Anonymised version

Case C-618/20

Request for a preliminary ruling

Date lodged:

19 November 2020

Referring court:

Juzgado de lo Mercantil de Córdoba (Commercial Court, Cordoba, Spain)

Date of the decision to refer:

24 September 2020

Applicants:

Ms ZU

Ms TV

Defendant:

Ryanair Ltd

COMMERCIAL COURT NO 1, CORDOBA

[…] [details of the court, proceedings, parties, place and date]

ORDER

(REQUEST FOR A PRELIMINARY RULING)

[…] [Repetition of the details of the judge, place and date]

Pursuant to Article 19(3)(b) of the Treaty on European Union ('the TEU'), Article 267 of the Treaty on the Functioning of the European Union ('the TFEU') and Article 4 bis of the Ley Orgánica del Poder Judicial (Organic Law on the Judiciary, 'the LOPJ'), an interpretation by the Court of Justice of the European

Union is needed 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 **[OR.2]** and, to that end, the following question is referred.

FACTS OF THE CASE

1.- MAIN PROCEEDINGS

- Ms ZU and Ms TV purchased plane tickets to fly from Malaga (Spain) to Dusseldorf (Germany).

- The tickets were purchased via the ticketing website for the airline RYANAIR and, indeed, the documentary evidence submitted by the applicants clearly shows a flight confirmation email sent by RYANAIR.

- The flight was, however, operated by the airline LAUDAMOTION.

- The flight they had booked was delayed by more than 4 hours.

- The applicants lodged a claim against RYANAIR seeking compensation as provided for in 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.

- The defendant, RYANAIR, opposed the claim on the ground that it had no capacity as defendant, arguing that it simply made its website available to LAUDAMOTION for the purpose of ticket sales, and that it did not have any contractual relationship with the applicants since the flight had been operated by LAUDAMOTION.

2.- Handling of the reference for a preliminary ruling

[…] [procedural matters of domestic law]

POINTS OF LAW

1.- The legal issues from the perspective of European Union law

The legal issue centres on the liability of an airline that sells plane tickets for another airline via its website, within the context of the application of Regulation No 261/2004 referred to above.

2.- European Union legislation

The applicable EU legislation is the aforementioned 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. Specifically, Article [(3)](5) of the regulations provides as follows[:] '5. This Regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2. Where an operating air carrier that has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger.' Similarly, Article 2 of Regulation No 261/2004 provides that: 'For the purposes of this Regulation: (a) "air carrier" means an air transport undertaking with a valid operating licence: (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'.

Section 2.2.3 of the Commission Notice of 15 June 2016 on Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council, is as follows: '2.2.3. Application to operating air carriers

In accordance with Article 3(5), the operating air carrier is always responsible for the obligations under the Regulation and not another air carrier which, for example, may have sold the ticket (emphasis added). The notion of operating air carrier is presented in recital 7.' **[OR.3]**

3.- National law and/or case-law

Since the case concerns enforcement of the right to compensation provided for in Regulation 261/2004, which has direct effect without requiring transposition into national legislation, there is no applicable national legislation within the field of air transport.

However, there is divergent case-law on the issue. Firstly, it should be noted that, due to the appeals system that applies under Spanish procedural legislation, proceedings involving sums of less than EUR 3 000 are heard in sole instance by the competent courts of first instance, in this case the Commercial Courts of the various Spanish provinces. As this type of claim rarely exceeds EUR 3 000, the only case-law is from the Commercial Courts, and there is no opportunity to arrive at a uniform position through rulings by higher courts. Thus, different commercial courts have given different answers to very similar questions, with some

upholding RYANAIR's lack of capacity as defendant, and others dismissing that argument. In the courts that do not accept the argument of lack of capacity as defendant, the following argument is frequently put forward: The legal system governed by Regulation No 261/2004 in relation to air transport extends beyond that regulation, and the remaining provisions of that system continue to apply. According to the judgment of the Court of Justice of the European Union of 6 May 2010, [*Axel Walz*, C-63/09, EU:C:2010:251,] the legislative framework to be taken into account in resolving air transport disputes is that provided by the regulation together with the treaties signed within the framework of the European Union, and thus '[18] … Regulation No 2027/97, applicable in this case, implements the relevant provisions of the Montreal Convention. It is apparent, in particular, from Article 3(1) of that regulation that the liability of European Union air carriers in respect of passengers and their baggage is to be governed by all provisions of the Montreal Convention relevant to such liability … 19. The Montreal Convention, signed by the Community on 9 December 1999 on the basis of Article 300(2) EC, was approved on its behalf by Decision 2001/539, and entered into force, so far as the Community is concerned, on 28 June 2004.'

