Provisional text

OPINION OF ADVOCATE GENERAL

PIKAMÄE

delivered on 16 March 2021 (1)

Case C-28/20

Airhelp Ltd

v

Scandinavian Airlines System SAS

(Request for a preliminary ruling from the Attunda tingsrätt (Attunda District Court, Sweden))

(Reference for a preliminary ruling – Air transport – Common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights – Regulation (EC) No 261/2004 – Article 5(3) – Article 7(1) – Right to compensation – Exemption – Concept of 'extraordinary circumstances' – Strike called by a trade union and announced in advance – Concept of 'reasonable measures' taken as a precaution against an extraordinary circumstance or the consequences thereof)

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I. Introduction

1. In the present case, which concerns a request for a preliminary ruling under Article 267 TFEU, the Attunda tingsrätt (Attunda District Court, Sweden) submits three questions to the Court for a preliminary ruling concerning the interpretation of the concept of 'extraordinary circumstances' referred to in 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. (2)

2. The request has been made in proceedings between S., an air passenger, and Scandinavian Airlines System Denmark – Norway – Sweden ('SAS'), an air carrier, concerning the air carrier's refusal to compensate S. for the cancellation of his flight. SAS claims 'extraordinary circumstances' as referred to in the abovementioned provision in connection with a strike by its staff called by a trade union with a view to demanding better working conditions. SAS therefore contends that it should be exempted from the requirement to pay the compensation provided for in Article 5(1)(c) and Article 7(1) of Regulation No 261/2004.

3. By its questions, the referring court asks, in essence, whether a strike in the situation described in the preceding point may be regarded as an 'extraordinary circumstance' exempting the air carrier from its liability towards passengers, not only as regards the payment of compensation but also regarding the adoption of appropriate measures in order to mitigate the impact of the strike. This case offers the Court the opportunity to expand its case-law on the interpretation of Regulation No 261/2004 and above all to clarify

the context of its judgment of 17 April 2018, *Krüsemann*, (3) which, although it also concerns the classification of a strike affecting the operations of an air carrier as an 'extraordinary circumstance' – a classification rejected by the Court – presents significant differences in terms of the facts of the case compared to those of the present case, which are such as to warrant a different legal assessment.

II. Legal background

A. European Union law

4. Recitals 1, 2, and 12 to 15 of Regulation No 261/2004 state:

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

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

…

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

(13) Passengers whose flights are cancelled should be able either to obtain reimbursement of their tickets or to obtain re-routing under satisfactory conditions, and should be adequately cared for while awaiting a later flight.

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

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

5. Article 2 of that regulation, entitled 'Definitions', provides:

'For the purposes of this Regulation:

…

(b) "operating air carrier" means an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger;

…

(l) "cancellation" means the non-operation of a flight which was previously planned and on which at least one place was reserved.'

6. Under Article 5 of that regulation, entitled ‘Cancellation’:

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

(a) be offered assistance by the operating air carrier in accordance with Article 8; and

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

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

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

2. When passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport.

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

4. The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier.’

7. According to Article 7 of Regulation No 261/2004, entitled ‘Right to compensation’:

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

(a) EUR 250 for all flights of 1 500 kilometres or less;

(b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;

(c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger’s arrival after the scheduled time.

2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked

(a) by two hours, in respect of all flights of 1 500 kilometres or less; or

(b) by three hours, in respect of all intra-Community flights of more than 1 500 kilometres and for all other flights between 1 500 and 3 500 kilometres; or

(c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air carrier may reduce the compensation provided for in paragraph 1 by 50%.

3. The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

4. The distances given in paragraphs 1 and 2 shall be measured by the great circle route method.'

8. Article 8 of that regulation, entitled 'Right to reimbursement or re-routing', provides:

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

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

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

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

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

…

3. When, in the case where a town, city or region is served by several airports, an operating air carrier offers a passenger a flight to an airport alternative to that for which the booking was made, the operating air carrier shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger.'

9. Article 9 of that regulation, which concerns the 'right to care', provides:

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

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

(b) hotel accommodation in cases

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

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

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

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

3. In applying this Article, the operating air carrier shall pay particular attention to the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied children.'

B. Swedish law

10. Article 45 of lagen (1976: 580) om medbestämmande i arbetslivet (Law No 580 of 1976 on workers' participation in decisions) provides, inter alia:

'Where an employers' organisation, employer or workers' organisation is considering taking industrial action or extending ongoing industrial action, it shall notify in writing the opposing party and the

Mediation Office at least seven working days in advance. Every day except Saturday, Sunday, any other public holiday, Midsummer Eve, Christmas Eve and New Year's Eve is regarded as a working day. The time limit shall be calculated from the same time of day as that at which the industrial action commences.'

III. The facts giving rise to the dispute, the procedure in the main proceedings and the questions referred

11. As can be seen from the grounds of the request for a preliminary ruling, the following factual circumstances gave rise to the dispute before the referring court. The passenger S. had booked a seat on a flight from Malmö (Sweden) to Stockholm (Sweden) with SAS. The flight was due to be performed on 29 April 2019 but was cancelled on the same day on account of a strike by SAS pilots in Norway, Sweden and Denmark. The background to the pilots' strike was that the workers' organisations in Sweden, Norway and Denmark representing SAS pilots had prematurely terminated the collective agreement previously concluded with SAS, which would have expired in 2020. Negotiations concerning a new agreement had been ongoing since March 2019. The pilots' strike lasted seven days – from 26 April 2019 until 2 May 2019 – and led SAS to cancel more than 4 000 flights, affecting around 380 000 passengers, including the passenger S. He was not offered re-routing which would have limited the delay to under three hours. The passenger S. assigned his possible right to compensation to Airhelp Ltd under an agreement.

12. Airhelp requested the referring court, namely the Attunda tingsrätt (Attunda District Court), to order SAS to pay it the compensation of EUR 250 provided for in Article 5(3) of Regulation No 261/2004, read in conjunction with Article 7 thereof, together with default interest from 10 September 2019 until payment was made.

13. SAS challenged Airhelp's request on the ground that, in its view, the pilots' strike constituted an 'extraordinary circumstance' which could not have been avoided even if all reasonable measures had been taken. SAS was therefore not required to pay the compensation claimed.

14. SAS argued that the negotiations broke down partly as a result of the pilots' unions' demand for a 13% increase in pilots' pay over three years, instead of the 6.5% increase provided for the same period in the previous collective agreement, and partly because of their demands in respect of pilots' working hours.

15. On 25 April 2019, the Medlingsinstitutet (National Mediation Office, Sweden) made a 'recommendation' to the parties proposing an annual salary increase of 2.3%. SAS, which approved the recommendation, states that the mediator's proposed salary increase was in line with what is known as the 'mark', that is to say, the percentage salary increase agreed by export industries for the Swedish labour market, while the pilots' unions had claimed a salary increase significantly higher than the 'mark'. However, the Swedish model of the labour market is based on the principle that the mark is binding when pay is set throughout the Swedish labour market in order to maintain Swedish competitiveness and stabilise negotiations for collective agreements.

16. For their part, the pilots' unions rejected that recommendation and, on 26 April 2019, proceeded to take the industrial action that had previously been announced.

17. That labour dispute continued until the evening of 2 May 2019, when a new three-year collective agreement was concluded. That new agreement covers a period of three years, until 2022, and provides, inter alia, that pilots' salaries are to increase by 3.5% in 2019, 3% in 2020 and 4% in 2021. In total, salaries will be increased by 10.5% over three years.

18. SAS maintains that the pilots' strike constitutes an 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation No 261/2004 in so far as it is not inherent in the normal exercise of its activity and is beyond its actual control. A simultaneous decision to strike by four trade union organisations is not, in its view, part of the normal exercise of SAS's activity, which consists in providing air transport services. Furthermore, strikes are very rare in the Swedish labour market and the strike at issue in the main proceedings, which theoretically affected all SAS pilots, was one of the largest strikes ever recorded in the air transport industry. SAS could not therefore have reorganised its activities in order to be able to operate

the planned flights. Moreover, as the pilots' strike was lawful, SAS could not have ordered them to return to work. The pilots' strike was therefore beyond its actual control.

19. Furthermore, the approach adopted in the judgment in *Krüsemann*, according to which a wildcat strike is inherent in the normal exercise of an air carrier's activity, cannot be transposed to the case in the main proceedings. The pilots' strike was not prompted by a measure taken by SAS; nor was it a spontaneous response by staff to one of SAS's normal management measures.

20. Lastly, given that, in accordance with the requirements of Swedish law, SAS had received the strike notice only one week before the strike started, SAS could not, in any event, have avoided the requirement to pay compensation laid down in Article 5(1)(c)(i) and Article 7(1)(a) of Regulation No 261/2004, since, under the first of those provisions, an air carrier can avoid paying that compensation only if a flight is cancelled at least two weeks before the scheduled departure time.

21. The pilots' strike which affected SAS and caused the cancellation of the flight at issue in the main proceedings therefore constituted an 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation No 261/2004 in that it was an event which, by its nature and origin, was not inherent in the normal exercise of SAS's activity and which was beyond that air carrier's actual control.

22. For its part, Airhelp has disputed whether the strike at issue in the main proceedings can be regarded as an 'extraordinary circumstance' for the purposes of the abovementioned provision. It argues that concluding collective agreements is part of the ordinary course of an airline's business, and labour disputes may arise in that connection.

23. Provision has been made for SAS, on the one hand, and the Swedish, Danish and Norwegian pilots' associations, on the other, to enter into collective agreements regarding the salaries and general working conditions of pilots-in-command and co-pilots. However, while negotiating such agreements, the parties can opt to take industrial action, such as strikes and lockouts. Once the social partners enter into a collective agreement, it is mandatory for them to call a 'social truce' while that agreement is in force, meaning that a strike held during that truce is unlawful or a wildcat strike.

24. In the past, disputes between SAS and various groups of staff have led on several occasions to industrial action by employees concerning terms of pay and better working conditions, but also concerning the fact that the employees wished to exert an influence on the workplace. SAS was on the verge of insolvency during the labour dispute in 2012. As majority shareholders had granted additional loans to SAS on the strict condition that it made savings, employees were forced, in the middle of the period for which the collective agreement was in force, to accept a salary cut in order to keep their jobs. It was thus agreed that pilots would work longer hours and lose one month's salary per year.

25. The decisions taken by SAS in 2012 are an important underlying reason for the pilots' strike in 2019, since, as a result of the airline's financial difficulties, they led to a significant deterioration in pilots' pay and working conditions. As SAS had recovered economically by 2019, it was completely foreseeable and reasonable that the pilots would seek salary increases and an improvement in their working conditions during the new negotiations regarding the agreement. The pilots considered the level of pay at SAS to be below market level, while SAS regarded their pay claims as excessive.

26. The strike at issue in the case in the main proceedings was, therefore, inherent in the normal exercise of SAS's activity and was under its actual control. It cannot therefore be regarded as an 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation No 261/2004, particularly as that provision is to be interpreted strictly.

27. In view of the unprecedented nature of the question whether the concept of 'extraordinary circumstances' referred to in Article 5(3) of Regulation No 261/2004 covers a strike which has been announced by workers' organisations following a strike notice and has been lawfully initiated, the Attunda tingsrätt (Attunda District Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '(1) Does a strike by airline pilots who are employed by an air carrier and who are needed to carry out a flight constitute an "extraordinary circumstance" within the meaning of Article 5(3) of

Regulation No 261/2004, when the strike is not implemented in connection with a measure decided upon or announced by the air carrier but of which notice is given and which is lawfully initiated by workers' organisations as industrial action intended to induce the air carrier to increase wages, provide benefits or amend employment conditions in order to meet the organisations' demands?

