELP/SAS

At first glance, the preliminary ruling handed down by the Grand Chamber of the Court of Justice of the European Union (CJEU) in Case C-28/20, *Airhelp Ltd v. Scandinavian Air System Denmark – Norway – Sweden* (*Airhelp/SAS*),<sup>1</sup> appears to confirm that the high level of European consumer protection afforded to air passengers by way of Regulation (EC) 261/2004 stands firmer than ever.

On the facts of this case brought before the Attunda District Court (‘the Swedish court’) a passenger, ‘S’, held a confirmed ticket for a Scandinavian Air Systems (SAS) flight from Malmö Airport to Stockholm’s Arlanda Airport (Sweden) on 29 April 2019. The flight was cancelled by SAS owing to a strike

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<sup>1</sup> Case C-28/20, *Airhelp Ltd v. Scandinavian Airline System Denmark – Norway – Sweden* (*Airhelp/SAS*), Reference for a preliminary ruling under Art. 267 of the Treaty on the Functioning of the European Union (TFEU) from the Attunda tingsrätt, 23 Mar. 2021, not yet published, ECLI:EU:C:2021:226.

called by SAS pilot unions in Denmark, Sweden and Norway.<sup>2</sup> The pilot unions had terminated their collective agreement in the summer of 2018. This brought to an end the peace obligation. Negotiations on concluding a new collective agreement began in March 2019. As the negotiations did not proceed to the satisfaction of the pilot unions, they called on their members to strike. The strike ran from 26 April to 2 May 2019, resulting in SAS cancelling more than 4,000 flights.<sup>3</sup> In turn, approximately 380,000 passengers were affected. Passenger, 'S', assigned to Berlin-based claims management company Airhelp any rights he might have to bring a claim against SAS for compensation.<sup>4</sup>

The Swedish Court referred three questions to the CJEU, asking in summary: (1) does a lawful strike that is initiated by unions not in response to an air carrier decision or announcement, but rather to 'induce the air carrier to increase wages, provide benefits or amend employment conditions in order to meet the organisations' demands, constitute an 'extraordinary circumstance'; (2) whether there should be any significance attached to the fact that unions' demands regarding wage increases are 'significantly higher than the wage increases which generally apply to the national labour markets in question'; and (3) what significance a proposal that is made by a national body for mediating labour disputes that, to avoid the strike, is accepted by the carrier but not the unions should have on the national court's decision.<sup>5</sup>

The CJEU ruled that the strike called by the SAS pilot unions did not amount to an 'extraordinary circumstance' and in turn, following the decision of the Swedish court, SAS was liable to pay compensation to 'S'. The *Airhelp/SAS* preliminary ruling creates a new interpretation of 'extraordinary circumstances' to serve as precedent for lawful strikes called in future by an air carrier's own workers to be treated by national courts in the same manner.

The CJEU reaffirmed its reasoning in Case C-613/20, *CS v. Eurowings* ('*CS/Eurowings*'),<sup>6</sup> which seems to strengthen our proposition below. The facts in

<sup>2</sup> *Airhelp/SAS*, para. 8.

<sup>3</sup> *Airhelp/SAS*, para. 10.

<sup>4</sup> For cancellation under Art. 7 of Regulation 261/2004 and possibly for damages occasioned by delay under Art. 19 of the Convention on the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999), UNTS 2242, 309 ('Montreal Convention'). On the company, Airhelp Ltd, see Matthias Verbergt, *Delayed Flights Pay Off for Startups – AirHelp, EUclaim and Others Digitize Claim Process for Travelers Seeking Compensation*, Wall St. J. (1 Nov. 2016); and on issues of enforcement, see Sara Drake, *Delays, Cancellations and Compensation: Why are Air Passengers Still Finding it Difficult to Enforce Their EU Rights Under Regulation 261/2004?* C 27(2) Maastricht J. Eur. & Comp. L. 230–249 (2020).

<sup>5</sup> *Airhelp/SAS*, para. 19.

<sup>6</sup> Case C-613/20, *CS v. Eurowings*, Reference for a preliminary ruling under Art. 267 of the TFEU from the Landesgericht Salzburg, 6 Oct. 2021, not yet published, ECLI:EU:C:2021:820. The case concerned cancellation of a flight from Salzburg to Berlin on 20 Oct. 2019 due to a strike at Eurowings in circumstances where the parent company (Deutsche Lufthansa AG) had acceded to

*Airhelp/SAS* and *CS/Eurowings* involve flight cancellations allegedly caused by strikes; both rulings centre on the concept of ‘extraordinary circumstances’ under Article 5(3) of Regulation 261/2004.

## 1.2 AIR CARRIERS, WORKERS AND CONSUMERS

The *Airhelp/SAS* ruling as supported by *CS/Eurowings* reveals and, we suggest, fails to resolve, a possible clash between the rights of and realities for air carriers, workers and consumers. First, as between air carriers and workers, national notification periods for lawful strikes do not appear to be consistent with those notification periods as between air carriers and consumers, established in Regulation 261/2004. The notification periods for consumers trump the strike notification periods. Second, as between consumers and air carrier-worker social dialogue, EU consumer protection by way of Regulation 261/2004 favours consumers over social dialogue. It therefore appears to some extent to interfere unintentionally with social dialogue, which the EU otherwise is so keen to protect.<sup>7</sup> This article considers different perspectives as it triangulates the three groups: air carriers, workers<sup>8</sup> and consumers. While each group is backed by different EU objectives: promotion of trade and mobility, consumer protection and decent employment relations, the ultimate question is: which group pays?

This article proceeds in three further sections. Section 2 examines air carriers and consumers in light of consumer protection in the EU as manifested in air passenger rights. It considers the law on flight cancellations and the evolution of the ‘extraordinary circumstances’ concept before turning to the case of *Airhelp/SAS*, observing that it adds a new category to a seemingly never-ending list of what does and does not constitute ‘extraordinary circumstances’. Regulation 261/2004<sup>9</sup> is discussed against the backdrop of, as the European Commission puts it, ‘consensus among the industry, regulators and passengers that there are issues with the application and enforcement of some areas of air passenger rights’.<sup>10</sup> The

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the demand of a 2 per cent pay rise two days before and was not subject to strike action, whereas the strike at Eurowings went ahead.

<sup>7</sup> See European Commission, ‘Social Dialogue’, *Employment, Social Affairs & Inclusion*, <https://ec.europa.eu/social/main.jsp?catId=329&langId=en> (accessed 15 July 2021).

<sup>8</sup> In the present case, commercial airline pilots.

<sup>9</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 Feb. 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, [2004] OJ L46/1.

<sup>10</sup> See European Commission, *Steer and Clyde & Co Report: Study on the Current Level of Protection of Air Passenger Rights in the EU* (2020), <https://op.europa.eu/en/publication-detail/-/publication/f03df002-335c-11ea-ba6e-01aa75ed71a1> (accessed 20 Aug. 2021). In Mar. 2013, the Commission proposed a revision of Regulation 261/2004. While Council has debated the proposal but has not, by the time of writing, agreed a general position. The proposal remains on hold for the foreseeable future.

unique nature of the flight in question, as an internal, short-haul flight within Sweden, and the extent to which SAS could have, if at all, satisfied the prescribed time thresholds for notifying and accommodating passengers of a cancelled flight under Regulation 261/2004, is also examined.

