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THURSDAY, 12 APRIL 2018

AG Tanchev: Wild-cat strikes are extraordinary circumstances (joined cases Krüseemann)

When a large number of British Airways flights were [cancelled in 2017](#) due to strikes of the company's personnel, the competent UK regulator advised disappointed passengers to claim compensation under the Air Passenger Rights regulation: while the point had never been expressly decided upon by the CJEU, it the restrictive way in which the concept of extraordinary circumstances had generally been applied by the court suggested that only strikes truly "external" to the airline would excuse them from paying compensation.

The [opinion](#) issued today by AG Wahl in a number of joint cases Krüseemann brought against TUIfly suggests a different answer to this general question.

In the case at stake, a **wild-cat strike** had taken place against the carrier due to unpopular restructuring plans: without a strike being officially announced by the unions, much of the staff called in sick on a number of consecutive days, effectively disrupting the airline's operations. This is a rather specific case because, technically, strikes of this kind are not legal - which makes it harder to impute them to someone who, like the carrier, is *not* breaking the law.

AG Tanchev's opinion makes at points larger, at points smaller differentiations between regular and irregular industrial action.

On the one hand, the AG argues [at para 57] that

the objectives of Regulation No 261/2004 point toward the inclusion of 'strikes' within the concept of 'extraordinary circumstances'. This is buttressed by the case-law of the Court, detailed above, at least in the context of substantial absences affecting operational capacity, on the interpretation of 'extraordinary circumstances' to date.

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On the other hand, the following paragraph [58] states that

in a Union governed by the rule of law, so-called 'wildcat strikes' are not inherent in the normal exercise of the activity of the air carrier concerned. They are not akin to something that is intrinsically linked to the operating system of the aircraft, so that it is inherent in the normal exercise of an air carrier's activity. I further take the view that informing the employees of a potential restructuring did not bring the wildcat strike within the control of TUifly, given that a wildcat strike was not the inevitable consequence of this action.

This last paragraph seems particularly focussed on the illegal nature of the strike at hand, even though the last sentence could be generalised to legal strikes - of course it was not informing employees of the restructuring that led to the strike, but the intention to do so - and this would be no less true of a "regular" strike.

He also notes in one of the footnotes (fn 35) to the opinion that

the conclusion to the effect that a wildcat strike is an extraordinary circumstance is in conformity with a recent Commission proposal to amend Regulation No 261/2004 which provides a non-exhaustive list of circumstances considered as 'extraordinary circumstances' for the purposes of the regulation. This proposal includes 'labour disputes at the operating air carrier or at essential service providers such as airports and Air Navigation Service Providers'.

Thus, according to AG Tanchev, it seems that all strikes would fall under the notion of extraordinary circumstances.

The impact of this conclusion on consumer rights, however, is mitigated by the answer he gives to another question raised in the preliminary ruling request: when the Regulation refers to extraordinary circumstances "which could not have been avoided even if all reasonable measures had been taken", does it intend that the *circumstances* as such could not have been avoided, or that their *consequences* could not be prevented?

AG Tanchev considers the latter to be the correct interpretation: the fact that a certain event cannot be avoided does not mean that it is impossible to prevent it, through appropriate arrangements, from causing delays or cancellations. It is for the national court invested with the question to determine whether, in the circumstances of a specific case, all reasonable measures have been taken in order to prevent the unforeseen circumstances from causing significant disruptions.

The opinion seems destined to bring about quite some forehead-scratching. On

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the one hand, there are bits in it that will be welcome both on the side of the industry and on that of consumer advocates; on the other hand, by making much depend on national courts' appreciation of the circumstances of a specific case, it seems destined to increase uncertainty. It also seems likely that air carriers would use the case, if the opinion were taken up by the court, to oppose all requests a prima facie denial - and then see whether consumers are going to take their claim to court.

It remains to be seen whether the Court will follow the AG on this path.

Posted by [Candida Leone](#) at 18:24



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