(2) What significance, if any, is to be attached to the fairness of the workers' organisations' demands and, in particular, to the fact that the wage increase demanded is significantly higher than the wage increases which generally apply to the national labour markets in question?

(3) What significance, if any, is to be attached 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' organisations do not?'

IV. Procedure before the Court

28. The order for reference, dated 16 January 2020, was received at the Registry of the Court on 21 January 2020.

29. The parties to the main proceedings, the Danish and Spanish Governments and the European Commission submitted written observations within the period prescribed by Article 23 of the Statute of the Court of Justice of the European Union.

30. The authorised representatives of the parties to the main proceedings, the Danish, French, Spanish and German Governments and the Commission made oral submissions at the hearing on 16 December 2020.

V. Legal analysis

A. Preliminary remarks

31. Passenger air transport is an important sector of the economy of the European Union. A number of airlines which currently dominate that sector at international level were founded in the Member States and have thus become, as it were, emblems of the spirit of European entrepreneurship. By transporting passengers to various places around the world, those airlines help to bring people together and facilitate trade and cultural exchange. This explains why strikes are often regarded by those who depend on reliable air transport as frustrating disruptions liable to entail serious consequences for passengers and the airlines themselves. However, there is a danger that this viewpoint may cause people to lose sight of the fact that strikes can be prompted by what are, as a rule, legitimate concerns, namely the desire of employees to improve their working conditions. Furthermore, it is clear that the interests of the airline, which as the employer ultimately bears the business risk, cannot be neglected. All these considerations show that, generally speaking, several interests come into conflict during a strike. Defusing the conflict in a way that allows due consideration to be given to the interests of all parties is therefore a real challenge.

32. In the present case, the Court is not called upon to resolve the dispute between SAS and its employees, since it has already been resolved internally through exercise of their autonomy in collective bargaining. It is for the Court to interpret Regulation No 261/2004 so that consumers are sufficiently protected in the event of a strike by staff, while taking into account the fact that the EU legal order recognises freedom of association in trade union matters and the right of negotiation and the right of industrial action, those fundamental rights being enshrined in Articles 12 and 28 of the Charter of Fundamental Rights of the European Union ('the Charter') respectively. Since the legislative objective of that regulation is consumer protection, the Court will have to provide clear guidelines for establishing with certainty the categories of strike which may be classified as 'extraordinary circumstances' for the purposes of Article 5(3) of Regulation No 261/2004 and relieve the air carrier, where appropriate, of its obligation to pay compensation to passengers on account of the ensuing consequences. The heterogeneous approach taken by national courts with regard to this issue (4) demonstrates the need for clarification by the Court of Justice. A greater degree of legal certainty would also benefit the social partners.

33. The Court took a first step with the judgment in *Krüsemann*, which I have already mentioned in the introduction to my Opinion. (5) However, in view of the specific circumstances of that case, namely the outbreak of a 'wildcat strike' organised by the employees themselves (and not by a trade union) in reaction to the 'surprise announcement' by the air carrier of a company restructuring, that judgment does not seem to me to be capable of answering all the legal questions that might arise. Consequently, broader case-law should be laid down, setting out general principles, of which the abovementioned judgment in *Krüsemann*, given its specific nature, could certainly be one element.

34. By contrast, it seems to me that no useful conclusions for the resolution of the present case can be drawn from the judgment in *Finnair*, (6) in which the Court had to rule on the question whether a denial of boarding could be justified by a reorganisation of flights following 'extraordinary circumstances'. I should point out that, by the questions referred for a preliminary ruling in that case, the national court referred to a strike by airport staff at the point of departure of the flight concerned. The Court of Justice adopted the national court's assessment in its reasoning and probably did not rule out the possibility that a strike may constitute such a circumstance, without, however, examining it in detail. (7) Admittedly, this could be regarded as tacit confirmation, by the Court of Justice, of the national court's assessment. However, the Court may also have deliberately avoided taking a stance on a legal issue which was not really central to the case. In any event, it would be preferable for the Court to rule expressly on an issue of such importance for air transport. In view of the ambiguity affecting the interpretation of that judgment, I am inclined not to include it in my reasoning as an indication of the current state of the case-law.

35. Before embarking on an analysis of the questions referred to the Court, a brief reminder should be given of the *stages of the legal analysis* that must be carried out in order to establish whether an air carrier may be exempted from the obligation to pay compensation under Article 5(1)(c) and Article 7(1) of Regulation No 261/2004, following the cancellation or long delay of a flight. First of all, the existence of an 'extraordinary circumstance' must be established using the criteria set out in the case-law. However, I should point out that, even if that condition were satisfied in the present case, the carrier could be exempted only if it were able to demonstrate that it had taken all 'reasonable measures' to avoid the consequences of that circumstance. In that context, I note a connection between the questions referred and those stages of the legal analysis. While those questions concern, from a formal point of view, the classification of a situation as an 'extraordinary circumstance', some aspects may instead be relevant to the consideration of the 'reasonable measures' that the air carrier is required to take. The questions referred will be examined below in the order in which they were put by the referring court.

B. The first question referred

1. A strike as a circumstance which may be classified as 'extraordinary'

36. As stated in the introduction to this Opinion, (8) the referring court wishes, in essence, to ascertain whether a strike in the situation described in the first question referred may be regarded as an 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation No 261/2004. My analysis will focus on that legal issue, as it is central to the present case.

37. In that regard, I should point out at the outset that the Court has consistently held that, in order to interpret a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives pursued by the legislation of which it forms part. (9) Although Regulation No 261/2004 does not expressly define the concept of an 'extraordinary circumstance', the EU legislature has stated that such a circumstance could exist where events such as those referred to in recital 14 of that regulation have occurred. In this context, it should be noted that that recital mentions, inter alia, '*strikes* that affect the operation of an operating air carrier'. (10) Given that the recitals of a legal act, even if they do not have any independent legal value, can serve as interpretive aids allowing the legislature's intention to be inferred, (11) that reference to strikes seems to me particularly relevant to answering the first question.

38. Furthermore, the Court has repeatedly stated that circumstances which may be classified as 'extraordinary' for the purposes of Article 5(3) of Regulation No 261/2004 'relate to an event which, *like those listed in recital 14* [of] that regulation, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin'. (12) Admittedly, the Court has clarified that the circumstances referred to in that recital are not necessarily and

automatically grounds for exemption from the obligation to pay compensation. (13) The wording of recital 14 suggests that strikes *may* constitute such circumstances, although that finding is not necessarily applicable in all cases. (14) Each case therefore needs to be considered individually, using specific criteria to determine whether such a classification is possible.

2. Analysis of 'extraordinary' nature from the point of view of the criteria established by the case-law

39. According to the Court's case-law, two cumulative conditions need to be satisfied to find that the circumstances surrounding certain events may be classified as 'extraordinary'. The first is that the relevant event is not inherent in the normal exercise of the activity of the air carrier concerned. The second is that the event is outside that air carrier's actual control on account of its nature or origin. (15)

40. As will be explained below, those conditions are satisfied in the case of a strike organised by a trade union as in the case in the main proceedings. The decision to call a strike is taken by employees' trade union representatives in connection with the exercise of their autonomy in collective bargaining and is therefore outside the decision-making structures of the air carrier concerned. Although strikes are part of the economic life of any undertaking, an undertaking has no control over the decisions taken by a trade union. It follows that the air carrier usually has no legally significant influence on whether or not a strike is held, even where its own staff are involved.

(a) A strike does not constitute an event inherent in the normal exercise of the air carrier's activity

41. As regards the first criterion, it is clear from the case-law that the 'origin' of the event which caused the cancellation or delay of the flight must be taken into consideration in the assessment. As some of the interested parties stated in their observations, a distinction must be made between events whose origin is 'internal' and those whose origin is 'external' to air transport. According to that approach, only events whose origin is 'internal' may be regarded as 'intrinsically linked' to the exercise of the air carrier's activity.

(1) Distinction between 'internal' and 'external' factors having an impact on the air carrier's activity

42. In its case-law on technical defects affecting the operation of an aircraft, the Court made a clear distinction between 'internal' and 'external' factors having an impact on the air carrier's activity, without, however, expressly using that terminology. This is one of the reasons why I propose to use that approach to settle the issues in question. In order to provide a better explanation of the relevance of that distinction, it is necessary to begin with a brief summary of the Court's case-law in this area, highlighting the lessons that can be drawn from it.

43. In the judgment in *Wallentin-Herrmann*, (16) the Court refused to exempt the air carrier from its liability towards passengers on the ground that resolving technical problems caused by a failure to maintain an aircraft was inherent in the normal exercise of the air carrier's activity. The Court based its reasoning on the observation that air carriers were confronted as a matter of course in the exercise of their activity with various technical problems on account of the particular circumstances in which air transport takes place and the degree of technological sophistication of aircraft. The Court noted that it was precisely to avoid such problems and to take precautions against incidents compromising flight safety that those aircraft were subject to regular checks which were particularly strict, and which were part and parcel of the standard operating conditions of air transport undertakings. The Court thus concluded that the occurrence of technical problems affecting the operation of an aircraft was not covered by the concept of an 'extraordinary circumstance' referred to in Article 5(3) of Regulation No 261/2004. (17)

44. That case-law was reiterated in the judgment in *van der Lans*, (18) which concerned the question whether a breakdown caused by the premature malfunction of certain components of an aircraft constituted such a circumstance. The Court ruled that it did not, and stated that such a breakdown remained intrinsically linked to the very complex operating system of the aircraft, which was operated by the air carrier in conditions, in particular meteorological conditions, which were often difficult or even extreme, it being understood moreover that no component of an aircraft lasted forever. The Court concluded that such an incident was inherent in the normal exercise of an air carrier's activity, as air carriers were confronted as a matter of course with technical problems. (19)

45. I am inclined to interpret the above case-law as meaning that the air carrier is *responsible for ensuring the maintenance and proper functioning of its aircraft in order duly to fulfil its contractual obligations towards passengers.* In other words, the air carrier may not, with the aim of avoiding those obligations, rely on technical problems which it is supposed to identify and resolve in the course of the usual management of the undertaking.

46. That said, I would like to draw attention to the fact that, in the judgments cited above, the Court did not rule out the possibility that technical problems might constitute 'extraordinary circumstances', provided that they stem from events which are not inherent in the normal exercise of the activity of the air carrier concerned and which are beyond its actual control. According to the Court, that would be the case, for example, if the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or a competent authority, revealed that those aircraft, although already in service, were affected by a hidden manufacturing defect which impinged on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism. (20)

47. In my view, that reservation in the Court's case-law amounts to a recognition that, even in the case of technical defects, there are 'external' factors for which the air carrier cannot be held responsible, if it is not to be required to do the impossible in order to avoid this type of incident which is liable to affect its operations. (21) Given that the air carrier is often entirely unaware of hidden manufacturing defects or the actions of third parties aiming to hinder its activities – those activities tending to be limited to the day-to-day management of the undertaking – it does not seem fair to impose on it an almost unlimited obligation to avoid any technical problem likely to have an impact on the operation of aircraft.

48. The reasoning set out in the preceding point is, moreover, the basis of case-law subsequently developed by the Court, according to which, where the malfunction in question results solely from the impact of a 'foreign' object, that malfunction cannot be regarded as intrinsically linked to the operating system of the aircraft.