Section 3 proceeds to consider, in light of the ruling, employment relations frameworks as developed in the EU and across national systems. First, the reasoning of the CJEU is examined, in particular its central logic that collective bargaining is central to social dialogue and that strike action is a key instrument in collective bargaining. This reasoning is hard to fault in logic and air carriers would be wise to engage in good faith in social dialogue and collective bargaining. However, the judgment also reveals tensions. Those tensions are created by the broad move at EU level towards a greater development of the principles of social dialogue while at the same time leaving much of labour law within the competence of Member States. Article 153(f) of the Treaty on the Functioning of the European Union<sup>11</sup> (TFEU) includes representation and collective defence of the interests of workers and employers in measures within EU competence, but Article 153(5) of the TFEU excludes the right to strike from Article 153(2) measures. The most obvious aspect of this diversity is that notification periods vary significantly across the EU, with only one system (Finland) within the EU requiring notification of a strike which would allow the air carrier to cancel flights in time to avoid paying compensation under Regulation 261/2004. Thus, a system which imposes most procedural constraints on the right to strike is the one in which an air carrier can avert payment of compensation.

The second, crucial, aspect is differing models of social dialogue and collective bargaining in national systems of collective labour law. The third of three questions referred by the national court asked about the significance which should be attached when a solution proposed by a State mediator had been accepted by the air carrier but refused by the union. The CJEU held that the air carrier's bargaining position remained under its control, and that it could therefore have avoided the strike. This conclusion may make sense in this case. However, the CJEU's focus on a purely bilateral negotiating process risks overlooking the public interest elements in collective bargaining and social dialogue which are present in some national systems.

In the meantime, however, the public interest sits outside the triangle. The individualistic rights of the consumer trump the interests of the air carrier; so, too, does a trade union's collective right to strike. In this article, we argue therefore that at present, on a triangulation of first, consumers and air carriers; and second, air

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<sup>11</sup> [2012] OJ C 326/47.

carriers and workers; consumers and workers seem protected, and it is the air carrier that pays.

## 2 CONSUMERS, AIR CARRIERS

In this section we explore two groups, consumer and air carriers, and the relationship between them, firstly in the context of consumer protection, compensation and ‘extraordinary circumstances’ and secondly in the specific instance of the *Airhelp/SAS* case.

### 2.1 CONSUMER PROTECTION IN THE EU

The legal basis and objectives of EU consumer policy and related rules are set out in four separate articles of the TFEU.<sup>12</sup> In its proposals concerning inter alia consumer protection, the European Commission will ‘take as a base a high level of protection’; within their respective powers, the European Parliament and the Council ‘will also seek to achieve this objective’.<sup>13</sup> Within the European Commission, the Directorate-General (DG) responsible for consumer rights is Justice and Consumers (DG JUST).<sup>14</sup> An elaboration of this high level of consumer protection is given in Article 169(1) of the TFEU:

In order to promote the interests of consumers and to ensure a *high level of consumer protection*, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.<sup>15</sup>

European consumer protection policies and strategies are wide-ranging.<sup>16</sup> The creation of effective consumer protection policy in the EU is seen as essential for efficient operation of the internal market. Of the various transport sectors, air transport was the first in the EU for which passenger rights legislation was adopted. This was achieved by way of Package Travel Directive 90/314/EEC, which covered both pre-arranged holidays and self-customised packages.<sup>17</sup> The Denied

<sup>12</sup> Namely, Arts 4(2)(f), 12, 114 and 169 of the TFEU. *See also* Art. 38 of the Charter of Fundamental Rights of the European Union, [2012] OJ C 326/391.

<sup>13</sup> Article 114(3) of the TFEU.

<sup>14</sup> European Commission, *DG JUST – DG for Justice and Consumers*, [https://knowledge4policy.ec.europa.eu/organisation/dg-just-dg-justice-consumers\\_en](https://knowledge4policy.ec.europa.eu/organisation/dg-just-dg-justice-consumers_en) (accessed 10 July 2021).

<sup>15</sup> Article 169(1) of the TFEU (emphasis added).

<sup>16</sup> *See* European Consumer Protection Strategy / Consumer Agenda, [https://ec.europa.eu/info/policies/consumers/consumer-protection\\_en](https://ec.europa.eu/info/policies/consumers/consumer-protection_en) (accessed 10 July 2021).

<sup>17</sup> Council Directive 90/314/EEC of 13 June 1990 on travel, package holidays and package tours [1990] OJ L 158/59; *See also* ‘Commission Working Document on the Council Directive 90/314/EEC of 13 June 1990 on travel, package holidays and package tours’ (26 July 2007).

Boarding Regulation (EEC) 295/91 that followed applied distinctly to flights; it was repealed and replaced by Regulation (EC) 261/2004.<sup>18</sup>

## 2.2 COMPENSATION

Under Regulation 261/2004, air carriers owe a duty of care to those passengers who depart from an airport located in a Member State of the EU, European Economic Area (EEA) or Switzerland<sup>19</sup> or if their flight is operated by an EU carrier.<sup>20</sup> If a passenger is affected by delays or cancellations, carriers must provide assistance to passengers, i.e., hotel accommodation and meals; rebooking, rerouting or refunding flights; and in some cases, pay fixed amounts of compensation.

An air carrier is obligated to compensate passengers if they are denied boarding<sup>21</sup> or, in certain instances, if their flight is cancelled. Cancellations are assessed on a case-by-case basis by looking firstly at the timing of the air carrier's notification to passengers of the cancellation relative to the agreed departure time in the original itinerary.

If an air carrier cancels a flight and does not inform a passenger with sufficient advance notice, it must pay compensation<sup>22</sup> so long as the cancellation is not caused by 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'.<sup>23</sup> Passengers that are informed at least two weeks before the scheduled time of departure that their flight is cancelled are deemed to have received sufficient advance notice.<sup>24</sup> For shorter periods of notification, passengers will be entitled to compensation, unless the air carrier offers re-routing within an acceptable range of inconvenience. If an air carrier gives notice between two weeks and seven days of the scheduled time of departure, the acceptable range of disruption is qualified as departing no more than two hours earlier and arriving at the final destination no more than four hours later,

<sup>18</sup> Regulation (EEC) No 295/91 of 4 Feb. 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport [1991] OJ L36/5; Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 Feb. 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L46/1.

<sup>19</sup> See Decision No 1/2015 of the Joint European Union/Switzerland Air Transport Committee set up under the Agreement between the European Community and the Swiss Confederation on Air Transport of 20 Aug. 2015 replacing the Annex to the Agreement between the European Community and the Swiss Confederation on Air Transport [2015] OJ L 226/12-37; Decision of the EEA Joint Committee No 171/2004 of 3 Dec. 2004 amending Annex XIII (Transport) to the EEA Agreement [2005] OJ L 133/21-22.

<sup>20</sup> See Art. 3, Regulation 261/2004.

<sup>21</sup> Article 4(3) of Regulation 261/2004.

<sup>22</sup> Articles 5(1)(c) and 7 of Regulation 261/2004.

<sup>23</sup> Article 5(3) of Regulation 261/2004.