In addition, the judgment of the Court of Justice of the European Union of 10 July 2008[, C-173/07, *Emirates Airlines*, EU:C:2008:400,] makes the following point: '43 It is true that the Montreal Convention forms an integral part of the Community legal order (see, to that effect, *IATA and ELFAA*, paragraphs 35 and 36). Moreover, it is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation (see, to that effect, Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52).'

The conclusion is that, in determining the framework of carriers' liability, we cannot rely on a literal interpretation that is divorced from the principles underlying the EU legislation; the meaning ascribed to the legislation must be consistent with the spirit of the legislation and with the protection to be accorded to passengers. It is true that Regulation No 261/2004 does not expressly provide for liability on the part of a carrier that enters into a contract with the passenger but does not provide the transport, but Article 45 of the Montreal Convention 1[9]99 (which, as we have already noted, is in force, is part of EU law, and therefore has direct and immediate effect) does establish the rule that applies in this situation, and provides as follows: 'In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately.' The rule thus allows the passenger to select the defendant that he considers appropriate, consistent with recital 7 of Regulation No 261/2004, which gives rise to obligations (and thus liability) on the part of the carrier that **[OR.4]** contracts with the passenger, whether or not it actually provides the transport. The passenger is not involved in any agreements that the entity with which he contracts may make with third parties; those agreements do not affect him, and his protection is maximised by the extension of any liability to apply to both the

actual carrier and the contracting carrier (in the words of Article 39 of the Montreal Convention).

4.- Questions regarding the interpretation (and/or validity) of EU law

As we noted above, the questions of interpretation centre on the notion of 'operating air carrier', in order to determine who satisfies that notion for the purposes of liability for the compensation provided for in Regulation No 261/2004 in the event of a long delay or cancellation of a flight.

As we said earlier, the Commission Notice of 15 June 2016 excludes a carrier that simply sells the ticket but does not operate the flight from the aforesaid notion of 'operating air carrier'.

Among recent judgments of the Court of Justice of the European Union which may be relevant to the issue is the judgment of the Court of Justice (Third Chamber) of 4 July 2018, C-532/2017; while the situation it addresses is not the same as that in the main proceedings, some of its observations are relevant. It states as follows (emphasis added): 'By its question, the referring court asks, in essence, whether the concept of "operating air carrier" within the meaning of Regulation No 61/2004 and, in particular, of Article 2(b) thereof must be interpreted as covering the case of an air carrier, such as that at issue in the main proceedings, which leases to another air carrier an aircraft, including crew, under a wet lease, but does not bear the operational responsibility for the flights, even where the booking confirmation of a seat on a flight issued to passengers states that that flight is operated by the former air carrier.

17 In that regard, it should be made clear that, according to Article 2(b) of Regulation N 261/2004, the concept of an "operating air carrier" must be understood as referring to 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".

18 That definition thus sets out two cumulative conditions that must be satisfied if an air carrier is to be regarded as an "operating air carrier" relating, first, to the operation of the flight in question and, second, to there being a contract concluded with a passenger.

19 The first condition relates to the concept of a "flight", which is the predominant element of the two conditions. The Court has previously held that that concept must be understood as "an air transport operation, being as it were a "unit" of such transport, performed by an air carrier which fixes its itinerary" (judgments of 10 July 2008, *Emirates Airlines*, C-173/07, EU:C:2008:400, paragraph 40; of 13 October 2011, *Sousa Rodríguez and Others*, C-83/10, EU:C:2011:652, paragraph 27; and of 22 June 2016, *Mennens*, C-255/15, EU:C:2016:472, paragraph 20).

20 It follows that an air carrier that, in the course of its air passenger carriage activities, decides to perform a particular flight, including fixing its itinerary, and, by so doing, offers to conclude a contract of air carriage with members of the public must be regarded as the operating air carrier. The adoption of such a decision means that that air carrier bears the responsibility for performing the **[OR.5]** flight in question, including, inter alia, responsibility for any cancellation or significantly delayed time of arrival.

21 In the present case, it is common ground that Thomson Airways merely leased the aircraft and the crew that performed the flight at issue in the main proceedings, but that the fixing of the itinerary and the performance of the flight were determined by TUIFly.