49. That was the situation in the case giving rise to the judgment in *Pešková and Peška*, (22) which concerned damage to an aircraft caused by its collision with a bird, and the case giving rise to the judgment in *Germanwings*, (23) which related to damage to a tyre caused by loose debris on the airport runway. For the sake of completeness, reference should also be made to the more recent judgment in *Moens*, (24) which dealt with whether petrol on an airport runway should be classified as an 'extraordinary circumstance'; that petrol did not come from an aircraft belonging to the carrier that had made that flight, and led to the runway's closure and, consequently, a lengthy flight delay. In the abovementioned judgments, the Court concluded that the circumstances at issue were not inherent, by their nature or origin, in the normal exercise of the activity of the air carrier concerned.

50. The preceding analysis of the case-law thus confirms the proposition put forward above (25) that the Court tends *to make a distinction between 'internal' and 'external' factors* in all circumstances which have the effect of hindering an air carrier's activity, with only those falling within the second category capable of being classified as 'extraordinary'.

(2) Application by analogy of the case-law on technical matters to the field of staff management

51. Since that distinction is not necessarily restricted to *technical matters*, it may be appropriately extended to the field of *staff management*, by applying it by analogy to events liable to have an impact in that area. Ultimately, the air carrier, as an undertaking, relies not only on its aircraft, but also on its staff. Staff are essential to an airline's operation in that they are responsible for a wide range of tasks, including navigating the aircraft, maintaining passenger safety, and providing on-board service. (26) Human and material resources are thus an integral part of any undertaking operating in the passenger air transport sector.

52. It therefore seems logical to require air carriers to organise their staff and assign tasks in such a way that they can ensure continuity of operations despite the occurrence of disruptive incidents, such as the absence of certain staff members owing to annual leave or sick leave, which are, moreover, governed by EU law, (27) national social legislation and collective labour agreements. In so far as such purely 'internal' incidents concern only the organisation of an undertaking's material and human resources, for which it has sole responsibility, it seems logical to consider such incidents intrinsically linked to its operation. They

therefore deserve to be classified as incidents ‘inherent’ in the activity of an air carrier, like any other undertaking.

53. However, the situation is different when staff react to ‘external’ factors outside the air carrier’s control. That is the case when a strike is called by a workers’ union. As associations of individuals whose aim is to defend shared professional interests, trade unions are structurally independent of employers’ influence owing to the form in which they are established. Trade unions are not part of an undertaking’s decision-making structure or system of operations. In so far as a trade union makes demands in respect of wages and calls on staff to stop working in order to force the employer to accept those demands, its activities must be regarded as an ‘external’ factor capable of significantly disrupting an air carrier’s operation. That finding applies irrespective of the fact that the EU legal order recognises freedom of association in the trade union sphere and the right of negotiation and the right of industrial action, including strikes, to which I shall return later in my analysis.

54. The present case is a good example of the extent of the disruption which an air carrier’s operations may suffer as a result of industrial action organised by trade unions. It is apparent from the documents in the case file that the strike in question is described as taking place on a wide scale, on account of the fact that workers’ organisations in Sweden, Norway and Denmark were involved. The air carrier was simultaneously affected by industrial action in the three countries in which it carries out most of its economic activity. Moreover, it should be noted that the strike was called by trade unions representing aircraft pilots, that is to say, a sector of the workforce which the referring court rightly describes as ‘needed to carry out a flight’. That strike lasted seven days, with the result that the air carrier had to cancel more than 4 000 flights, affecting around 380 000 passengers. According to SAS’s calculations, which it has brought to the attention of the Court of Justice, if each of the passengers were entitled to the lump-sum compensation provided for in Article 7, this would have resulted in a cost of around EUR 117 000 000. The threat of a protracted strike could have resulted in even greater harm. Those facts show that the interruption of operations caused by a trade union strike is considerably different, in terms of quality and scale, from the usual scenario in which certain staff members are absent from work owing to annual leave or sick leave. I therefore consider that strikes must be treated differently from a legal point of view.

(3) The principles laid down in the judgment in Krüsemann are not applicable to the present case

55. The judgment in *Krüsemann*, in which the Court held that a wildcat strike did not constitute an ‘extraordinary circumstance’, does not invalidate that assessment, since that judgment is confined to the circumstances of that particular case. Attention should be drawn to the fact that the Court held on that occasion that the origin of the strike was ‘internal’, namely the announcement that the undertaking was being restructured, and that neither trade unions nor staff representatives had been involved.

56. More specifically, the Court found, first, that the air carrier had communicated its restructuring plan to staff in a ‘surprise announcement’ and, second, that the strike had not been organised by staff representatives but by the workers themselves, who had placed themselves on sick leave. It can be seen from an analysis of the grounds of that judgment that the classification of the strike as ‘inherent’ in the normal exercise of the air carrier’s activity was clearly based on the specific circumstances of the case. In particular, in paragraph 42 of that judgment, the Court includes a reference to ‘the *conditions* referred to in paragraphs 38 and 39’, (28) which merely summarises the facts of the case in the main proceedings. The specific context, in particular the management measure adopted by the carrier that was liable to lead to a deterioration in employees’ working conditions, explains why the Court was led to find so categorically that ‘air carriers may, as a matter of course, when carrying out … their activity, face disagreements or conflicts with all or [some] of their members of staff’.

57. By contrast, it seems to me that no conclusion can be drawn as regards the classification of a strike called suddenly owing to a disagreement between a trade union and an employer, as in the present case. There is no indication that SAS announced or adopted any measure likely to be rejected by the staff. The strike in question seems instead to have been more generally motivated. It is apparent from the documents before the Court that the trade unions decided to call the strike in 2019 owing to the failure of, or insufficient progress in, negotiations with the employer. In that respect, it should be noted that the trade unions had prematurely terminated the collective agreement concluded with SAS, thereby opening the way for collective bargaining, with all the risks that such an approach entails. Entering into negotiations is not a guarantee that

demands will be successful. It is rather a question of reaching an agreement with the opposing party. Thus, the sequence of events which led to the strike seems to have begun with the termination of the collective agreement by the trade unions themselves and the blatant failure of their attempts to win concessions in respect of wages from the employer. By contrast, Airhelp's reference to the agreement concluded with SAS in 2012 – that is to say, seven years before the events relevant to the consideration of the present case – in which the trade unions accepted pay cuts in order to ensure the airline's survival (29) seems to me too vague to be capable of establishing a direct causal link with the occurrence of the strike.

58. Similarly, the fact that, in the present case, it was not the staff themselves but rather an association independent of the undertaking which disrupted the air carrier's operations through staff absenteeism precludes any application of the principles set out in the judgment in *Krüsemann* to the present case. Consequently, it must be considered that a strike called by the trade union, without it being possible to criticise the employer in any respect, is a factor 'external' to the air carrier's activities.

59. It seems to me that the scope of the judgment in *Krüsemann* should be limited as far as possible to the specific circumstances which gave rise to that judgment, failing which recital 14 of Regulation No 261/2004 would be rendered meaningless. I note that that recital leaves no doubt when it describes a strike as capable of constituting an 'extraordinary circumstance'. Irrespective of that recital's a priori indicative nature, and the obvious need for a case-by-case assessment of whether the circumstances referred to therein satisfy the two cumulative conditions referred to above, (30) the reference to strikes must be understood as a strong indication on the part of the EU legislature in favour of such a classification. (31)

60. As regards future case-law developments, and leaving aside the present case, it seems appropriate to make a distinction, when assessing whether a strike is inherent in the normal exercise of an air carrier's activity, between disruptive factors that are purely 'internal' and those which are 'external'.

61. On the one hand, some strikes arise from a dispute within the undertaking itself, as in the case giving rise to the judgment in *Krüsemann*. On the other, there are strikes which may have an impact on the air carrier's operations, even if, by their nature and origin, they are not linked to the management of the undertaking, but depend instead on the wishes of a third-party entity, such as a strike by air traffic controllers, fuel suppliers, ground staff or, in general, a political strike involving several public services throughout a Member State. (32) In that scenario, it would certainly be disproportionate to require the air carrier to ensure that its activities are not disrupted and to ensure passenger transport at any price. Such a commitment would in some cases be almost impossible to keep.

62. This is all the more true given that the type of strike referred to in the preceding point is characterised by the fact that it mainly affects the *general conditions governing the air carrier's economic activity*; conditions over which the air carrier generally has no influence. It therefore appears appropriate not to regard this type of strike as an event 'inherent' in the normal exercise of the air carrier's activity.

63. It follows that a strike started by an air carrier's staff union, in circumstances such as those of the case in the main proceedings, cannot be regarded as an event 'inherent' in the air carrier's activities.

(b) The air carrier has no control over a strike started by a workers' union

64. As stated above, the air carrier has no control over a trade union's activities or decision-making power. The trade union is not part of the undertaking's structure; nor does the employer take part in the trade union's internal decision-making process. They are two separate entities which, moreover, do not always represent the same social interests. That said, it is normal for a trade union to perform its role of protecting workers independently and without any interference from the employer. Conversely, the trade union can decisively influence an undertaking's operation by calling on the workers it represents to stop work in order to force the undertaking to comply with its demands. Assuming a strike is 'lawful', the employer cannot use the means provided for under labour and procedural law to prevent it. Given that a strike initiated by a trade union is an 'external' factor over which the air carrier has no influence, it seems consistent to conclude that it is beyond its actual control.

65. In the following points, I shall present a number of arguments in support of the view that a strike, as described by the referring court in the first question referred, is not an event over which the air carrier can exercise control. To begin with, (33) I shall set out the reasons which lead me to consider that the principles

laid down in the judgment in *Krüsemann are not applicable* to the situation at issue in the dispute in the main proceedings. While so doing, I shall take the opportunity to subject the criterion of 'responsibility' for the outbreak of a strike – used by the Court in that judgment – to a *critical analysis* of its usefulness. I shall then explain the role of workers' unions and employers in that 'social dialogue', with the aim of demonstrating that trade unions, far from being in a relationship of subordination, are, in reality, *equal partners*, which precludes a finding that the employer is in a position to influence unilaterally the course of strikes and that, consequently, it has actual control over them. To that end, I shall consider, first, *the provisions of the Charter which protect their respective interests* and then propose that the *interests at issue be weighed up at the level of primary law*. (34) I shall illustrate, with the help of *some examples drawn from the case-law*, how the Court has resolved conflicts of interests with constitutional status in the EU legal order. (35) The aim of such a balancing exercise is to arrive at an interpretation of Regulation No 261/2004 which is *consistent with fundamental rights* and enables *the interests at stake to be reconciled.* I shall end with a number of *guidelines concerning the interpretation of that regulation* and, in particular, the concept of an 'extraordinary circumstance'. (36) My *interim conclusion* – before I address the relevance of other aspects of strikes – will be that the two tests laid down by the case-law for identifying an 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation No 261/2004, as interpreted in the light of recital 14 of that regulation, are satisfied in the present case. (37)

(1) The principles laid down in the judgment in Krüsemann are not applicable to the situation at issue in the main proceedings

66. The Court's findings in the judgment in *Krüsemann* do not seem to me to be capable of being applied to the situation at issue in the main proceedings because they are linked to the specific circumstances of that case. As has already been stated, the Court held in that judgment that the wildcat strike was partly under the airline's 'actual control' because it resulted from a decision taken by that air carrier. It is also relevant for a better understanding of that judgment that the Court observed that the wildcat strike had ceased when the air carrier concluded an agreement with workers' representatives. It can thus be inferred from this that the Court apparently saw a relationship between, on the one hand, the measure announced by the airline and, on the other, the swift resolution of the dispute, possibly owing to the revocation of that measure.