<sup>24</sup> Article 5(1)(c)(i) of Reg 261/2004.

relative to the originally scheduled times.<sup>25</sup> If the notification is given less than seven days before the scheduled time of departure, the acceptable range for re-routing is a changed departure of no more than one hour earlier and an arrival at the end destination of no more than two hours later than originally scheduled.<sup>26</sup>

Article 7 of Regulation 261/2004 sets out the right as fixed amounts of monetary compensation as determined by a flight's distance in kilometres. After the timing assessment is conducted, it is necessary to establish causation by looking at two cumulative conditions: 1) was the cancellation caused by extraordinary circumstances; and 2) did the air carrier in question take all reasonable measures to avoid the cancellation or was it impossible to do so?

### 2.3 'EXTRAORDINARY CIRCUMSTANCES'

The existence of extraordinary circumstances will not in itself relieve an air carrier from its obligation to compensate passengers. An air carrier must instead take *all reasonable measures* to avoid the extraordinary circumstances. Article 7 of Regulation 261/2004 refers only to the obligation to pay compensation to passengers in the event that a flight is cancelled. The CJEU ruled in *Sturgeon and others* that since passengers who suffer a long delay experience a similar inconvenience and loss of time as passengers whose flights are cancelled, they too are entitled to Article 7 compensation.<sup>27</sup> Following *Sturgeon*, local courts in Germany 'explicitly revealed their disapproval of the said ruling and frankly dissented from the Court's opinion'.<sup>28</sup>

To begin, what constitutes 'extraordinary circumstances' for the purposes of Regulation 261/2004? The legislative text does not provide a definition. In its recitals, however, the phrase 'extraordinary circumstances' is mentioned as including situations:

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.<sup>29</sup>

<sup>25</sup> Article 5(1)(c)(ii) of Reg 261/2004.

<sup>26</sup> Article 5(1)(c)(iii) of Reg 261/2004.

<sup>27</sup> Joined Cases C-407/07 and C-432/07, *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v. Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v. Air France SA*, [2009] ECR I-10923, paras 44, 49.

<sup>28</sup> Ulrich Steppeler & Mareike Muenning, *No Compensation for Long Delay in Spite of Sturgeon: Will This New Jurisprudence Prevail?*, 36(4/5) Air & Space L. 339–341 at 339 (2011).

<sup>29</sup> Recital 15, Regulation 261/2004.

The recitals to Regulation 261/2004 also indicate that '[s]uch 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'.<sup>30</sup> The recital provides only that a strike *may* constitute extraordinary circumstances; it is not an automatic classification.

The CJEU offered a rigorous interpretation in *Wallentin-Hermann*<sup>31</sup> of the Article 5(3) exemption from the obligation to provide compensation, holding that these words should be interpreted strictly:

a technical problem in an aircraft which leads to the cancellation of a flight is *not* covered by the concept of "extraordinary circumstances" ... unless that problem stems from events which, by their nature or origin, are *not inherent* in the normal exercise of the activity of the air carrier concerned *and* are beyond its actual control.<sup>32</sup>

Thus, in classifying whether an event amounts to extraordinary circumstances, the CJEU must assess on a *case-by-case* basis whether two cumulative conditions are fulfilled.<sup>33</sup> Firstly, the event must not by its nature or origin be inherent in the normal exercise of the activities of the air carrier. Secondly, the event must be beyond the air carrier's actual control. Not only technical problems<sup>34</sup> but also breakdowns<sup>35</sup> and a collision of mobile boarding stairs with an aircraft<sup>36</sup> are examples of events that the CJEU has ruled are both inherent in the normal exercise of the air carrier's activity *and* not beyond the carrier's actual control.

The European Commission, through its *Interpretative Guidelines*, explains 'more clearly a number of provisions contained in the Regulation, in particular in light of the Court's case-law, so that the current rules can be more effectively and consistently enforced'.<sup>37</sup> Technical extraordinary circumstances are mentioned. The

<sup>30</sup> Recital 14, Regulation 261/2004 (emphasis added).

<sup>31</sup> Case C-549/07, *Friederike Wallentin-Hermann v. Alitalia - Linee Aeree Italiane SpA*, [2008] ECLI:EU:C:2008:771.

<sup>32</sup> Steven Truxal, *Economic and Environmental Regulation of International Aviation: From International to Global Governance* 97 (Routledge 2017), (emphasis added). See also Jochem Croon, *Placing Wallentin-Hermann in Line with Continuing Airworthiness, a Possible Guide for Enforcers of EC Regulation 261/2004* 36(1) Air & Space L. 1-6 (2011).

<sup>33</sup> As confirmed by the CJEU in *Wallentin-Hermann*, para. 23; Case C-257/14, *van der Lans*, EU: C:2015:618, para. 36; Case *TUfly*, paras 32, 34; Case C-74/19, *Transportes Aéreos Portugueses*, C-74/19, EU:C:2020:460, para. 37; *Airhelp*, para. 23; *CS v Eurowings*, para. 19.

<sup>34</sup> *Supra* n. 31.

<sup>35</sup> Case C-257/14, *C. van der Lans v. Koninklijke Luchtvaart Maatschappij NV*, [2015] ECLI:EU:C:2015:618.

<sup>36</sup> Case C-394/14, *Sandy Siewert and Others v. Condor Flugdienst GmbH*, [2014] ECLI:EU:C:2014:2377.

<sup>37</sup> Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council, [2016] OJ C 214/04, at 6.

*Interpretative Guidelines* also refer to reasonable measures air carriers should take ‘to organise its resources in good time so that it is possible to operate a programmed flight once the extraordinary circumstances have ceased’, making reference to the CJEU ruling on flight cancellation in the *AirBaltic*<sup>38</sup> case.<sup>39</sup> An air carrier must ‘take account of those secondary risks, insofar as their constituent elements are foreseeable and calculable’.<sup>40</sup> In *AirBaltic*, while the closure of Swedish airspace following a power outage constituted extraordinary circumstances and was beyond the actual control of the air carrier, the CJEU held that AirBaltic should have in foreseeability of possible extraordinary circumstances incorporated, as a reasonable measure, sufficient ‘reserve time’ when scheduling of the flight in question and its crew.<sup>41</sup>

## 2.4 AMBIGUITY AND COMPATIBILITY

Owing to ambiguities in the text of Regulation 261/2004, national courts have frequently referred questions to the CJEU, particularly on the interpretation of the ‘extraordinary circumstances’ concept and its meaning within Article 5(3) of the Regulation.

The (in)compatibility between Regulation 261/2004 and international law on air carrier liability, the Montreal Convention 1999, has been widely debated.<sup>42</sup> The Convention established a limited liability regime for international carriage of passengers, baggage and cargo by air, whereby providing for unification of certain rules. While the regime is exclusive<sup>43</sup> and the EU and all EU Member States are parties to it, the CJEU held in *IATA and ELFAA* that Regulation 261/2004 is consistent with the Montreal Convention.<sup>44</sup> In short, the CJEU found that ‘[s]ince the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute such *standardized*

<sup>38</sup> Case C-294/10, *Andrejs Eglītis and Edvards Ratnieks v. Latvijas Republikas Ekonomikas ministrija*, [2011] ECLI:EU:C:2011:303.

<sup>39</sup> *Interpretative Guidelines*, para. 5.5.

<sup>40</sup> Case C-294/10, *Andrejs Eglītis*, para. 34.

<sup>41</sup> *Ibid.*, para. 37.

