Case C-263/20

Request for a preliminary ruling

Date lodged:

15 June 2020

Referring court:

Landesgericht Korneuburg (Austria)

Date of the decision to refer:

26 May 2020

Applicant:

Airhelp Limited

Defendant:

Laudamotion GmbH

[…]

REPUBLIC OF AUSTRIA

Landesgericht Korneuburg (Regional Court, Korneuburg) **[…]**

The Regional Court, Korneuburg, sitting as an appellate court […] in the case of the applicant **Airhelp Limited**, Central Hong Kong, […] versus the defendant **Laudamotion GmbH**, 2320 Schwechat, […] concerning **EUR 500.00** […], following an appeal against the judgment of the Bezirksgericht Schwechat (District Court, Schwechat) of 19 December 2019 […], has made the following

O r d e r

(I) The following **questions** are referred to the Court of Justice of the European Union **for a preliminary ruling** pursuant to Article 267 TFEU:

(1) Are Article 5(1)(c) and Article 7 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 ('the Air Passenger Rights Regulation'), to be interpreted as meaning **that the passenger has a right to [Or. 2] compensation where the original time of departure of 14.40 is brought forward to 8.25 on the same day**?

(2) Is Article 5(1)(c)(i) to (iii) of the Air Passenger Rights Regulation to be interpreted as meaning **that examination as to whether the passenger is informed of the cancellation is to be conducted solely in accordance with that provision and precludes the application of national law on the receipt of declarations which was enacted in transposition of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on Electronic Commerce') and includes a provision whereby declarations are deemed to be received**?

(3) Are Article 5(1)(c)(i) to (iii) of the Air Passenger Rights Regulation and Article 11 of the Directive on Electronic Commerce to be interpreted as meaning **that, where a passenger reserved a flight via a booking platform and provided his telephone number and email address, but the booking platform forwarded to the air carrier the telephone number and an email address that was generated automatically by the booking platform, delivery to the automatically generated email address of the notification that the flight has been brought forward is to be regarded as information or delivery of notification that the flight has been brought forward, even where the booking platform does not forward, or delays forwarding, the air carrier's notification to the passenger**? **[Or. 3]**

(II) The proceedings are stayed pending receipt of the ruling of the Court of Justice of the European Union […].

Grounds:

Passengers M***** O***** and G***** P*****, who are resident in the Czech Republic, reserved the defendant's flight OE 503 on 14 June 2018 from Palma de Mallorca (PMI, Spain) to Vienna (VIE, Austria). The scheduled time of departure was 14.40, with a scheduled time of arrival of 17.05. The passengers used the reservation system of the online platform k*****.com. The court is aware that the operator of the booking platform is established in the Czech Republic. The email address which they entered was: m*****.o*****@gmail.com. k*****.com made the reservation in the passengers' names and, as the reservation was being processed, an email address was generated specifically for that reservation. That email address (6703421@hositojsmezasemy.com) was entered as the contact email address in the air carrier's system. No other email address was entered or known to the air carrier.

The **applicant**, which is seeking judgment awarding EUR 500, submits that the passengers have a right to compensation under Article 7 of the Air Passenger Rights Regulation of EUR 250 each, giving a total of EUR 500, and that that claim was assigned by them to the applicant by a declaration of assignment dated 12 October 2018. The applicant argues, first, that the flight was delayed by more than three hours and, second, that the passengers also have a right to compensation because they were not informed that the flight had been brought forward by just under six hours until 10 June 2018, that is to say, less than seven days before the flight **[Or. 4]**; that it would have been easy for the defendant to establish which reservations had been made via the k*****.com platform in the case of all email address entered; that the platform is a travel agent; and that it is for the air carrier to ascertain the identity of the other party to the contract, which is obvious in the case of automatically generated emails.