67. However, in the present case, the strike was in no way a reaction to any measure relating to the management of the undertaking. On the contrary, in the light of the considerations set out above (38) and in the absence of any indication to the contrary, it is to be assumed that the strike was solely based on workers' pay demands. Consequently, the air carrier cannot be regarded as solely 'responsible', on account of its conduct, for the strike breaking out. It follows that the principles identified in the judgment in *Krüsemann* do not apply in the present case.

68. Having said that, I must confess to experiencing a degree of uneasiness about this criterion of 'responsibility' for the outbreak of a strike – which seems to be at the root of the Court's reasoning in the judgment in *Krüsemann* (39) – and, in particular, concerning the fact that it should be applied in the present case in order to make either the trade union or the air carrier 'responsible' for the situation. Since the Court does not have any information concerning the working conditions of SAS employees, it seems to me inappropriate to decide whether or not the trade union's pay demands were justified. Furthermore, such a classification depends on the point of view of the social partners, as well as the socioeconomic context in each Member State. Rather, as I shall explain in more detail below, it is for the social partners to negotiate and determine freely, without intervention by the State or by the institutions, pay and working conditions by virtue of their autonomy in wage bargaining. (40)

69. Apart from those considerations, I note that the criterion of 'responsibility' is likely to be of rather limited usefulness in practice. It should not be forgotten that the socioeconomic context in a Member State may also evolve independently to the detriment of working conditions, even without the employer's intervention, for example as a result of the impact of inflation on citizens' purchasing power or an increase in the cost of living in connection with other factors. In such a case, the employer cannot reasonably be held responsible for the deterioration in the employees' situation. This shows that the criterion is not suitable for application to every conceivable situation. In my view, that is particularly the case in circumstances such as those of the case in the main proceedings, where it is not possible to identify a single reason for the strike being called.

(2) The respective interests of the social partners and of consumers protected by the Charter and the need to strike a balance

(i) General remarks

70. It should be noted at the outset that dialogue between management and labour is recognised in Article 151 TFEU as being one of the objectives of the European Union. That dialogue 'holds a crucial, unique position in the democratic governance of Europe'. (41) In that context, the first paragraph of Article 152 TFEU lays down the principle of the autonomy of the social partners, stating that the European Union 'recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems' and that it 'shall facilitate *dialogue between the social partners*, respecting *their autonomy*'. (42)

71. In so far as the social partners enjoy the same autonomy in wage bargaining and *are thus on an equal footing*, it cannot seriously be assumed that the air carrier has 'control' of the situation because it could have yielded entirely to demands in respect of wages in order to avoid work stoppages. Just as staff cannot be expected to abandon a legally permissible strike, since this would represent an abandonment of demands that, in their view, are justified, the air carrier cannot be required to react to work stoppages by yielding without hesitation to all the workers' demands in order to avoid claims for compensation being brought by passengers.

72. In that regard, it should be borne in mind that the interests of the social partners are, generally speaking, *protected in an equivalent manner* by the EU legal order, that is to say, without either one being granted superiority. Workers and their trade union representatives may rely on freedom of association, the right of negotiation and the right of industrial action, including strikes, which are all fundamental rights guaranteed by Article 12(1) and Article 28 of the Charter, whereas employers may claim the right of negotiation and the freedom to conduct a business, the latter being enshrined in Article 16 of the Charter, in order to defend their respective interests. To assume that one of the partners is obliged to renounce their interests would amount to a breach of the essence of those rights.

73. As social partners, they share responsibility for reaching agreement through negotiation. Such an approach has undeniable advantages over other measures which Advocate General Jacobs summarised briefly and precisely in his Opinion in *Albany*. (43) In his view, 'collective agreements between management and labour prevent costly labour conflicts, reduce transaction costs through a collective and rule-based negotiation process and promote predictability and transparency. A measure of equilibrium between the bargaining power on both sides helps to ensure a balanced outcome for both sides and for society as a whole'. Moreover, in so far as consumers' interests are compromised by staff strikes with a disruptive effect on passenger transport, they also benefit if an agreement is reached as soon as possible by means of a compromise. Their interests therefore deserve to be properly taken into account by the social partners.

74. The foregoing observations show that opposing interests – at least in some respects – are at stake in the case in the main proceedings. Since those interests are protected by the fundamental rights laid down in the Charter, and *thus enjoy constitutional status*, *a balance must be struck between them if the dispute is to be resolved effectively*. (44) The need for such an approach arises from the fact that, often, fundamental rights cannot be guaranteed without restriction, in particular if they conflict with other legitimate interests protected by EU law, as can be seen from the relevant provisions of the Charter. First, Article 52(1) of the Charter provides that the exercise of rights and freedoms may be limited if limitations 'are necessary and *genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*'. (45) Second, Article 28 of the Charter itself makes recourse to strike action subject to compliance with '[EU] law', which includes other rights guaranteed by the Charter. It follows that the right to strike could be limited so as protect the freedom to conduct a business, mentioned above, which is likewise not absolute, (46) as well as the interests of consumers, referred to in Article 38 of the Charter.

75. The conclusions to be drawn from a balancing exercise must be taken into account when interpreting Regulation No 261/2004. I should point out that, according to settled case-law, (47) EU law, including secondary law, must be interpreted in the light of the fundamental rights enshrined in the Charter. The aim of such a balancing exercise is to arrive at an interpretation of Regulation No 261/2004 that is consistent with fundamental rights in so far as it reconciles the respective interests. The principle of the unity of the EU legal

order also requires that inconsistencies be avoided in the overall assessment of the legitimate interests at stake.

76. The following overview of case-law is intended to illustrate how the Court has resolved *conflicts between interests with constitutional status* in the EU legal order. By way of example, I shall refer to conflicts between fundamental rights and fundamental freedoms of the internal market, and also between fundamental rights themselves. Irrespective of the applicable terminology, the scenarios which I shall present have in common the fact that they set social rights against economic rights, as in the case in the main proceedings. That overview of case-law will be followed by some reflections on the interpretation of Regulation No 261/2004.

(ii) Overview of case-law concerning the resolution of conflicts between interests with constitutional status

– *Balance between fundamental rights and fundamental freedoms of the internal market*

77. The proposed approach is reminiscent of the approach followed in the case giving rise to the judgment in *International Transport Workers' Federation and Finnish Seamen's Union*, (48) in which the Court had to reconcile the right to take industrial action, including the right to strike, with freedom of establishment. I should point out that that case concerned a reference for a preliminary ruling regarding the interpretation of Article 43 EC (now Article 49 TFEU). More specifically, the referring court wished, in essence, to ascertain whether a private undertaking could rely on that fundamental freedom against the industrial action taken against it by a trade union. In that judgment, having emphasised the fundamental nature of the right to strike in the EU legal order, the Court held, first, that it did not fall outside the scope of the fundamental freedoms of the internal market. (49) Next, having found that the industrial action at issue constituted a restriction on freedom of establishment, the Court examined whether it was also justified. (50) It is important to note that the Court recognised that the right to take industrial action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty. (51)

78. However, the Court added that the Community included not only an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital, but also a policy in the social sphere. The Court thus found that since the Community had not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital had to be balanced against the objectives pursued by social policy, which included, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement was maintained, proper social protection and dialogue between management and labour. (52) On the basis of a balance struck between the competing interests, the Court subsequently gave guidance on the interpretation of Article 43 EC to the national court enabling it to rule on the dispute before it.

– *Balance between fundamental rights*

79. The judgments in *Scarlet Extended* (53) and *SABAM* (54) also seem to me to be relevant, given the issue in the present case. In those judgments, the Court ruled on the balance to be struck between protection of the right to intellectual property, which is part of the fundamental right to property enshrined in Article 17 of the Charter, and protection of the freedom to conduct a business, already mentioned. Those cases were based on disputes between, on the one hand, a management company which represented authors, composers and editors of musical works and, on the other, undertakings operating an online social networking platform and an internet service provider. More specifically, [that management company] had asked the national courts to order [the other parties] to stop infringing copyright. The national courts had then submitted requests for a preliminary ruling to the Court of Justice seeking to establish whether EU law permitted Member States to authorise a national court to issue an injunction against [those parties] and to order them to install a filtering system capable of identifying electronic files containing musical, cinematographic or audio-visual works in respect of which [the management company] claimed to hold intellectual property rights, with a view to preventing those works being made available to the public in a way which infringed copyright.

80. Although the Court began by emphasising the importance of the intellectual property right, it clearly suggested that it was not in any way apparent from Article 17(2) of the Charter or the case-law that such a

right ‘is inviolable and must for that reason be absolutely protected’. (55) On the contrary, the Court stated that the protection of that right ‘[had to] be *balanced* against the protection of other fundamental rights’. (56) The Court called on national authorities and courts to strike a ‘fair balance’ between the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by [the other parties] pursuant to Article 16 of the Charter. (57) (58) The Court found that the injunction to install the filtering system at issue did not comply with the requirement to strike such a balance between fundamental rights, and relied on a series of arguments which can be construed as interpretative guidance for the referring courts. More specifically, the Court criticised the effects of such a filtering system, as it was liable to infringe the right of users to the protection of their personal data and their freedom to receive or impart information, which were rights safeguarded by Articles 8 and 11 of the Charter. (59) Moreover, it considered that such an injunction would result in a serious infringement of [the other parties’] freedom to conduct their businesses since it would require them to install a complicated, costly, permanent computer system at their own expense. (60) Thus, the Court held that EU law, ‘construed in the light of the requirements stemming from the protection of the applicable fundamental rights’, had to be interpreted as precluding an injunction against [the other parties] which required them to install a filtering system. (61)

81. Lastly, mention should be made of the judgment in *McDonagh*, (62) delivered in the same area of law as the present case, in which the Court examined whether Article 5(1)(b) and Article 9 of Regulation No 261/2004, which require an air carrier to take care of passengers whose flights have been cancelled, are compatible with Articles 16 and 17 of the Charter, which safeguard, respectively, the freedom to conduct a business and the right to property. The Court noted, first of all, that the freedom to conduct a business and the right to property are not absolute rights but must be considered in relation to their social function. (63) The Court stated that Article 52(1) of the Charter accepts that, under certain conditions, limitations may be imposed on the exercise of rights enshrined by it. (64) It reiterated that ‘when several rights protected by the European Union legal order clash, such an assessment must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and striking *a fair balance* between them’. (65) The Court correctly pointed out that Articles 16 and 17 of the Charter were not the only fundamental rights to be taken into account in a balancing exercise, but that account also needed to be taken of Article 38 thereof which, like Article 169 TFEU, sought to ensure a high level of protection for consumers, including air passengers, in European Union policies. (66) The Court thus found that ‘[Article] 5(1)(b) and [Article] 9 of Regulation No 261/2004 … must be considered to comply with the requirement intended to *reconcile the various fundamental rights* involved and *strike a fair balance between them*’. (67) The Court concluded that the above provisions complied with Articles 16 and 17 of the Charter.

(3) Consideration of conclusions drawn from balancing interests when interpreting Regulation No 261/2004

82. In view of the above, I consider that when interpreting Regulation No 261/2004 in the present case, care should be taken to maintain the balance of power between the social partners. More specifically, that interpretation must enable workers to take industrial action without, however, requiring the air carrier to suffer unacceptable disadvantages liable to threaten the existence of the undertaking. It seems obvious to me that such an outcome would not be in anyone’s interest. On the basis of those general observations, I shall set out below some guidance which will assist the Court in carrying out the necessary balancing exercise, which will have a bearing on the interpretation of Regulation No 261/2004.