<sup>42</sup> See Paul Stephen Dempsey & Svante O. Johansson, *Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage*, 35(3) *Air & Space L.* 207–224 (2010); Robert Lawson & Tim Marland, *The Montreal Convention 1999 and the Decisions of the ECJ in the Cases of IATA and Sturgeon – in Harmony or Discord?*, 36(2) *Air & Space L.* 99–108 (2011); Sonja Radošević, *CJEU’s Decision in Nelson and Others in Light of the Exclusivity of the Montreal Convention*, 38(2) *Air & Space L.* 95–110 (2013); Paul Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (Canada: McGill University 2005).

<sup>43</sup> Under Art. 29 of the Montreal Convention, an action for damages arising in contract, tort or otherwise relating to the international contract of carriage must be brought subject to the conditions and limits of liability laid down in the Montreal Convention.

<sup>44</sup> Case C-344/04, *The Queen on the Application of: International Air Transport Association, European Low Fares Air carrier Association v. Department for Transport*, [2006] ECR I-403.

and immediate compensatory measures, they are not among those whose institution is regulated by the Convention'.<sup>45</sup> Furthermore, the CJEU determined that the EU law '... simply operates at an earlier stage than the system which results from the Montreal Convention'.<sup>46</sup> Unlike with the fixed, *standardized* amounts of competition set out in Article 7 of Regulation 261/2004, a successful action brought under the Montreal Convention may attract damages that are to be *individually* assessed.<sup>47</sup>

In the recitals of Regulation 261/2004 is the following which draws likeness of the EU law to the Montreal Convention when referring to extraordinary circumstances: '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'.<sup>48</sup> The Montreal Convention applies to all intra-EU flights and flights operated within a single Member State.<sup>49</sup>

## 2.5 AIRHELP/SAS: AIR CARRIER AND CONSUMER

The cancelled flight in question in *Airhelp/SAS* was timetabled to depart Malmö and arrive in Stockholm (Arlanda Airport), both in Sweden. The average flight duration is seventy minutes non-stop. Two carriers service the route: SAS and Air Leap. A direct train journey from Malmö Central Station to Stockholm Central Station takes around four and a half hours. It would take 40 minutes to drive from Malmö Airport to the nearest alternative airport, Copenhagen Airport in Denmark, and from there the flight time to Stockholm is 70 minutes. Could SAS have rebooked the affected passengers on a competitor air carrier at Malmö or Copenhagen, or rerouted them by train? Did SAS discharge their duty of timely notification? Apparently not. Why not? Was this owing to the timing of the strike announcement or because the air carrier hoped the strike would be called off? And was there a possibility to re-route the passenger within the acceptable range of inconvenience? SAS could possibly have chartered a flight, though that may have

<sup>45</sup> *Ibid.*, para. 46 (emphasis added).

<sup>46</sup> *IATA and ELFAA*, para. 96 (emphasis added).

<sup>47</sup> See John Balfour, *EU Regulation 261 and Compensation for Delay: The Advocate General's Opinion in the References re Sturgeon*, 37(4/5) Air & Space L. 377–382 (2012); Kinga Arnold, *EU Air Passenger Rights: Assessment of the Proposal of the European Commission for the Amendment of Regulation (EC) 261/2004 and of Regulation (EC) 2027/97*, 38(6) Air and Space L. 403–438 (2013).

<sup>48</sup> Recital 14, Regulation 261/2004.

<sup>49</sup> See Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2097/97 on air carrier liability in the event of accidents, [2002] OJ L 140/2. The Montreal Convention applies to all international and domestic flights operated by EU carriers. See Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, [2002] OJ L 140/2–5.

interfered with a legal strike, implicated the air carrier and affected the process of collective bargaining.

The CJEU ruled on the interpretation of ‘extraordinary circumstances’ in Article 5(3) of Regulation 261/2004 in situations involving a strike twice before and, so far, once after *Airhelp/SAS*. In the first case, *Finnair*,<sup>50</sup> a strike by airport employees at Barcelona Airport in 2006 was held to be ‘extraordinary circumstances’. Two days after the strike had ended, the claimant passenger was denied boarding because the air carrier rebooked him on to a later flight that day. Finnair was still required to pay compensation to this passenger as the air carrier took the business decision to give his seat to other passengers whose flights were cancelled during the strike.

The second case, *TUIfly*,<sup>51</sup> centred on a so-called ‘wildcat strike’ between 3 and 8 October 2016 by air carrier employees in response to the carrier’s surprise announcement about restructuring. In its written observations, the European Commission noted that ‘the restructuring and reorganization of undertakings are part of the normal management of those entities’.<sup>52</sup> The CJEU agreed and held that the strike was not beyond TUIfly’s actual control,<sup>53</sup> and therefore did not amount to ‘extraordinary circumstances’.<sup>54</sup> In *TUIfly*, an agreement was reached between the air carrier and its workers, but owing to the lag in getting crews and aircraft back into position, the claimant’s flight was cancelled even after the ‘extraordinary circumstances’ had ended. Here, the CJEU reasoned that distinguishing between a strike that is legal under national law and one that is not so as to determine if that strike should be classified as an extraordinary circumstance under Article 5(3), would make a passenger’s right to Article 7 compensation ‘dependent on the social legislation specific to each Member State, thereby undermining the objectives of Regulation No 261/2004’.<sup>55</sup> There are varying strike notification periods under national rules. This point will be returned to below in section 3.5.

In the third case, *CS/Eurowings*,<sup>56</sup> a passenger’s Eurowings flight from Salzburg to Berlin was cancelled owing to a strike called by the airline’s cabin crew. The strike was originally scheduled to take place until the morning of 20

<sup>50</sup> C-22/11, *Finnair Oyj v. Timy Lassooy*, [2012] ECLI:EU:C:2012:604.

<sup>51</sup> Case C-195/17, *Helga Krüsemann and Others v. TUIfly GmbH*, [2018] ECLI:EU:C:2018:258.

<sup>52</sup> *TUIfly*, para. 40.

<sup>53</sup> *Ibid.*, para. 43.

<sup>54</sup> *Ibid.*, para. 45.

<sup>55</sup> *Ibid.*, para. 47; For discussions on this ruling, see Jochem Croon & Fina Verbeek, *Regulation (EC) 261/2004 and Internal Strikes Under Article 5.3: ‘It’s All About Control, Stupid’*, 44(6) *Air & Space L.* 485–498 (2019); and Christian Hermann, *Entschädigung der Fluggäste bei ‘wildem Streik’ – das TUIfly-Urteil des EuGH vom 17.04.2018*, 26(3) *ReiseRecht aktuell* 102–104 (2018). On the potential impact of the ruling, see Magdalena Kučko, *The Decision in TUIfly: Are the Ryanair Strikes to Be Seen as Extraordinary Circumstances?*, 44(3) *Air & Space L.* 321–336.

<sup>56</sup> Case C-613/20, *CS v. Eurowings*, Reference for a preliminary ruling under Art. 267 of the TFEU from the Landesgericht Salzburg, 6 Oct. 2021, not yet published, ECLI:EU:C:2021:820.

October 2019, but was extended, on the same day and without notice, to midnight. Owing to this, the airline did not adhere to its flight plan.<sup>57</sup> Whereas the passenger sought compensation under Article 7 of Regulation 261/2004, Eurowings contended that the cancellation was caused by ‘extraordinary circumstances’ within the meaning of Article 5(3) of the Regulation.<sup>58</sup> The CJEU ruled that the extension of the strike, even after an agreement has been reached with the parent company, Lufthansa AG, is not covered by the concept of ‘extraordinary circumstances’.<sup>59</sup>

Therefore, it would appear from these judgments involving strikes, that ultimately the consumer is protected and the air carrier will be liable to pay compensation.