The **defendant** contests the form of order sought, both as to the grounds for, and the amount of, the claim, and contends that the action should be dismissed. It argues that the flight was 29 minutes, not more than three hours, late; that an email advising that the flight had been brought forward was sent out on 23 May 2018; that as the passengers' contact details had not been forwarded to it, the defendant was unable to contact them directly, an action which would not have been permissible for reasons of data protection; and that it has no contractual relationship with k*****.com, which is not a travel agent and which makes reservations in the defendant's systems by pretending to be a passenger against the defendant's will. The defendant contends that it had no way of knowing that k*****.com would receive the confirmation of reservation, boarding passes and other information via the email address generated specifically for the reservation; that, the passenger must take responsibility for using k*****.com; and that an air carrier cannot reasonably be expected to verify who the email addresses entered actually belong to or engage in detective work to establish each passenger's actual email address.

By the **judgment** under appeal, the District Court, Schwechat, which was seised at first instance, rejected the form of order sought. **[Or. 5]**

In addition to the uncontested facts recounted above, it found that the defendant has no contractual relationship with the booking platform k*****.com and that k*****.com has no access to the defendant's reservation system; that, were the defendant to review each individual reservation and, in particular, the email address entered for it, the defendant would realise that an email address such as that used in this case had most probably been generated automatically but, as incoming reservations are not opened and checked individually by an employee due to the large number of reservations received (around 20 000 a day), there is initially no difference as far as the defendant is concerned between reservations made via k*****.com and reservations made by the passengers themselves; that it cannot be determined whether it is technically possible to establish, without having to retrieve each individual reservation, whether a reservation was made via k*****.com or whether it is technically possible for the defendant to prevent

reservations being made via or by k*****.com; that, when flight times are changed, the defendant initially informs passengers by email and that, if that does not work, the defendant tries to contact them via some other channel, for example by sending a text message to the telephone number provided; that on 23 May 2018 and on 29 May 2018 the defendant sent information about the earlier flight time to the email address generated automatically by k*****.com and, as both emails were delivered successfully, the defendant assumed that it had informed the passengers of the change to the flight time; and that passenger M***** O***** received on 10 June 2018 an email from tickets@k*****.com to his (regular) email address (m*****.o*****@gmail.com), informing him **[Or. 6]** that the time of departure had been changed from 14.40 to 8.25. […] The court of first instance did not make any further findings, especially as to when the flight which had been brought forward landed. Nor did it consider whether the passengers knew or should have known that they had been allocated an automatically generated email address and whether and, if so, how passengers had the facility to retrieve information sent to the automatically generated email address.

The applicant **appealed** against that judgment to the referring court, requesting that the judgment under appeal be amended to the effect that the form of order sought is granted. The applicant refers in particular to the judgment of the Court of 11 May 2017, *Krijgsman*, C-302/16, and argues that it must be guaranteed that a passenger whose flight has been booked via a third party and then cancelled must be identified. It argues that the air carrier bears the burden of proof as to whether information was provided and as to the fact that it was unable to check whether the email address belonged to the passenger.

The defendant requests that the appeal be dismissed. It contends that the judgment of the Court of 11 May 2017, *Krijgsman*, C-302/16, does not apply because the air carrier was entitled to assume that the email address provided belonged to the passengers; that the defendant did not assume that it had notified a travel agent; and that the passengers, not the air carrier, must take responsibility for the fact that contact data were provided during the reservation procedure **[Or. 7]** that did not belong to the passengers.

Lastly, the defendant argues in its **response** that a flight brought forward by several hours is not the same as a cancelled flight.

The referring court, sitting as an **appellate court**, is called upon to rule at second and final instance on the applicant's claims. In doing so, it has to confine itself to a review of the legal issues, in accordance with the provisions enacted in national procedural law […]. It has to consider whether bringing a flight forward establishes the same right to compensation as cancellation (Question 1). Then it must consider whether the passengers must be regarded as having been validly informed of the cancellation (Questions 2 and 3).

The possible outcomes are as follows:

(a) If this was not a cancellation, no right to compensation exists as there has been no incomplete performance, in which case the judgment under appeal would have to be set aside and the court of first instance would have to examine the facts in light of an alleged and unexamined delay rather than a cancellation.