22 In those circumstances, without it being necessary to examine the second cumulative condition provided by Article 2(b) of Regulation No 261/2004, it must be held that an air carrier, such as Thomson Airways in the main proceedings, that leases an aircraft and its crew to another air carrier under a wet lease, cannot, in any event, be regarded as an "operating air carrier" within the meaning of Regulation No 261/2004 and, in particular, of Article 2(b) thereof.

23 That finding is consistent with the objective of ensuring a high level of protection for passengers, set out in recital 1 of Regulation No 261/2004, in so far as it enables the passengers carried to be ensured compensation or that they will be cared for, without needing to take account of arrangements made by the air carrier that decided to perform the flight in question with another air carrier for the purposes of actually performing that flight.

24 The finding is, moreover, consistent with the principle, set out in recital 7 of that regulation, according to which, in order to ensure the effective application thereof, the obligations that it creates should rest with the operating air carrier, whether with owned aircraft or under a wet lease.

25 Indeed, the referring court also adds that the booking confirmation issued to the applicants in the main proceedings states that the flight at issue in the main proceedings was "operated" by the air carrier that leased the aircraft and its crew. However, although that factor appears to be relevant for the purposes of applying Regulation No 2111/2005, it cannot affect the determination of the "operating air carrier" within the meaning of Regulation No 261/2004, since it clearly follows from recital 1 of Regulation No 2111/2005 that the latter pursues an objective different from that of Regulation No 261/2004.

26 In the light of all of the foregoing considerations, the answer to the question referred is that the concept of an "operating air carrier" within the meaning of Regulation No 261/2004 and, in particular, of Article 2(b) thereof must be interpreted as not covering the case of an air carrier, such as that at issue in the main proceedings, which leases to another air carrier an aircraft, including crew, under a wet lease, but does not bear the operational responsibility for the flights,

even where the booking confirmation of a seat on a flight issued to passengers states that that flight is operated by the former air carrier.'

As we have said, in the case at issue in the main proceedings, it is RYANAIR which sells the ticket through its website and emails the flight confirmation document to the passengers. It is true that the airline code in that document is the code for LAUDAMOTION rather than RYANAIR, but at no point is there any explicit information to that effect; that is to say, at no point is it expressly stated that the flight will not be **[OR.6]** operated by RYANAIR. In the main proceedings, it is not known who actually scheduled the flight, and whether it was RYANAIR or LAUDAMOTION.

Lastly, it may be relevant to note that LAUDAMOTION is part of the RYANAIR group, as RYANAIR states on its own website: https://www.ryanair.com/es/es/planear-viqje/explorar/lauda-tarifasbajas.

5.-The relevance of the response from the Court of Justice of the European Union

It is highly relevant to determine who the operating air carrier is in these specific cases, since the fact that LAUDAMOTION tickets are sold by RYANAIR, after the latter acquired the former, seems significant, as demonstrated by the various court rulings in Spain which, as we noted earlier, are not all of the same opinion. Moreover, as we also explained earlier, it is very unlikely that the higher courts will be able to issue a uniform interpretation that will provide legal certainty and equal treatment for litigants.

6.- In view of all the legal reasoning set out above, we refer the questions set out in the operative part of this decision to the Court of Justice for a preliminary ruling.

OPERATIVE PART

One.- Proceedings are stayed until a decision is issued on the request for a preliminary ruling.

Two.- The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1) May a carrier that sells tickets through its own website for flights operated under the code of another airline be considered an operating air carrier for the purposes of Article 5(5) of Regulation No 261/2004 in respect of the specific flights it sells that are operated by another company?

2) May a carrier that sells tickets through its own website for flights operated under the code of another airline be considered an operating air carrier for the purposes of Article 5(5) of Regulation No 261/2004 in respect of the specific

flights it sells that are operated by another company where the company that operates a flight is part of the corporate group of the company that sells tickets for that flight?

3) May the concept of contracting carrier in Article 45 of the Montreal Convention be equated with the concept of operating air carrier in Article 5(5) of Regulation No 261/2004?

4) May the concept of actual carrier referred to in Article 45 of the Montreal Convention be equated with the concept of operating air carrier in Article 5(5) of Regulation No 261/2004?

[…] **[OR.7]**

[…] **[OR.8]**

[Closing procedural wording and judge's signature]