### 3 WORKERS, AIR CARRIERS

In this section, we turn to consider *Airhelp/SAS* from the perspective of employment relations, as between the workers and air carriers. From this perspective, the CJEU’s conclusion that strikes by an air carrier’s own staff are not an externality reflects common sense for employment specialists, reinforced by recent developments in the definition of corporate activity.<sup>60</sup> It is also consistent with general practice in commercial contracts for *force majeure* clauses.<sup>61</sup> The interest of the case lies in how the test of control applies to collective bargaining and the tensions created between the broad promotion of social dialogue at EU level and the differences across individual Member States. There is of course a distinction to be made at the outset between: 1) social dialogue, which is the wider process of discussion between management and unions as social partners that includes but is not limited to collective bargaining; and 2) collective bargaining, which is the process of bargaining carried out at company or sectoral level.

#### 3.1 COLLECTIVE BARGAINING AND THE TEST FOR EXTRAORDINARY CIRCUMSTANCES

As seen above, the *Wallentin-Herman case*<sup>62</sup> set out two aspects of the test for the extraordinary circumstances exemption from compensation: the events must first,

<sup>57</sup> *CS/Eurowings*, para. 8.

<sup>58</sup> *Ibid.*, paras 9–10.

<sup>59</sup> *Ibid.*, para. 34.

<sup>60</sup> See *The British Academy, Policy & Practice for Purposeful Business* (2021), <https://www.thebritishacademy.ac.uk/publications/policy-and-practice-for-purposeful-business/> (accessed 25 Sept. 2021).

<sup>61</sup> The International Chamber of Commerce (ICC) cites ‘general labour disturbance’ in its model *force majeure* clause but this would suggest a general strike. See e.g., ICC, *Force Majeure Hardship Clauses* (Mar. 2020), <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf> (accessed 30 Sept. 2021). This is also the position in practice. Strikes by own staff are commonly excluded.

<sup>62</sup> *Supra* n. 31.

by their nature and origin, not be inherent to the normal exercise of activity of the air carrier, and they must be outside its actual control. The test set out in *Wallentin-Herman* is an elucidation of recitals 12 and 15 of the Regulation, which refers to extraordinary circumstances that could not have been avoided even if all reasonable measures had been taken. Thus, an air carrier must establish the extraordinary circumstance – that the event was outside the normal exercise of activity – which they could not have avoided even if all reasonable measures had been taken to avoid the delay or cancellation. In setting out the ‘actual control’ test, in *Wallentin-Herman* itself, which concerned an engine defect in the turbine, the CJEU referred to a scenario where a technical defect had been found because of a hidden manufacturing defect, or where the defect was due to sabotage or terrorism. The inability to avoid the event appears to define and confirm the test, rather than serve as an additional stage to it. Thus, if it could be shown that a strike was inevitable, despite all reasonable measures taken by the employer, that would amount to an extraordinary circumstance. Even if the event is not an extraordinary circumstance, an air carrier will avoid paying compensation by cancelling the flight in time to comply with the Article 5(1)(c) of Regulation 261/2004. The circumstances in *Airhelp/SAS* will now be considered.

### 3.2 COLLECTIVE BARGAINING A NORMAL EXERCISE OF ACTIVITY?

As part of collective bargaining, the strike is, the CJEU concludes, a circumstance which is neither external nor extraordinary. This is in contrast to the Opinion of AG Pikamäe, who had identified<sup>63</sup> the relevant activity as providing air transport services and concluded that the calling of the strike is outside the decision-making structures of the air carrier.<sup>64</sup> The judgment reflects a developing wider conception of the activities of a corporation than one which is limited to boardroom activities and shareholder benefit maximization. For example, on 10 March 2021, the European Parliament voted to take forward a legislative proposal on mandatory due diligence and corporate accountability in respect of the impacts of business activities on human rights. Articles 50, 83(2) and 114 of the TFEU are the legislative bases for the proposal.<sup>65</sup>

The CJEU accepts the internal/external distinction made by SAS and the intervening governments, and as established in previous cases, although this is nowhere in the Regulation or the Commission’s *Interpretative*

<sup>63</sup> AG Opinion, *Airhelp/SAS*, para. 18.

<sup>64</sup> *Ibid.*, para. 39.

<sup>65</sup> European Parliament, Resolution of 10 Mar. 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, 2020/2129(NL), [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html) (accessed 26 Sept. 2021). This appears to have been paused by the Commission as of Dec. 2021.

*Guidelines*.<sup>66</sup> The CJEU indicates that strikes by air traffic controllers or airport staff would be external and may amount to extraordinary circumstances.<sup>67</sup> However, it locates strikes by the air carrier's own staff squarely within collective bargaining, and collective bargaining as part of social dialogue with air staff and thus squarely internal to the air carrier. It identifies a strike as:

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, irrespective of the particular features of the labour market concerned or of the national legislation applicable as regards implementation of that fundamental right.<sup>68</sup>

The court concludes that 'measures relating to the working and remuneration conditions of an operating air carrier's staff fall within the normal management of that carrier's activities'.<sup>69</sup> It also makes clear that its conclusion is based on the fact that the trade union is acting in the interests of the air carrier's workers.<sup>70</sup> So far, again, there is nothing startling about this.

The CJEU's ruling also reveals a greater balance between freedom of establishment and the right to strike, where previously the freedom of establishment trumped the right to strike. The CJEU identifies strike action as a right protected by Article 28 of the EU Charter of Fundamental Rights ('EU Charter').<sup>71</sup> This right was first connected to collective bargaining in the 2000 draft of the EU Charter:

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.<sup>72</sup>

In *Airhelp/SAS*, the CJEU rejected arguments that its conclusion affected either the employer's right of negotiation under Article 28, or Articles 16 and 17, of the EU Charter. The CJEU regarded this<sup>73</sup> as part of the bargaining process. They further pointed out that Articles 16 and 17 of the EU Charter had to be read in light of Articles 38 and 169. This is the strongest indication by the CJEU of a more balanced approach by it in issues arising under the EU Charter, criticized by Velyvyte as having given primacy to freedom to trade.<sup>74</sup>

<sup>66</sup> *Airhelp/SAS*, para. 39.

<sup>67</sup> *Ibid.*, para. 42.

<sup>68</sup> *Ibid.*, para. 28.

<sup>69</sup> *Ibid.*, para. 29.

<sup>70</sup> *Ibid.*, para. 44.

<sup>71</sup> [2012] OJ C 326/391.

<sup>72</sup> Article 28 of the Draft Charter of Fundamental Rights of the European Union (11 Oct. 2000), [https://www.europarl.europa.eu/charter/pdf/04473\\_en.pdf](https://www.europarl.europa.eu/charter/pdf/04473_en.pdf).

<sup>73</sup> *Airhelp/SAS*, para. 48.

<sup>74</sup> Vilija Velyvyte, *The Right to Strike in the European Union After Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence*, 15(1) Hum. Rights L. Rev. 73–100 (2015).