83. I am sensitive to the argument put forward by certain interested parties in the present case that it should be accepted that the air carrier may claim an ‘extraordinary circumstance’ in the event that its own staff go out on strike when it attempts, like the workers, to assert its interests in the context of negotiations. In that regard, I should point out that the objective of Regulation No 261/2004 is to protect consumers, as is apparent from recital 1 thereof. With the adoption of Regulation No 261/2004, the legislature was seeking to strike a balance between the interests of air passengers and those of air carriers. (68) By contrast, it was not intended to protect the right of workers, in the event of conflicting interests, to take industrial action to protect their interests, including strikes.

84. Granting passengers a right to compensation in the event of cancellation or long delay of a flight, where this was caused by a workers’ strike, entails the risk that that right to compensation would be ‘exploited’ for the purposes of industrial action. Workers would be able to trigger a large number of claims for compensation brought by passengers against the air carrier, thereby exerting additional pressure on its

management and causing serious economic harm to that undertaking, which, if exemption were impossible, would generally be obliged to pay compensation in the event of cancellations or long delays. That would involve a considerable financial burden for air carriers. (69)

85. In that context, I should draw attention to the fact that air carriers are generally treated less favourably than other economic agents in similar circumstances. As certain interested parties stated at the hearing, Regulation No 261/2004 requires them to pay compensation almost 'automatically', whereas other economic agents could, as a rule, rely on the exemption provisions and clauses laid down in the national legislation concerning compensation and in the contracts themselves, respectively, in order to effectively contest claims for compensation. (70) Given that that unequal treatment seems difficult to understand, the question arises as to whether it is necessary to envisage a 'corrective' interpretation of Regulation No 261/2004 so as to provide for the possibility of exempting the air carrier from liability.

86. Under Article 13 of Regulation No 261/2004, in cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under that regulation, no provision of that regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the applicable national law. It is apparent from the Court's case-law that such compensation may reduce or even remove the financial burden borne by carriers. (71) However, I doubt whether the financial losses resulting from a possible obligation to pay compensation to passengers in the event of a strike could be offset by the air carrier's hypothetical right to seek compensation from third parties on the basis of that provision. (72) Subject to what the applicable national law might provide in a given case, such a claim for compensation would most probably have to be made against the natural or legal person deemed to have caused the damage. However, it is possible that such a claim would prove unsuccessful in the case of a 'lawful' strike, that is to say, in respect of industrial action taken against the employer in compliance with national social and labour law. (73) Consequently, in so far as such an option does not appear to be workable without exceptions, I consider that it is not capable of mitigating the damage caused by the strike and thus responding to the air carrier's interests.

87. Even though it is true that the right of industrial action was conceived with the aim of helping workers to assert their interests vis-à-vis the employer and that any recognition by the Court of a passenger's right to compensation in the event of a strike by the air carrier's staff would help to achieve that objective, it seems to me that an interpretation of Regulation No 261/2004 to that effect would go beyond what is necessary for workers' protection. I very much doubt that the result described in the preceding points, namely a shift in the balance of power disproportionately towards employees, was envisaged by the EU legislature.

88. The protection afforded by Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition, as is apparent from the explanations relating to that article, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter. (74) The air carrier, as an employer, is entitled to defend its interests and to demand that any dispute with staff be resolved through negotiation. Moreover, since it bears the financial risk, the air carrier is entitled to adopt the management measures it considers appropriate to ensure the undertaking's survival. It also has the right to be protected from any disruption by third parties, including the possible abuse of a right, (75) which could jeopardise its existence. (76) However, the result described in the preceding points would necessarily have the consequence of de facto denying the employer the right to the effective defence of its interests, since the alternative to yielding to staff demands would be to accept the risk of the undertaking becoming insolvent, which seems to me to be incompatible with the safeguards of fundamental rights provided by the Charter.

89. Nor do I consider that, for the legislative objective of Regulation No 261/2004 to be attained, it is necessary to recognise passengers' right to compensation in all cases of strike action. That interest is already safeguarded by the fact that passengers affected by a cancellation or long delay of their flight as a result of a workers' strike continue to be entitled to reimbursement or re-routing under Article 8 and to assistance under Article 9 of Regulation No 261/2004. This demonstrates that proportionate means exist to protect consumers while taking into account the legitimate interest of employees and employers in negotiating and concluding collective agreements.

90. It follows from the foregoing that a strike called by a trade union in the circumstances described in this Opinion is beyond an air carrier's 'control'. As an employer, the air carrier has the right and

responsibility to negotiate an agreement with employees by virtue of the autonomy in wage bargaining enjoyed by the social partners. By contrast, the carrier cannot be held solely liable for the consequences of industrial action taken by staff.

(c) Interim conclusion

91. My consideration of the facts leads me to conclude that the two tests laid down by the case-law for identifying an 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation No 261/2004, as interpreted in the light of recital 14 of that regulation, are satisfied in the present case.

92. It must therefore be held as an *interim conclusion* that a strike called by a trade union, in the exercise by the air carrier's staff of the right to strike, with a view to demanding better working conditions – where that strike is not triggered by a prior decision of the undertaking but by the workers' demands – falls within the concept of an 'extraordinary circumstance' referred to in Article 5(3) of Regulation No 261/2004.

(d) Relevance of a strike's 'lawfulness' and of the existence of a strike notice if the circumstance is to be classified as 'extraordinary'

93. As has already been stated in this Opinion, the fact that a strike is 'lawful', that is to say, that industrial action was initiated by the trade union in compliance with national labour law rules, may have a certain impact on the employer's discretion in such a situation. (77) The same applies to the question whether the strike was announced after 'notice' had been given, an aspect that is also governed by national law. Those two aspects are closely linked and therefore deserve to be examined together from the standpoint of their relevance to the question whether air passengers are entitled to compensation.

94. At the outset, I would like to point out that, contrary to what is suggested by the referring court in its question, it does not seem to me appropriate, from a legal point of view, to assess those aspects from the perspective of 'actual control' of a circumstance as a relevant criterion for classifying that circumstance as 'extraordinary' for the purposes of Article 5(3) of Regulation No 261/2004. I consider it more appropriate to examine them from the perspective of the 'reasonable measures' which the carrier is required to take in order to avoid the consequences typically associated with the occurrence of an 'extraordinary circumstance', namely the cancellation or long delay of a flight. (78) There are a number of reasons, which I shall set out below, for considering those aspects at this stage of the legal analysis.

95. First, it is common ground that those aspects fall entirely within the scope of national law. In other words, it is national law that establishes the regulatory requirements with which they must comply and, ultimately, whether a strike is 'lawful' or not. I agree with the Court's view, as expressed in the grounds of the judgment in *Krüsemann*, that making a distinction between strikes which are lawful under the applicable national law and those which are not in order to determine whether they should be classified as 'extraordinary circumstances' would make passengers' right to compensation dependent on the social legislation specific to each Member State, thereby undermining the objectives of Regulation No 261/2004, referred to in recitals 1 and 4 thereof, of ensuring a high level of protection for passengers as well as equivalent conditions for the exercise of the activities of air carriers on the territory of the European Union. (79) Consequently, the 'lawfulness' of a strike should not be regarded as a decisive criterion for establishing whether it constitutes an 'extraordinary circumstance'.

96. Second, making a distinction on the basis of a strike's 'lawfulness' would amount to calling into question the considerations underlying the analysis carried out in this Opinion, from which it is apparent that a strike, as described in the first question referred, is beyond the air carrier's 'actual control' because its origin and subsequent development depend not only on the will of the employer but also on the intentions of the workers' union, which, as I have explained in detail, is an autonomous entity over which the employer has no influence. (80) Precisely for those reasons, it is conceivable that a trade union might decide to call a strike, irrespective of whether or not such an approach is consistent with national labour law rules. That applies in particular to the obligation to give notice. I should point out that, in such a case, the possible unlawfulness of industrial action initiated by a trade union would only give the employer the opportunity to request the competent courts to order its cessation. However, since such a procedure takes time, the risk of a judicial decision being taken only after the employer has already incurred a huge economic loss cannot be discounted. In my view, those considerations clearly show that the 'lawfulness' of a strike is not in itself an appropriate criterion for determining whether an incident is 'extraordinary'.

97. Third, I consider that the answer to the question whether a strike called by a workers' union should be classified as an 'extraordinary circumstance' is of such importance from the point of view of legal certainty that it should not be left to chance. However, that is exactly what would happen if it were necessary to ascertain each time whether the requirements of national law concerning the proper organisation of a strike by airline workers had been complied with. The consequence would be an extremely casuistic, if not random, approach that would hardly differ from current judicial practice. For reasons connected with the foreseeability of case-law and with the aim of giving the referring court clear, simple assessment criteria, I propose that the Court should recognise generally that a strike, as described in the first question referred, constitutes an 'extraordinary circumstance' and that the factors characterising the dispute in the main proceedings, such as compliance with national labour law rules which stipulate, inter alia, that notice must be given, may only play a role in considering whether the air carrier has taken 'reasonable measures'.

98. Such an approach to the application of Regulation No 261/2004 would have the advantage of simplifying the analysis and enabling the national court to assess the circumstances of the particular case. Moreover, it would not entail any disadvantage for air passengers, as not all 'extraordinary circumstances' give rise to an exemption. Such a classification of the strike would not a priori preclude the right to compensation of affected passengers, but would rather make it possible to take into account several relevant aspects, including the lawfulness of the strike and compliance with the obligation to give notice, and thus reach a more nuanced conclusion.

3. Criteria for establishing the 'reasonable measures' that must be taken by all air carriers

(a) The concept of 'reasonable measures' under the case-law

99. Given the foregoing considerations, it is necessary to establish the 'reasonable' measures which the air carrier must take in order to avoid the consequences of a strike such as that in the case in the main proceedings. By its question, the referring court questions the relevance of certain facts, more specifically the fact that the strike was announced to the carrier in compliance with the notice period laid down by national law. Those facts must therefore be examined individually in the light of the criteria set out in the case-law of the Court of Justice.

100. As I have already stated in my preliminary remarks, (81) it is apparent from that case-law that, in the event of the occurrence of an 'extraordinary circumstance', the air carrier is released from its obligation to pay compensation under Article 5(1)(c) and Article 7(1) of Regulation No 261/2004 only if it is able to prove that it adopted the measures appropriate to the situation by deploying all its resources in terms of staff or equipment and the financial means at its disposal in order to avoid that circumstance leading to the cancellation or long delay of the flight concerned, without it being possible to require it to make sacrifices that are intolerable in the light of the capacities of its undertaking at the relevant time. (82)

101. Thus, the Court has established an individualised and flexible concept of 'reasonable measures', leaving to the national court the task of assessing whether, in the circumstances of the particular case, the air carrier could be regarded as having taken measures appropriate to the situation, (83) while stating that only those measures which can actually be its responsibility must be taken into account, excluding those which are the responsibility of other parties. (84)

102. I must point out that, notwithstanding the individualised and flexible nature of that concept, in the interests of consumer protection, the case-law cited above stipulates particularly strict conditions for exemption, requiring the air carrier to do everything objectively possible with the available means to avoid the cancellation or long delay of a flight. Furthermore, it must not be forgotten that it is inherent in the obligation to provide transport that passengers reach their final destination – and not only the place of connection – as soon as possible. (85) Accordingly, the air carrier cannot validly claim that it has 'partially fulfilled' that obligation.

103. It is with those criteria in mind that it is necessary to determine what is entailed by the requirement to take all 'reasonable measures' to avoid the cancellation of a flight as a result of a strike by the air carrier's staff in a context such as that under examination in the present case.