(b) If this was a cancellation and the notification emailed on 23 May 2018 is regarded as having informed the passengers of the cancellation of the flight on 14 June 2018, no right to compensation under Article 5(1)(c)(i) of the Air Passenger Rights Regulation exists, in which case the judgment under appeal would again have to be set aside and the court of first instance would have to examine the facts in light of an alleged and unexamined delay.

(c) If the notifications emailed on 23 May 2018 and 29 May 2018 cannot be regarded as having informed the passengers of the cancellation of the flight on 14 June 2018 **[Or. 8]**, the passengers were not informed until 10 June 2018 (by email from k******.com), in which case, as the re-routing was more than one hour before the scheduled time of departure and thus outside the time limit laid down in Article 5(1)(c)(iii) of the Air Passenger Rights Regulation, the judgment under appeal would have to be amended to the effect that the form of order sought is granted.

Consideration of the **questions referred**:

Question 1:

The Air Passenger Rights Regulation confers a right to compensation for incomplete performance, denied boarding, cancellation and delay. It does not regulate flights that are brought forward.

The applicant relied in the proceedings at first instance on press release No 89/2015, X ZR 59/14, issued by the German Bundesgerichtshof (Federal Court of Justice, 'the BGH'). Although the BGH delivered its judgment of 9 June 2015 on the basis of an admission by the air carrier and without any further considerations, its press release expresses the chamber's provisional finding that, where a scheduled flight is brought forward by the air carrier by more than a negligible amount of time, that may substantiate a right to compensation under Article 7(1) of the Air Passenger Rights Regulation, as the original flight plan is abandoned where a flight is brought forward by several hours.

The defendant, on the other hand, relies in its response on a judgment delivered by the Handelsgericht Wien (Commercial Court, Vienna) on 13 November 2018 (1 R 285/18k […]). That court found that the application by analogy of the rules governing cancellations is frustrated by an unintended loophole in the regulation, which deals with denied boarding due to overbooking, **[Or. 9]**, not flights brought forward. It has to be noted that the Commercial Court, Vienna, relied on a German judgment, delivered by the Amtsgericht Hannover (Local Court, Hanover) on 3 December 2013 (561 C 3773/13), which ruled at first instance on a case which the BGH ultimately brought to a close by a judgment by consent.

The referring court tends to concur with the BGH that, where a flight is brought forward, the original flight plan has been abandoned and thus the flight has been cancelled.

In light of the different findings made by national courts, the appellate court is entitled and obliged to refer the question to the Court. Similar questions were referred to the Court in Cases C-79/14 and C-345/19; however, those proceedings have since been removed from the register. Comparable questions have been referred and are pending in Cases C-10/20 (*Flightright*) and C-188/20 (*Azurair*).

Question 2:

The following national provisions are relevant for the purpose of examining whether the passengers were informed of the earlier flight time:

Paragraph 862a of the applicable version of the Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code, 'the ABGB'), […] which entered into force in, and has remained unchanged since, 1916, reads:

'Acceptance shall be regarded as received in time if the declaration was received by the proposer within the notification period. However, even if it is out of time, the contract shall enter into force if the proposer should have realised that the declaration of acceptance was sent in time and fails promptly to notify the other party immediately prior to his withdrawal.' **[Or. 10]**

Paragraph 12 of the E-Commerce-Gesetz (Federal Act governing certain legal aspects of electronic commercial and legal transactions, 'the ECG'), Bundesgesetzblatt (Federal Law Gazette) I No 152/2001, reads:

'Electronic contractual declarations, other legally significant electronic declarations and electronic confirmations of receipt shall be regarded as received if the party for whom they are intended can retrieve them under normal circumstances. This provision may not be departed from to the disadvantage of consumers by contractual agreement.'