### 3.3 BREAKDOWN IN COLLECTIVE BARGAINING CIRCUMSTANCES BEYOND THE AIR CARRIER'S CONTROL?

The CJEU then turned to the counterpart question, examined above, in *Wallentin-Herman*, identified by it as whether the strike action could be regarded as an event *entirely beyond*<sup>75</sup> the actual control of the air carrier concerned.<sup>76</sup> The CJEU's reasoning and conclusion on control<sup>77</sup> are that the event was foreseeable; that it followed that the employer could mitigate its effects; and that demands related to working and remuneration conditions were capable of being dealt with through management-labour dialogue within the undertaking. Put simply, the strike could have been averted through the reasonable measure of SAS accepting the union's demand on wages. As the CJEU commented, this analysis could not be resisted by suggestions that the workers' demands were unreasonable or disproportionate since, as we add, this would lead the court into adjudication for which it is not designated or equipped.<sup>78</sup> Viewed further from a solely contractual perspective, those conclusions are unanswerable. As we said above, it aligns with best practice of *force majeure* clauses in commercial contracts, and there would be no reason to take a different view in a consumer contract.<sup>79</sup> A party to a negotiation can always control its own position and therefore the outcome of the negotiation. The logic applies to collective negotiation as it does to individual negotiation. *Airhelp/SAS* applies the principle in *TUIfly* to its characterization of social dialogue.

Considering how the CJEU applies its reasoning on control<sup>80</sup> to a situation where, as here, a proposal had been made for settlement of the wage dispute which had been accepted by the employers and rejected by the unions, it is noteworthy that, in this case, the proposal was from the Swedish National Mediation Office. Under the Swedish system, in some rare circumstances where a strike has been called and the Office considers it necessary, mediation can be imposed – but the mediator's proposal is not binding on the parties. Equally, here the collective agreement had been terminated and so the peace obligation (not to strike) did not operate. However, what if the mediator had issued a recommendation or the dispute had been heard by an arbitrator whose decision was binding? Our caution, expressed earlier, about a court deciding compensation being asked to investigate the merits of an industrial dispute, does not apply to an arbitrator whose role is precisely that. What if a position on wages had been taken pursuant to a decision

<sup>75</sup> Emphasis added.

<sup>76</sup> *Airhelp/SAS*, para. 31.

<sup>77</sup> *Ibid.*, paras 34–38.

<sup>78</sup> *Ibid.*, para. 38.

<sup>79</sup> Subject to application of Art. 29 exclusivity of the Montreal Convention.

<sup>80</sup> *Airhelp/SAS*, para. 38.

by a part-public owner or as a condition of State aid?<sup>81</sup> It is harder in such circumstances to see the strike as within the control of the employer.

The third referred question asked what significance a national court should give to circumstances where a solution proposed by a *State* mediator had been accepted by the air carrier but refused by the union. In other words, had the air carrier taken reasonable steps to avoid the extraordinary circumstance – here, the strike? The CJEU left the third question referred to it unanswered directly. While the CJEU is entitled to answer or reformulate questions as it sees fit, the result is perhaps a missed opportunity. A fuller discussion would also have led the court to consider whether the control test which it devised in the context of a technical event rightly applies to a strike. A fuller discussion of social dialogue, including collective bargaining, which takes account of national systems gets lost amongst the assertion of consumer rights, the right to strike and the broad EU wide definition of social dialogue.

### 3.4 EU PROMOTION OF SOCIAL DIALOGUE

Title IX of the TFEU sets out the framework for developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce, and labour markets responsive to economic change, with a view to achieving the objectives defined in Article 3 of the Treaty on European Union. Its stated aim is to co-ordinate, not harmonize.<sup>82</sup> Social dialogue is at the heart of the TFEU competence on employment, specifically in Article 151: ‘improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, *dialogue between management and labour*, the development of human resources with a view to lasting high employment and the combating of exclusion’.<sup>83</sup>

Article 152 of the TFEU highlights the role of the social partners, while ‘taking account of the diversity of national systems’. Article 153 of the TFEU sets out a range of employment provisions which the EU will support and complement with a view to achieving the Article 151 goals. These extend across the range of working conditions and concerns, including ‘... (f) *representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5*’.<sup>84</sup>

<sup>81</sup> SAS is part-owned by the Kingdoms of Denmark and Sweden, with 14.82 and 14.24% of total holdings, respectively, at the time of writing.

<sup>82</sup> Article 149 of the TFEU.

<sup>83</sup> Article 151 of the TFEU (emphasis added).

<sup>84</sup> Article 153 of the TFEU (emphasis added).

Article 153(2) of the TFEU founds the power to adopt Directives. But, crucial for this article, Article 153(5) excludes from Article 153(2) measures, pay,<sup>85</sup> the right of association, the right to strike and the right to impose lock-outs. This exclusion dates back to the 1992 Maastricht Treaty Social Protocol, integrated into the Amsterdam Treaty and subsequently into Title X of the TFEU. However, the European social dimension has continued to develop. The European Pillar of Social Rights was launched in 2017, principle 7 of which was social dialogue and involvement of workers.<sup>86</sup> As Zahn remarks in the context of wages, this creates a tension between the EU Social Model in broad theory and the limits to measures which can be introduced in the areas excluded from competence.<sup>87</sup> In the *Airhelp/SAS* case, the areas of tension arise in two areas: first, in respect of the differing periods across the EU, UK and Norway for notification to the employer of strike action; and second, and more broadly, the position and effect of collective bargaining across the different national labour systems.

### 3.5 VARYING NOTIFICATION PERIODS

The first difference across States concerns the time available to an air carrier to give notice of cancellation and thereby avoid the payment of compensation. National rules on strike notification fall within Article 153(2) of the TFEU and therefore outside EU competence. Recalling that Article 5(c)(i) of Regulation 261/2004, the operating air carrier avoids compensation if it informs the passenger at least two weeks before the scheduled time of departure. However, in the vast majority of States across the European Union (EU), in the European Free Trade Agreement (EFTA) and including the United Kingdom, strikes do not require a minimum of fourteen days' notice to be given to the employer. Table 1 shows that almost none of the notification periods required across the EU, EFTA and the UK allows flight cancellation by the air carrier which is early enough to avoid compensation under Regulation 261/2004.<sup>88</sup> Only Norway and Finland require fourteen days' notice, and that appears to be to allow for mediation. Otherwise, it is only the now departed UK, where the notification period is fourteen days<sup>89</sup> in the Trade Union Act 2016.<sup>90</sup> In those systems only, the *Airhelp/*

<sup>85</sup> See the very broad framework in the Draft Directive on adequate minimum wages, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0682> (accessed 27 Sept. 2021).

<sup>86</sup> Interinstitutional Proclamation on the European Pillar of Social Rights 2017/C 428/09.