(b) Observations on the division of jurisdiction between national courts and the EU judicature

104. Before considering those aspects, I should recall that the Court's role in the procedure established by Article 267 TFEU is limited to clarifying the scope of the concept of 'reasonable measures'. It is for the Court of Justice to provide the referring court with the criteria for interpretation and guidance necessary to enable it itself to carry out a legal assessment of the facts and apply the provisions of Regulation No 261/2004 in accordance with the interpretation obtained. Respect for the division of jurisdiction between national courts and the EU judicature is crucial to ensuring the proper functioning of the judicial system established by the Treaties. (86)

105. In order to enable the Court of Justice to exercise its jurisdiction, the referring court must carefully gather the facts, thus allowing the Court of Justice to understand the issues in the case to be decided. In that context, the responsibility which the referring court must assume in establishing the facts cannot be underestimated, since relevant points to be taken into consideration in the analysis of the question referred could conceivably escape the Court's attention if the necessary information is not provided, for example as regards the logistical, technical and financial resources available to the air carrier. The level of precision of the guidance provided by the Court of Justice to the referring court will depend to a large extent on the information gathered.

(c) Criteria for interpretation to be given to the referring court

106. The following criteria for interpretation are intended to provide the referring court with the guidance necessary for it itself to be able to carry out a focused, effective assessment of the facts.

(1) Reasonable measures must avoid the cancellation or long delay of flights

107. At the outset, it must be observed that the reasonable measures which the air carrier is required to take under Article 5(3) of Regulation No 261/2004 must seek to avoid the typical and, consequently, foreseeable adverse consequences for passengers of an 'extraordinary circumstance', namely the cancellation or long delay of the flight in question. Therefore, in view of the *interim conclusion* that a strike, as described in the question referred, must be classified as an 'extraordinary circumstance', (87) the referring court is not necessarily required to ascertain whether the air carrier could have avoided the occurrence of the strike itself. Such a conclusion seems logical to me, given that, ultimately, it is inherent in the concept of an 'extraordinary circumstance' that it cannot be predicted by the parties concerned.

(2) The air carrier must use every legal means in order to defend its interests and those of passengers

108. A more nuanced assessment is nevertheless warranted if it transpires that the strike is *unlawful* because it does not comply with the requirements of national social and labour law. The issue of a strike's 'lawfulness', raised by the referring court, may indeed be of some relevance when it comes to determining the 'reasonable measures' which the air carrier is required to take. (88) I consider that the air carrier's responsibility should include the obligation to use every legal means to defend its interests and, indirectly, those of passengers, including bringing proceedings before courts with jurisdiction to resolve labour disputes. The aim of such a step would be to ask the competent courts to find the industrial action unlawful and, if appropriate, order its cessation. (89)

109. In that regard, I should point out that Article 28 of the Charter protects a worker's right of industrial action only 'in accordance with Union law and national laws and practices'. That clarification seeks to define the scope of the fundamental right. However, Article 28 of the Charter does not in itself make any statement on crucial issues such as the conditions that a lawful strike must satisfy, leaving it to the law to which it refers to specify them. (90) Article 52(6) of the Charter, under which 'full account shall be taken of national laws and practices as specified in this Charter', must be understood in the same way. (91)

110. It should be noted that the European Union's legislative competence in the areas falling within that scope is very limited. Article 153(1)(f) TFEU provides that the Parliament and the Council may adopt, by means of directives, minimum requirements for the 'representation and *collective defence of the interests of workers* and employers'. (92) However, Article 153(5) TFEU states that that provision does not apply to 'pay, the right of association, *the right to strike* or the right to impose lock-outs'. (93) It follows that the European Union has no legislative power authorising it to adopt rules concerning the exercise of the right to strike. (94) Moreover, this is why certain directives which refer to negotiations and industrial action do not themselves regulate those matters. In spite of this fact, it is certainly conceivable that the Court will in future

define, through case-law, the essence of that right on the basis of the constitutional traditions common to the Member States. (95)

111. National law applies where there are no relevant provisions at the level of EU law. The reference to 'national laws and practices' must be understood as imposing the condition that strikes must be lawful, determined by national law. Consequently, it can be concluded that workers cannot validly rely on the right enshrined in Article 28 of the Charter if they infringe the rules governing the use of industrial action. There is no doubt that the air carrier's freedom to conduct a business, protected by Article 16 of the Charter, should prevail in the event of a dispute. That said, it is for the air carrier to enforce its rights by using the available remedies. For their part, Member States must provide remedies sufficient to ensure effective legal protection for the social partners in the event of a dispute, as required by the second subparagraph of Article 19(1) TEU and Article 47 of the Charter.

(3) The air carrier must allow reserve time to deal with any unforeseen events

112. Furthermore, it is necessary to take account of the fact that the longer the period separating the event constituting an 'extraordinary circumstance' from the time of departure or arrival of a flight likely to be affected by that event, the greater the air carrier's room for manoeuvre. In other words, if the carrier has sufficient time, there are generally several solutions which it can employ to transport the passengers concerned to their final destination. On the other hand, those solutions will be very limited, if not almost non-existent, if it does not have enough time. (96) It follows that the air carrier should allow adequate reserve time in order to deal with any unforeseen events.

113. In the judgment in *Eglītis and Ratnieks*, (97) the Court recalled that a reasonable air carrier is characterised by the organisation of its resources in good time to provide for reserve time so as to be able to employ other solutions. Careful, rational route planning by the air carrier is therefore crucial in order to prevent the trouble and inconvenience to passengers caused by flight cancellations and long delays, in accordance with the objective set out in recital 12 of Regulation No 261/2004.

(4) The air carrier must take into account the strike notice preceding the strike called by the trade union

114. The arguments which I have just presented in support of the need to allow adequate reserve time in order to deal with any unforeseen events are also relevant in a context such as that of the case in the main proceedings in which the trade union, when calling a strike, complied with the notice period laid down in national law. (98) In view of the importance which the Court attaches to allowing reserve time, it seems to me that it would be irresponsible for an air carrier not to take advantage of this additional time to make every effort to mitigate the impact of the strike on its activities. That is particularly true in a situation such as that at issue in the main proceedings, where the pilots' associations had given notice on 2 April 2019 of a strike starting on 26 April 2019. SAS therefore had several weeks – that is to say, a period longer than the minimum period (of at least seven working days) laid down by the Swedish legislation – to make the necessary arrangements. Consequently, the answer to the referring court must be that the carrier is required to take into account in its planning the fact that it has been informed of the exercise of the right to strike in compliance with the notice period laid down by the national legislation.

115. For the sake of completeness, it should be noted that the question concerning the applicability of the exemptions provided for in Article 5(1)(c) of Regulation No 261/2004 may arise in certain cases. That provision states that, in the event of cancellation of a flight, the passengers concerned are entitled to compensation in accordance with Article 7 of that regulation, 'unless they are informed of the cancellation of the flight' with notice which may vary from two weeks to less than seven days before the scheduled departure time. Depending on the situation at issue, that requirement could possibly lead to an overlap in the scope of those provisions, namely in cases where the national legislation provides that a strike must be called in compliance with a specific notice period.

116. However, I consider that that possibility is not, in itself, liable to call into question the applicability of the provisions conferring entitlement to compensation, namely Article 5(1)(c) and Article 7(1) of Regulation No 261/2004, which are the subject of the present request for a preliminary ruling. Moreover, as SAS does not claim that it availed itself of the exemptions listed in Article 5(1)(c) of that regulation in order to avoid

having to pay compensation to passengers, this issue seems to me to be purely hypothetical and therefore irrelevant for the purpose of analysing the present case.

(5) The air carrier must organise its material and human resources in order to safeguard the continuity of its operations

117. It has already been explained in this Opinion (99) that the air carrier relies on material and human resources to operate the undertaking. By applying by analogy the case-law concerning the right to receive compensation in the event of the technical failure of the aircraft, I propose to make the air carrier responsible for organising its staff and assigning tasks in such a way that it can safeguard the continuity of its operations despite the occurrence of disruptive incidents. That approach is consistent with the Court's case-law, which expressly requires the air carrier to deploy '*all its resources in terms of staff or equipment and the financial means at its disposal* in order to [prevent] that situation from resulting in the cancellation or long delay of the flight in question'. (100) Obviously, this requires an effort in terms of staff reorganisation. Thus, just as the air carrier has a duty to ensure that there are sufficient staff to cover absences linked to annual leave and sick leave, (101) it seems to me consistent to require the air carrier to have, as far as possible, adequate staff to take over the tasks of striking colleagues if necessary.

118. On that point, it is important to note that the reference in the question referred to the fact that the strike concerns 'airline pilots who are employed by an air carrier' and to the fact that the strike was 'lawfully initiated' raises two issues which may considerably limit the employer's discretion when implementing staff reorganisation measures and which the referring court will have to take into account in its assessment of the facts. These limitations are of a factual and regulatory nature.

119. As regards *factual* limitations, it should be noted that aircraft pilots perform a central function in passenger air transport, since their role requires a strong sense of responsibility and complete command of the technical aspects of operating aircraft. This is why pilots are subject to extensive, specific training followed by periodic training. The referring court is therefore right to consider that they are 'needed to carry out a flight'. In view of the fact that aircraft pilots cannot be properly replaced by other crew members who perform separate functions, it seems to me reasonable to require the air carrier to ensure *operational continuity* as far as possible. Therefore, it is for the referring court to assess whether, and to what extent, such operational continuity was safeguarded in the present case.

120. From a *regulatory* point of view, it should be noted that the fact that the national legislation prohibits the undertaking from hiring staff to replace strikers may be relevant to the analysis. I should like to point out that the case-law does not describe as 'reasonable' measures liable to constitute a 'sacrifice that is intolerable in the light of the capacities of the undertaking', which evidently refers to measures which are tolerable from a personnel, technical and financial perspective. Although the Court has not yet expressly ruled on the question whether that concept also includes legally permissible measures, I have no doubt that the answer should be that it does. EU law cannot require the carrier deliberately to infringe national law, particularly as Article 28 of the Charter guarantees workers the right to take industrial action 'in accordance with national laws and practices', as I have already stated. Therefore, in so far as that provision refers to national law, which specifies the *scope of the right to strike* (102) and *sets limits on the employer's powers*, the employer is required to abide by them.

121. It follows that the fact that national law may prohibit the hiring of staff to replace strikers is particularly important and must, therefore, be taken into account in assessing the 'reasonable measures' that the air carrier might have had to take.

(6) The carrier must facilitate access to flights operated by other companies which are not affected by the strike

122. The air carrier's responsibility towards passengers does not end when a strike breaks out. On the contrary, it is required to facilitate passengers' access to flights operated by other companies which are not affected by the strike, a subject on which the judgment in *Transportes Aéreos Portugueses* (103) provides valuable indications. I should like to recall that the Court stated that, 'in the event of an extraordinary circumstance arising, an air carrier which seeks to be released from its obligation to compensate passengers … *cannot, in principle, merely offer to re-route the passengers concerned to their final*

destination on the next flight operated by that airline which arrives at their destination on the day following the day originally scheduled for their arrival'. (104)

123. In that judgment, the Court held that 'the care and attention required of that air carrier in order to enable it to be exempted from its obligation to pay compensation presupposes that it deploys all the resources at its disposal to ensure reasonable, satisfactory and timely re-routing, including *seeking alternative direct or indirect flights which may be operated by other air carriers, whether or not belonging to the same airline alliance*, arriving at a scheduled time that is not as late as the next flight of the air carrier concerned'. (105)

124. In the Court's view, 'therefore, it is only where there are no seats available on another direct or indirect flight enabling the passenger concerned to reach his or her final destination at a time which is not as late as the next flight of the air carrier concerned, or where the implementation of such re-routing constitutes an unbearable sacrifice for that air carrier in the light of the capacities of its undertaking at the relevant time, that that air carrier must be considered to have deployed all the resources at its disposal by re-routing the passenger concerned on the next flight operated by it'. (106)

125. It follows from that judgment that the carrier is also generally obliged to allow for the option of re-routing on direct or indirect flights operated by other air carriers unless the performance of such re-routing constitutes an 'unbearable sacrifice' for that air carrier in the light of the capacities of its undertaking, which it is for the referring court to determine.