Paragraph 862a of the ABGB has been applied in all case-law on the receipt of declarations similar to the air carrier's notification of a change to the flight time in this case. That provision is supplemented by Paragraph 12 of the ECG in the case of electronic declarations. It was the documented intention of the legislature that that provision should correspond to the second indent of Article 11(1) of the Directive on Electronic Commerce; however, it goes beyond the rule on receipt laid down in the directive in that it applies not only to orders (that is to say, to declarations of contract proposal or acceptance) and acknowledgements of receipt, but also to all other legally significant electronic declarations, even those unrelated to information society services, such as a simple exchange of declarations by email. All these provisions provide for declarations to be deemed to be received, essentially from the time at which the declaration can be retrieved. However, Article 5(1)(c)(ii) and (iii) and Article 5(2) of the Air Passenger Rights

Regulation suggest that information for the passenger under Article 5 of the Air Passenger Rights Regulation may be regarded as received only once the notification has been received by the passenger.

It is therefore necessary to examine whether receipt of the declaration notifying the earlier flight time has to be appraised under national law on the receipt of emails or under the Directive on **[Or. 11]** Electronic Commerce, or whether the Air Passenger Rights Regulation alone applies. The need to coordinate certain national laws to ensure the proper functioning of the internal market (recital 6) suggests that the Directive on Electronic Commerce and the respective national transpositions apply. This view is supported by the obligation imposed by Article 14(2) of the Air Passenger Rights Regulation on an operating air carrier cancelling a flight to provide each passenger affected with a written notice setting out the rules for compensation and assistance in line with the regulation. The fact that passengers who are travelling do not necessarily have the same access to electronic media as they do at home suggests that the receipt of declarations from air carriers should be understood differently. The referring court is therefore of the opinion that the question of whether the passenger was informed of a cancellation has to be examined solely in accordance with Article 5 of the Air Passenger Rights Regulation.

It would appear to the referring court that this question has not yet been clarified in the Court's case-law.

Question 3:

The question of information or receipt in this particular case has to be examined first in light of the judgment of the Court of 11 May 2017, *Krijgsman*, C-302/16, by which the Court found, inter alia, that it is clear from Article 13 of the Air Passenger Rights Regulation that the regulation in no way restricts the operating air carrier's right to seek reimbursement from a tour operator or another person **[Or. 12]** with whom the operating air carrier has a contract (judgment in *Krijgsman*, paragraph 30). If that is an essential factor for the purpose of adjudication, the judgment in *Krijgsman* cannot be applied to this case. It has been established that no contractual relationship exists between the booking platform and the air carrier and that the only contractual relationship that exists is between the booking platform and one of the two passengers. Therefore, it would be necessary to consider if, mirroring the judgment in *Krijgsman*, the right to compensation should be denied and the passenger should be advised of his right to compensation from the booking platform.

According to one Austrian commentary on Paragraph 12 of the ECG, it should, in principle, be assumed that a declaration sent via a standardised email account was not received. Anyone who surely knows or should know that he has such an account but fails to act on that (e.g. by blocking the account or having the messages forwarded) must accept that messages which can be retrieved from it are valid in his regard, provided that they contain the necessary references. Thus, such

declarations are valid even if they are not known about ([…]). As the question of whether the passenger knew or even just should have known about the automatically generated email account has not been raised in these proceedings, a message sent to him via that account would not be regarded as received.

The referring court further holds that the information forwarded to the booking platform is, in principle, forwarded to the passenger and it was only the contested information concerning the earlier flight time that was forwarded late. The passenger provided the booking platform with the correct email address and did not know that it was not provided to the air carrier. Had the air carrier expended additional effort, it could have realised that this was an automatically generated **[Or. 13]** email address; however, it would not necessarily have had to conclude that messages sent to that address would be received late by the passenger, if at all. Given that, according to Article 5(4) of the Air Passenger Rights Regulation, the burden of proof as to whether and when the passenger was informed of the cancellation of the flight rests with the operating air carrier, the referring court assumes that, in a situation in which neither the passenger nor the air carrier can be held to blame for having used the automatically generated email address, it must be assumed in the event of doubt that the air carrier failed to discharge its obligation to inform the passenger of the earlier flight time.

As it would appear to the referring court that this question has not yet been clarified in the Court's case-law, the court is obliged to refer the question for a preliminary ruling.

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Regional Court, Korneuburg, […]

Korneuburg, 26 May 2020

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