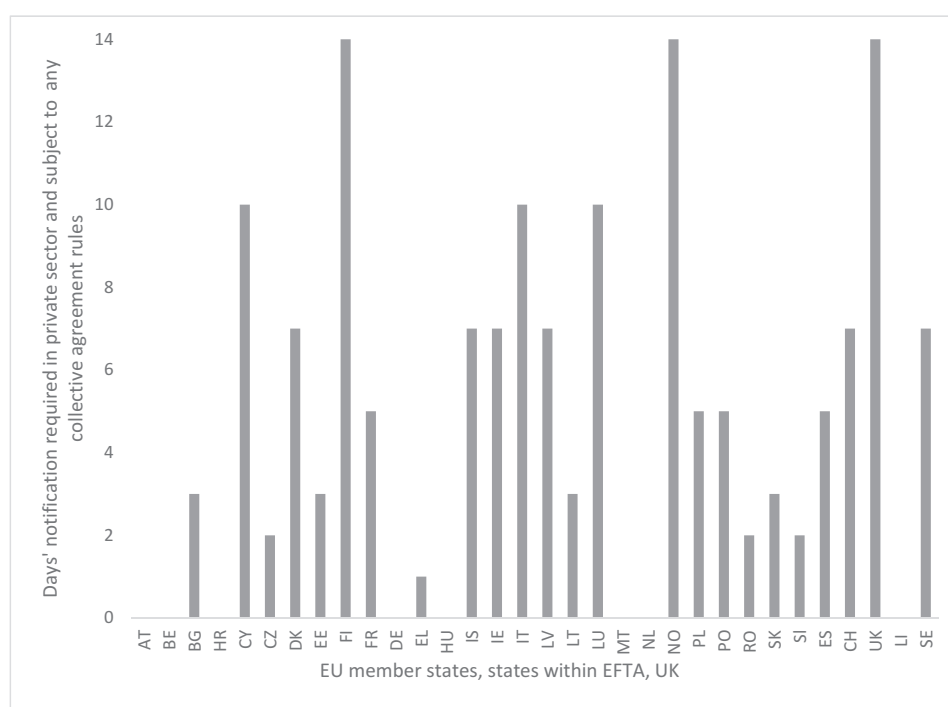
<sup>87</sup> Zahn, *infra* n. 90.

<sup>88</sup> European Trade Union Institute, *Strikes Map – Germany*, <https://www.etui.org/strikes-map/germany> (accessed 27 Sept. 2021).

<sup>89</sup> Section 234A of the Trade Union Labour Relations (Consolidation) Act 1992, as amended by the Trade Union Act 2016.

<sup>90</sup> See for a discussion on the state of UK law on air passenger rights since the UK's withdrawal from the EU, Robert Lawson QC, 'Air Passenger Rights in the UK Post-Brexit: The Position so Far', 46(Special Issue) *Air & Space L.* 45–60 (2021).

*SAS* judgment means that air carriers operating in such a national system are able to notify passengers in time to avoid payment of compensation, as discussed above in section 2.2: in those systems, the interests of air carriers prevail over those of striking workers as they have time to make arrangements to avoid disruption. Equally, they prevail over consumers as they can notify in sufficient time to avoid paying compensation.



### 3.6 DIVERSE MODELS OF SOCIAL DIALOGUE

The national systems regulating collective labour disputes differ across the EU and Norway. Is mediation compulsory? Is it binding? Can the dispute, in this case, on wages, be arbitrated in case of disagreement? Issues of social dialogue fall within EU competence but, as mentioned above, Article 151 itself recognizes the diversity of models of social dialogue across national systems. As we have set out, the third referred question asked what significance should be attached, if any, to the fact that the air carrier, in order to avoid a strike, accepts a proposal for settlement from a

national body responsible for mediating labour disputes but the workers' organizations do not?

Answering the third referred question, AG Pikamäe concluded that the freedom to mediate which was inherent in such a procedure confirmed his opinion as to the lack of control which an air carrier had over strikes.<sup>91</sup> Aside from this, he suggested that the CJEU should not answer this question because of the diversity of practice.<sup>92</sup> The CJEU took a different view. The CJEU is of course not required to answer the questions referred to it in the exact form referred and may reformulate the question to better reflect the allocation of jurisdiction between it and the national court.<sup>93</sup> However, here, the CJEU stated that it *was* answering the third question, despite it involving a question on which there is diversity of practice on regulation and prevention of strikes.

The Court agreed<sup>94</sup> that decisions made in negotiation could not form the basis of the judgment, but pointed out that the breakdown of negotiations did not take the relationship outside an employment relationship. This explains their reference to strikes by air traffic controllers or airport staff (we would add, border staff) *not in an employment relationship* with the air carrier as being capable of constituting an extraordinary circumstance. The Court's resolution is predicated upon an employment relationship where the employer has control over terms and conditions of employment and over its response to disputes over those terms and conditions. A party to a mediation retains control.

Similar questions were posed by the Austrian referring court in *CS/Eurowings* and the CJEU again declined to pronounce on them.<sup>95</sup> Instead, they referred to the fact that 'the determination of salary levels, or, more generally, working conditions, falls within the scope of the employer and its workers', citing *Airhelp/SAS*.<sup>96</sup>

The question raised is the following: is acceptance by the air carrier of a proposal a reasonable measure to avert the event? If the EU aims to encourage social dialogue, should it not recognize serious engagement by an employer in that social dialogue as a reasonable measure which takes the event outside the definition of exceptional circumstances in cases of compensation payable to consumers?

Systems vary across the EU and Europe, from a model where the State's role is limited to providing reasonable conditions for bargaining (such as prohibiting victimization for trade union activity to providing non-binding arbitration) to

<sup>91</sup> AG Opinion, *Airhelp/SAS*, para. 136.

<sup>92</sup> *Ibid.*, para. 141.

<sup>93</sup> Morten Broberg & Niels Fenger, *Preliminary References to the European Court of Justice* 412 (OUP 2014).

<sup>94</sup> *Ibid.*, para. 38.

<sup>95</sup> *CS/Eurowings*, para. 29.

<sup>96</sup> *Airhelp/SAS*, paras 37 and 38.

the State being an active participant, offering concrete solutions to a conflict.<sup>97</sup> In others, dialogue operates within a carefully structured tripartite system which goes beyond simple bilateral relations. Underlying these differences are deep differences of social philosophy from the market-driven collective *laissez-faire* of the UK to the unconditional right to strike in France to assert workers' interests, to the social protection of the Nordic Model which brings in different stakeholders, to the co-determination model in Germany influencing corporate decisions. On closer analysis, therefore, the CJEU's judgment in *Airhelp/SAS* contains a tension between its protection of the right to strike and promotion of social dialogue and the dynamics of differing models of social dialogue and collective bargaining in national systems, beyond the broad EU meaning and not subject to harmonization.

The CJEU's characterization of social dialogue and bargaining is closer to bargaining within *collective laissez-faire*, the term used by the UK labour theorist Otto Kahn-Freund to describe the UK State's non-intervention in the bargains made by social partners. This very influential framing of collective labour law has been criticized, notably by Dukes<sup>98</sup> and by Zahn<sup>99</sup> as omitting some of the ways in which the public interest may be engaged: this may be by way of regulation, or peace obligations in collective agreements, or resolution options ranging from an obligation to mediate to binding arbitration. Outside the EU, New Zealand plans to introduce legislation in November 2021 on sectoral fair work agreements, initially reached by bargaining by the social partners, but where the level of wages may be imposed by a State body named the Employment Relations Authority where they cannot be agreed.<sup>100</sup>

Concerns rightly exist about regulatory capture<sup>101</sup> of the State, which the air transport sector has experienced in the past, and of the State imposing solutions where the right to strike would be affected. A State may have a policy of wage restraint which may militate against union demands. On the other hand, as we have mentioned above, the EU is moving towards requiring corporations to consider impacts beyond profits, and these social aspects may develop as

<sup>97</sup> European Foundation for the Improvement of Living and Working Conditions ('Eurofound'), 'Industrial Relations' (3 Sept. 2021), <https://www.eurofound.europa.eu/topic/industrial-relations> (accessed 21 Sept. 2021).

<sup>98</sup> Ruth Dukes, *Otto Kahn-Freund and Collective Laissez-Faire: An Edifice Without a Keystone?*, 72(2) MLR 220–246 (2009); *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014).