4. Answer to the first question referred

126. In the light of all those factors, the answer to the first question is that a strike by aircraft pilots who are employed by an air carrier and essential to the performance of a flight, on a scale such as that of the strike in the main proceedings, (107) must be regarded as an 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation No 261/2004, where it has been announced by workers' organisations following a strike notice and lawfully initiated in accordance with national law as industrial action intended to induce the air carrier to increase wages, provide benefits or amend employment conditions in order to meet the organisations' demands.

127. In circumstances such as those at issue in the main proceedings, the air carrier is required to take reasonable measures to avoid the cancellation or long delay of flights. In particular, it must use all lawful means in order to defend its interests and those of passengers, allow sufficient reserve time in order to deal with unexpected incidents, take into account the notice preceding the strike called by the trade union, organise its material and human resources in order to ensure the continuity of operations, and facilitate access to flights operated by other companies which are not affected by the strike.

C. The second question referred

128. By its second question, the referring court asks the Court of Justice to specify, in order to determine whether a strike constitutes an 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation No 261/2004, what significance should be attached, if any, to the fairness of the workers' organisations' demands and, in particular, to the fact that the wage increase demanded is significantly higher than the wage increases which generally apply to the national labour markets in question.

129. In view of the answer I propose to give to the first question referred, I consider that it is no longer necessary to consider the second question referred. The following observations are therefore made only for reasons of completeness and clarity.

130. At the outset I would like to point out that I fully share the view expressed by the parties in the main proceedings that it is not for the Court to examine the merits of the issue of the 'fairness' or otherwise of a given demand. Concern arises that, if the Court of Justice or a national court hearing a dispute concerning the application of Regulation No 261/2004 were to decide to assess the respective positions of the social partners, it might interfere with their negotiations, which would effectively undermine the principle of autonomy in wage bargaining. As explained in this Opinion, that autonomy means that it is for the social partners to negotiate and determine pay and working conditions freely, without intervention by the State or by the institutions. For the sake of completeness, I should draw attention to the fact that, in any event, the Court does not have sufficient information to enable it to give an informed ruling on that matter. (108)

131. Consequently, I propose that the Court should refrain from answering that question. The Court will thus avoid taking a position in favour of either party, at the risk of undermining the autonomy of the social partners as regards collective bargaining.

D. The third question referred

132. The third question referred seeks to determine, in order to assess the concept of an 'extraordinary circumstance' referred to in Article 5(3) of Regulation No 261/2004, 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' organisations do not.

133. In view of the proposed answer to the first question referred, I see no need to examine the third question referred. However, I shall address it in my analysis for the sake of completeness and clarity.

134. In that regard, it should first of all be noted that the usefulness of various dispute resolution mechanisms, including mediation, cannot be overestimated. Those mechanisms are appropriate means for enabling the social partners to reach an agreement which takes their interests into account. (109) In my view, there is little doubt that use of mediation should in the first instance be understood as a gesture of goodwill which shows a sincere commitment to reaching a sustainable compromise.

135. That said, I consider that, in so far as the EU legal order expressly recognises the right of the social partners to resolve their disputes freely by negotiation, on an equal footing, (110) it would be inconsistent to require them to use a particular dispute resolution mechanism. Rather, they are entitled independently to choose the appropriate means of reaching an agreement and to accept (or reject) a proposal for settlement according to their respective interests. They cannot therefore be criticised for pursuing those interests in the manner which best suits them.

136. It is precisely that broad discretion which explains, among other factors, why a strike becomes an event beyond the 'actual control' of the social partners, each considered individually, as has already been explained in the context of examining the criteria defining the concept of an 'extraordinary circumstance'. (111) In so far as each social partner remains free to reject a proposed agreement (and, where appropriate, to submit a counter-proposal), it cannot reasonably be claimed that a strike, as an expression of the existence of a profound disagreement, is an event over which the air carrier can exercise control.

137. Furthermore, in this context, I should point out a certain similarity with the subject matter of the second question referred, since the question at issue clearly seeks to ask the Court to rule, in essence, on the 'fairness' of the parties' negotiating stance. However, for the reasons I have already given in the context of examining the second question referred, the Court should refrain from taking a position in favour of either party.

138. Should the Court nevertheless decide to answer that question, I would like to express my reservations as to a possible approach consisting of inviting the referring court to apply *criteria pertaining to the social partners' attitude or conduct before and during the strike*. (112) It seems to me that such criteria are somewhat liable to become an *additional element of uncertainty* for judicial practice, as those criteria would open the way to casuistry, the development of which is difficult to predict. In so far as the social partners' attitude or conduct may vary considerably from case to case depending on the issues at stake, there is a risk that the outcome of a given dispute would become unpredictable.

139. Should those criteria be considered relevant by the Court, I am also concerned that a civil court asked to decide a dispute such as that in the present case would inevitably be faced with *sensitive issues relating to labour law* which fall outside its jurisdiction. That said, if the dispute were to be brought before a national court specialising in labour law, there is a risk that that court might judge the circumstances of the case differently from a civil court. All of this would run precisely counter to the objective which the Court should pursue, namely *determining objective criteria* capable of promoting legal certainty and avoiding disparate judicial decisions. (113) In so far as the present case concerns only the interpretation of Regulation No 261/2004, it is advisable to avoid importing considerations relating to a separate field of law, namely labour law.

140. The foregoing observations are all the more relevant since Regulation No 261/2004, as an act of the European Union, requires an *autonomous interpretation* to ensure its *uniform application* in all Member States. Given that, first, several issues relating to labour law raised in the present case fall within the competence of the national legislature, (114) and may therefore differ considerably between Member States and, second, the relevant provisions of that regulation make no reference to national law, I do not see why those issues should be used as criteria for interpreting the concept of an 'extraordinary circumstance'.

141. For the reasons set out above, I propose that the Court should not answer the third question referred.

VI. Conclusion

142. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Attunda tingsrätt (Attunda District Court, Sweden) as follows:

– A strike by aircraft pilots who are employed by an air carrier and essential to the performance of a flight, on a scale such as that of the strike in the main proceedings, must be regarded as an 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, where it has been announced by workers' organisations following a strike notice and lawfully initiated in accordance with national law as industrial action intended to induce the air carrier to increase wages, provide benefits or amend employment conditions in order to meet the organisations' demands.

– In circumstances such as those at issue in the main proceedings, the air carrier is required to take reasonable measures to avoid the cancellation or long delay of flights. In particular, it must use all lawful means in order to defend its interests and those of passengers, allow sufficient reserve time in order to deal with unexpected incidents, take into account the notice preceding the strike called by the trade union, organise its material and human resources in order to ensure the continuity of operations, and facilitate access to flights operated by other companies which are not affected by the strike.

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1 Original language: French.

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2 OJ 2004 L 46, p. 1.

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3 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; 'the judgment in *Krüsemann*').

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4 See, in favour of classifying a strike by airline staff as an 'extraordinary circumstance': Germany (judgment of the Federal Court of Justice of 21 August 2012, Case X ZR 138/11); United Kingdom (judgment of West London County Court of 17 April 2009, *Rigby v. Iberia* [2009] 4 WLUK 299); Poland (judgment of Warsaw Regional Court of 5 April 2017, XXIII Ga 1889/16 and XXIII Gz 1360/16); Czech Republic (judgment of Prague City Court of 20 November 2019, No 18 Co 300/2019). Against such a classification: France (judgment of the Court of Cassation of 24 September 2009, Cases 08-18.177 and 08-18.178); Netherlands (judgment of Rotterdam District Court of 2 June 2017, Case 5277790); Italy (judgment of the Trieste Magistrate of 17 September 2012, Case 668/2012). While this list is not exhaustive, it illustrates the diversity of judicial decisions.

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5 See point 3 of this Opinion.

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6 Judgment of 4 October 2012 (C-22/11, EU:C:2012:604).

7 See judgment of 4 October 2012, *Finnair* (C-22/11, EU:C:2012:604, paragraphs 33, 37, 38 and 40), and the Opinion of Advocate General Bot in that case (EU:C:2012:223, points 49 and 55).

8 See point 3 of this Opinion.

9 Judgments of 5 September 2019, *Verein für Konsumenteninformation* (C-28/18, EU:C:2019:673, paragraph 25); of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraph 45); and of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 44).

10 Emphasis added.

11 See, to that effect, Opinion of Advocate General Szpunar in Joined Cases *X and Visser* (C-360/15 and C-31/16, EU:C:2017:397, point 132).

12 Judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 23). Emphasis added.

13 Judgment in *Krüsemann*, paragraph 34.

14 Judgment of 17 September 2015, *van der Lans* (C-257/14, EU:C:2015:618, paragraph 42).

15 Judgments of 11 June 2020, *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:460, paragraph 37); of 12 March 2020, *Finnair* (C-832/18, EU:C:2020:204, paragraph 38); and of 4 April 2019, *Germanwings* (C-501/17, EU:C:2019:288, paragraph 20).

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

17 Judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraphs 24 and 25).

18 Judgment of 17 September 2015 (C-257/14, EU:C:2015:618).

19 Judgment of 17 September 2015, *van der Lans* (C-257/14, EU:C:2015:618, paragraphs 41 and 42).

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

21 However, the principle that ‘no one is obliged to do the impossible’ (‘*impossilium nulla obligatio est*’) is one of the general principles of EU law (see judgments of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission, Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 79), and of 3 March 2016, *Daimler* (C-179/15, EU:C:2016:134, paragraph 42)).

22 Judgment of 4 May 2017 (C-315/15, EU:C:2017:342).

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

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

25 See point 42 of this Opinion.

26 See, in that regard, Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 (OJ 2018 L 212, p. 1), which lays down, inter alia, essential requirements for aircrew (Annex IV) and air operations (Annex V). It is apparent from those provisions that aircrew must have a sufficient level of professional competence (both in theory and in practice) and medical fitness to perform their duties satisfactorily.

27 See, inter alia, Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (OJ 2000 L 302, p. 57), which sets out limitations and minimum standards, including provisions on paid annual leave, and Commission Regulation (EU) No 83/2014 of 29 January 2014 amending Regulation (EU) No 965/2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ 2014 L 28, p. 17), which lays down the requirements to be complied with by every commercial air transport operator and its crew members with regard to flight and duty time limitations and rest requirements for crew members.

28 Emphasis added.

29 See points 24 and 25 of this Opinion.

30 See points 35 and 39 of this Opinion.

31 See point 38 of this Opinion.

32 In his Opinion in *Finnair* (C-22/11, EU:C:2012:223, points 53 and 55), concerning a strike by airport staff, Advocate General Bot stated that the strike could not be attributed to the air carrier since the air carrier had no control over it. Furthermore, it should be noted that the Commission's Proposal of 13 March 2013 for a Regulation amending Regulation No 261/2004 (COM (2013) 130 final) contains a non-exhaustive list of 'extraordinary' circumstances which mentions, inter alia, 'labour disputes … at essential service providers such as airports and Air Navigation Service Providers', which seems to support that interpretation. That said, I note that 'labour disputes at the operating air carrier', that is to say, a situation such as that in the present case, are to be treated as equivalent to those scenarios.