<sup>99</sup> Rebecca Zahn, 'What Future for the European Social Model? The Relevance of Early Intellectual Concepts of Social Integration', 7(2) JICL 351–369 (2020).

<sup>100</sup> New Zealand Government, *Fair Pay Agreements*, <https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-legislation-reviews/fair-pay-agreements/> (accessed 4 Oct. 2021).

<sup>101</sup> See Steven Truxal, *Competition and Regulation in the Airline Industry: Puppets in Chaos* 47–56 (Routledge 2012); E. Dal Bó, *Regulatory Capture: A Review*, 22(2) Oxford Rev. Econ. Pol'y 203–225 (2006); and Cento Veljanovski, *Economic Approaches to Regulation*, in *Oxford Handbook of Regulation* 17–38 (Robert Baldwin, Martin Cave & Martin Lodge eds, OUP 2010).

considerations which are social rather than related to the employer's direct interest. The resolution of a trade dispute may be driven by factors external to the direct interests of either party. Would this be an unwarranted limitation of the freedom of association and bargaining?

The Nordic model of social dialogue,<sup>102</sup> observed in Sweden, has two essential elements: strong status for collective bargains, including peace obligations and a strong obligation to mediate or arbitrate in order to avoid strikes.

As to the first, collective agreements reached through collective bargaining are legally binding and contain enforceable peace obligations, which prohibit industrial conflict over a matter which has been agreed by the social partners. Peace obligations are unique to systems with a strong function to collective bargaining. They do not prohibit conflict over a matter which has not been agreed. In the *Airhelp/SAS* case itself, as we have seen, a collective agreement with pilots' unions had been terminated by the unions. Negotiations took place over predictability of scheduling, job security and salaries. A strike was called during the negotiations to conclude a new collective agreement and took place 26 April – 2 May 2019, affecting flights in Denmark, Norway and Sweden. On 2 May 2019, a new three-year collective agreement was agreed.<sup>103</sup>

As to the second, under the Nordic social dialogue model, the State does not interfere but has a role in promoting peace, from available mediation to compulsory and binding arbitration (such as in Norway).<sup>104</sup> The latter is much criticized by trade unions and cautiously used by the Norwegian State only in case of risk to public life or health.<sup>105</sup> The ILO Committee on Freedom of Association has suggested that this be replaced by a basic services provision.<sup>106</sup> In Sweden, section 10 of the Co-determination Act lays down a general obligation to negotiate and sections 46–53 lay down rules on mediation. The collective agreement itself may also do so. The National Mediation Office<sup>107</sup> must be informed of any strike action at least seven working days in advance. It may of its own motion appoint a mediator who may make proposals and issue fines in the event of non-compliance.

<sup>102</sup> Stein Evju, *Labour Courts and Collective Agreements – the Nordic Model*, 3 *Europäische Zeitschrift für Arbeitsrecht* 429–437 (2008).

<sup>103</sup> SAS, *SAS Reaches Agreements with Pilots' Unions and the Pilot Strike in Denmark, Norway and Sweden has Ended* (2 May 2019), <https://www.sasgroup.net/newsroom/press-releases/2019/sas-reaches-agreements-with-pilots-unions-and-the-pilot-strike-in-denmark-norway-and-sweden-has-ended/> (accessed 28 Sept. 2021).

<sup>104</sup> Kristin Alsos, Kristine Nergaard & Sissel C Trygstad, *Getting Together and Staying Together: 100 Years of Social Dialogue and Tripartism in Norway* (ILO 2019).

<sup>105</sup> *Ibid.*, at 22.

<sup>106</sup> *Industri Energi (IE), the Norwegian Confederation of Trade Unions (LO), the Confederation of Organised Workers in the Energy Sector (SAFE) and the Confederation of Vocational Unions (YS) v. Norway* (13 June 2014) Report No. 372, Case No. 3038.

<sup>107</sup> Medlingsinstitutet, *About the Swedish National Mediation Office*, <https://www.mi.se/other-languages/in-english/> (accessed 4 Oct. 2021).

The mediator may refer the matter for arbitration. The National Mediation Office can postpone collective action for fourteen days at the request of the mediator. This stops short of a binding process but reflects the public interest in a peaceful solution.

The CJEU's rejection of the premise behind the third question is not total. It distinguishes<sup>108</sup> demands which only the State could meet. These, the Court suggests, might indeed be extraordinary circumstances outside the control of the air carrier. Obvious examples are the decision whether or not to extend a social protection scheme; decisions on pensions in the light of the economic impact of the pandemic; or decisions on air security or Covid-19 testing or quarantine. What of the case where the decision by a State is an important factor in the employment relationship but the reaction to those circumstances is within control? Can reasoning that a position on wages is always within the employer's control be extended to these circumstances?

The unanswered question in *Airhelp/SAS* may increase in importance as we emerge from the Covid-19 pandemic, with the pandemic itself certainly amounting to 'extraordinary circumstances'. But, in any case, air carriers would be well advised to engage in good faith in social dialogue, including collective bargaining, with a view to reducing the incidence of strikes.

#### 4 CONCLUSION

This article has considered two sides of the triangle: consumers and air carriers, and then workers and air carriers. The third side of the triangle has not been fully explored in this article: consumers and workers. The air carrier is the focus of regulation, whether that be consumer protection or employment relations. As has been observed, where a national system provides for fourteen days' notification period as in Finland, it is only then that the air carrier is removed and what is left are competing interests of consumers and workers.

Seen in light of the first two referred questions in *Airhelp/SAS*, the judgment appears to be a simple allocation of risk as between the air carrier (insured) and the customer (not always insured). To the question, 'who pays?', the CJEU gives the answer: the air carrier. The addition of workers to the picture does not change the answer. A strike by the air carrier's own workers is not an externality and it can be avoided, the CJEU concludes, through social dialogue and collective bargaining. However, on closer study, the judgment throws up uncertainties for air carriers attempting to prevent strikes.

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<sup>108</sup> *Airhelp/SAS*, para. 45.

First, and most simply, this area of employment relations is not entirely within EU competence and so national systems on strikes vary widely. Most strike notification times do not allow for passengers to be notified in time. The second area of uncertainty relates to whether the circumstance can be avoided – the control test. The third referred question asked whether a strike was within the control of an air carrier if it had accepted a proposal by a State mediator, but the union had not. The CJEU did not answer it separately, but held that it did not change the conclusion, and that the air carrier's bargaining position remains within its control.

In light of the CJEU ruling in *Airhelp/SAS* and its consequences for compensation payments under Regulation 261/2004, air carriers should engage in social dialogue as positively as possible and in line with the particular form of social dialogue applicable in their State. However, the form of social dialogue in the national labour systems of Member States varies considerably – from strongly laissez-faire collective bargaining; to more polycentric systems containing peace obligations, to the system of co-determination, the latter as seen in Germany, where Airhelp Ltd is registered. These very different forms of social dialogue are likely to perform differently in conditions of strain, with consequences for the air carriers, with bases located in and with operations across, multiple Member States. In future, a national court may yet again refer the essence of the third, unanswered question to the Luxembourg court as the CJEU's examination of social dialogue develops. Until then, consumers in Europe remain at the top of the triangle and air carriers will continue to be required to pay compensation. The cost, however, may eventually trickle down to the others in the triangle.