33 See points 66 to 69 of this Opinion.

34 See points 70 to 76 of this Opinion.

35 See points 77 to 81 of this Opinion.

36 See points 82 to 92 of this Opinion.

37 See point 92 of this Opinion.

38 See point 57 of this Opinion.

39 See, to that effect, Herrmann, C., 'Entschädigung der Fluggäste bei wildem Streik – das TUIfly des EuGH vom 17.4.2018', *Reise-Recht Aktuell: Zeitschrift für das Tourismusrecht*, 2018, p. 102; Croon, J., and Callaghan, J. A, '"Wild Cat" Ruling by the European Court of Justice', *Zeitschrift für Luft- und Weltraumrecht*, 2018, No 4, p. 601, which assume that the Court's reasoning starts from the premiss that the air carrier must suffer the consequences of its actions, given that it is normally required to bear the economic risk associated with the management of the undertaking.

40 See point 74 of my Opinion in *EPSU* v *Commission* (C-928/19 P, EU:C:2021:38).

41 Communication from the Commission, entitled 'The European social dialogue, a force for innovation and change' (COM(2002) 341 final of 26 June 2002, p. 6).

42 That provision is applicable to the European Union and, through Article 13 TEU, to all the institutions. Emphasis added.

43 C-67/96, C-115/97 and C-219/97, EU:C:1999:28, point 181.

44 According to Hesse, K., *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, Heidelberg 1999, p. 28, paragraph 72, 'the legitimate interests protected by constitutional law must be weighed against each other so that each becomes reality. Limits on such interests should be imposed so that they can achieve optimal effectiveness'. See also Alexy, R., 'Constitutional Rights and Proportionality', *Journal for constitutional theory and philosophy of law*, 2014, No 22, p. 51, which takes the view that certain fundamental rights constitute 'principles which must be balanced so that they can be realised to the greatest extent possible given the legal and factual possibilities'.

45 Emphasis added.

46 Judgment of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 45).

47 See judgments of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317, paragraph 68); of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics* (C-129/13 and C-130/13, EU:C:2014:2041, paragraph 69); of 11 September 2014, *A* (C-112/13, EU:C:2014:2195, paragraph 51); and of 25 May 2016, *Meroni* (C-559/14, EU:C:2016:349, paragraph 45).

48 Judgment of 11 December 2007 (C-438/05, EU:C:2007:772).

49 Judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union* (C-438/05, EU:C:2007:772, paragraph 47).

50 Judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union* (C-438/05, EU:C:2007:772, paragraph 74).

51 Judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union* (C-438/05, EU:C:2007:772, paragraph 77).

52 Judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union* (C-438/05, EU:C:2007:772, paragraphs 78 and 79).

53 Judgment of 24 November 2011 (C-70/10, EU:C:2011:771).

54 Judgment of 16 February 2012 (C-360/10, EU:C:2012:85).

55 Judgments of 24 November 2011, *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 43), and of 16 February 2012, *SABAM* (C-360/10, EU:C:2012:85, paragraph 41).

56 Judgments of 24 November 2011, *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 44), and of 16 February 2012, *SABAM* (C-360/10, EU:C:2012:85, paragraph 42).

57 Judgments of 24 November 2011, *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 46), and of 16 February 2012, *SABAM* (C-360/10, EU:C:2012:85, paragraphs 43 and 44).

58 Everson, M., and Correia Gonçalves, R., *The EU Charter of Fundamental Rights – A Commentary* (Peers, Hervey, Kenner, Ward), Oxford 2014, art. 16, p. 455, paragraph 16.40, raise the importance of those judgments because they require national courts to weigh the right to property against the freedom to conduct a business, which has the effect of transforming the freedom to conduct a business into a private obligation or an individual right.

59 Judgments of 24 November 2011, *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 50), and of 16 February 2012, *SABAM* (C-360/10, EU:C:2012:85, paragraph 48).

60 Judgments of 24 November 2011, *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 48), and of 16 February 2012, *SABAM* (C-360/10, EU:C:2012:85, paragraph 46).

61 Judgments of 24 November 2011, *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 54), and of 16 February 2012, *SABAM* (C-360/10, EU:C:2012:85, paragraph 52).

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

63 Judgment of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraph 60).

64 Judgment of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraph 61).

65 Judgment of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraph 62).

66 Judgment of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraph 63).

67 Judgment of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraph 64). Emphasis added.

68 See judgments of 11 June 2020, *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:460, paragraph 52); 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).

69 See, to that effect, Kučko, M., 'The decision in TUIfly: are the Ryanair Strikes to be seen as extraordinary circumstances?', *Air and Space Law,* 06/2019, vol. 44, No 3, p. 334, which states that even if such a result would enhance passengers' rights, it would not be desirable for airlines because it could give trade unions an unfair advantage. The prospect of paying compensation to passengers in addition to having to bear losses accumulated during the strike period would be likely to force airlines to yield to any demand from trade unions, however unreasonable; Flöthmann, M., 'Verbraucherschutz: Ausgleichszahlungen nach Flugausfall trotz wilden Streiks des Flugpersonals', *Europäische Zeitschrift für Wirtschaftsrecht*, 2018, p. 461, which perceives a danger that this might encourage employees to take industrial action against air carriers so as to force them to accede to their demands.

70 Some interested parties have observed that national law makes the right to compensation subject to a condition of 'culpability' ('intention' or 'negligence') for the damage caused. They have also argued that economic agents could, as a rule, rely on exemption clauses in contracts or renegotiate those contracts with their trading partners by virtue of their contractual autonomy.

71 Judgments of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342, paragraph 36); of 17 September 2015, *van der Lans* (C-257/14, EU:C:2015:618, paragraph 46); and of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716, paragraph 68).

72 See the Opinion of Advocate General Bot in *Finnair* (C-22/11, EU:C:2012:223, point 56), in which he proposed that solution. However, it should be noted that, first, that case differs from the present case in that it concerned a strike by airport staff (and not the staff of the air carrier on a trade union's initiative) and, second, the Advocate General merely stated that such a right could theoretically exist under the applicable national law.

73 See, to that effect, Wendeling-Schröder, 'Schadensersatz drittbetroffener Unternehmen bei Streiks?', *Arbeit und Recht*, 03/2017, vol. 65, No 3, p. 96; Unterschütz, J., 'Strike and Remedies for Unlawful Strikes in the Legal System of Poland, Hungary, and Slovakia', *International Journal of Comparative Labour Law and Industrial Relations*, 2014, vol. 30, No 3, p. 335, which explain, in relation to German, Polish, Hungarian and Slovak law, that the right to compensation exists only as a result of illegal strikes or illegal acts in connection with a strike.

74 Judgment of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 42).

75 See, to that effect, Gernigon, B., Odero, A., and Guido, H., *ILO principles concerning the right to strike*, Geneva 2000, p. 42, who state that the right to strike is not an absolute right and its exercise should be consistent with other fundamental rights of citizens and employers. The national legislation generally specifies penalties for such abuse which may vary, depending on the seriousness of the consequences of the abuse, from dismissal to different kinds of financial or criminal penalties.

76 See, to that effect, Everson, M., and Correia Gonçalves, R., *The EU Charter of Fundamental Rights – A Commentary* (Peers, Hervey, Kenner, Ward), Oxford 2014, Art. 16, p. 459, paragraph 16.52, who draw attention to the fact that the freedom to conduct a business is closely linked to the right to property and the right to work, with the result that it must be regarded as an 'existential right'.

77 See points 64 and 86 of this Opinion.

78 See points 108 to 111 (on the lawfulness of a strike) and points 114 to 116 (on the need to take into account the notice preceding the strike) of this Opinion.

79 Judgment in *Krüsemann,* paragraph 47.

80 See points 40 and 64 of this Opinion.

81 See point 35 of this Opinion.

82 Judgment of 11 June 2020, *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:460, paragraph 57).

83 Judgments of 26 June 2019, *Moens* (C-159/18, EU:C:2019:535, paragraph 27), and of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342, paragraph 30).

84 Judgments of 26 June 2019, *Moens* (C-159/18, EU:C:2019:535, paragraph 27), and of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342, paragraph 43).

85 See judgment of 26 February 2013, *Folkerts* (C-11/11, EU:C:2013:106, paragraphs 35 and 47).

86 See points 67 and 68 of my Opinion in *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:135).

87 See point 92 of this Opinion.

88 See point 94 of this Opinion.

89 See, to that effect, Jarec, W., 'Eindeutiges und Widersprüchliches im Urteil des EuGH in der RS Krüsemann ua/TUIfly', *Ecolex*, 2019, No 1, p. 102.

90 See Krebber, S., *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar* (Calliess/Ruffert), 4. Auflage, Art. 28 GRCh, p. 2903, paragraph 3.

91 See, to that effect, Barnard, C., *The EU Charter of Fundamental Rights – A Commentary* (Peers, Hervey, Kenner, Ward), Oxford 2014, Art. 28, p. 792, paragraph 28.57.

92 Emphasis added.

93 Emphasis added.

94 See, to that effect, Lembke, U., *Europäisches Unionsrecht Kommentar* (Hans von der Groeben/Jürgen Schwarze/Armin Hatje), 7. Aufl., 2015, Band 1, Art. 28 GRCh, p. 682, paragraph 15.

95 See, in that regard, Krebber, S., *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar* (Calliess/Ruffert), 4. Auflage, Art. 28 GRCh, p. 2903, paragraph 8.

96 See, in that regard, my Opinion in *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:135, point 72).

97 Judgment of 12 May 2011 (C-294/10, EU:C:2011:303, paragraph 28).

98 See point 93 of this Opinion.

99 See point 51 of this Opinion.

100 Judgment of 4 April 2019, *Germanwings* (C-501/17, EU:C:2019:288, paragraph 19 and the case-law cited). Emphasis added.

101 See, to that effect, Flöthmann, M., 'Verbraucherschutz: Ausgleichszahlungen nach Flugausfall trotz wilden Streiks des Flugpersonals', *Europäische Zeitschrift für Wirtschaftsrecht*, 2018, p. 461, according to which an air carrier may be expected to have sufficient staff to carry out its operations.

102 See point 111 of this Opinion.

103 Judgment of 11 June 2020 (C-74/19, EU:C:2020:460).

104 Judgment of 11 June 2020, *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:460, paragraph 58). Emphasis added.

105 Judgment of 11 June 2020, *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:460, paragraph 59). Emphasis added.

106 Judgment of 11 June 2020, *Transportes Aéreos Portugueses* (C-74/19, EU:C:2020:460, paragraph 60).

107 See point 54 of this Opinion.

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108 See point 68 of this Opinion.

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109 García, A., Romero Pender, E., Medina, F., and Euwema, M., ‘Mediation in Collective Labor Conflicts’, *Industrial Relations & Conflict Management*, 2019, pp. 5 and 10, explain that collective labour disputes are an inevitable part of company life. Tensions between the interests and rights of employees, management and owners, as shareholders or public servants, can easily reach damaging levels. For that reason, companies develop legal frameworks to resolve those disputes. Mediation is one means of settling disputes. It may be defined as any assistance provided by third parties to the parties concerned to help them avoid the conflict escalating, bring it to an end and identify negotiated solutions.

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110 See point 71 of this Opinion.

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111 See point 90 of this Opinion.

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112 Criteria such as the social partners’ ‘constructiveness and openness to dialogue’ or ‘willingness to employ a mediator’.

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113 See point 32 of this Opinion.

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114 See point 93 of this Opinion.