

Anonymised version

Translation

C-438/20 – 1

Case C-438/20

Request for a preliminary ruling

Date lodged:

18 September 2020

Referring court:

Landgericht Düsseldorf (Germany)

Date of the decision to refer:

27 August 2020

Appellant:

BT

Respondent:

Eurowings GmbH

[...]

Landgericht Düsseldorf
(Regional Court, Düsseldorf)

Order

In the case of

BT, [...] Bochum,

applicant and appellant,

[...]

Eurowings GmbH, [...] Düsseldorf,

defendant and respondent,

[...]

the 22nd Civil Chamber of the Regional Court, Düsseldorf,
on 27 August 2020,

[...]

makes the following order:

The proceedings are stayed.

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of EU law pursuant to point (b) of the first paragraph and the third paragraph of Article 267 TFEU: **[Or. 2]**

- 1) Is there a case of ‘denied boarding’ within the meaning of Article 4 and Article 2(j) of Regulation (EC) No 261/2004 even in the case where passengers are denied boarding on the flight in question not at the boarding gate (departure gate) but earlier, at the check-in desk, and for that reason do not even get as far as the boarding gate (departure gate)?
- 2) If the first question is answered in the affirmative, is there a case of ‘denied boarding’ within the meaning of Article 4 and Article 2(j) of Regulation (EC) No 261/2004 even in the case where the passenger is refused acceptance onto the flight at the check-in desk only a few minutes before the scheduled time of departure, that is to say at a point in time by which it is clear that boarding has already closed and it is effectively no longer possible to accept passengers onto the flight?
- 3) If the second question is answered in the negative, does the fact that the passenger is rebooked onto another flight constitute a case of ‘denied boarding’ within the meaning of Article 4 and Article 2(j) of the Regulation, in the case where the passenger reaches the check-in desk only a few minutes before the scheduled time of departure, that is to say at a point in time by which it is clear that boarding has already closed and it is effectively no longer possible to accept passengers onto the flight, and has been denied boarding because boarding has already closed?
- 4) In the event that questions 1 to 3 are answered in the negative, is Article 2(j) of Regulation (EC) No 261/2004 to be interpreted as meaning that a situation in which passengers join the queue at the check-in desk in good time (here, approximately two hours) before departure, but, because of organisational shortcomings on the part of the airline (such as not opening enough check-in desks, short staffing and not providing information to passengers over the public announcement system) and/or on account of

disruptions affecting the airport (in this instance, a baggage carousel malfunction), do not reach the front of the queue at the check-in desk until a point in time (in this instance, five minutes before the scheduled time of departure) by which boarding has already closed and for that reason passengers are no longer being accepted onto the flight, constitutes a case of ‘denied boarding’ within the meaning of Article 2(j) of the Regulation? **[Or. 3]**

Grounds:

I.

The applicant is seeking from the defendant, in her own right and under rights assigned to her from her husband, the payment of compensation pursuant to Article 7(1)(b) of 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 repealing Regulation (EEC) No 295/91 (‘the Regulation’) on account of denied boarding.

The applicant booked with the defendant a return flight for herself and her husband on the Düsseldorf – Malaga route (No. EW 9536). The outbound flight was scheduled to depart Düsseldorf at 07:05 on 27 May 2018 and arrive in Malaga at 10:10.

The distance between Düsseldorf and Malaga is 1 854 km.

The applicant and her husband arrived at the airport at approximately 05:00, that is to say some two hours before the scheduled time of departure at 07:05, and joined the queue at the check-in desk. On account of a baggage carousel malfunction, the queue was long and consisted of some 200 to 300 passengers. They queued for two hours. When they reached the front of the queue at approximately 07:00, a member of staff at the check-in desk refused to allow them onto the flight because boarding had already closed. They were directed to the information desk, where they were offered an alternative flight (EW9536) at 06:45 the following day, 28 May 2018. As a result, they did not reach their final destination of Malaga until 09:00 the following day. The applicant and her husband were not called forward over the public announcement system, either by name or as passengers of flight EW9536, while they were waiting in the queue.

The applicant is seeking, inter alia, compensation for denied boarding under Article 4(3) and Article 7(1)(b) of the Regulation for herself and her husband. **[Or. 4]**

The defendant takes the view that this is not a case of denied boarding within the meaning of Article 2(j) and Article 4 of the Regulation. The [applicant and her husband] did not present themselves for check-in at the boarding gate in good time, even though this is a specific requirement under Article 2(j) of the

Regulation. It is the responsibility of passengers to present themselves at the boarding gate in good time. The applicant and her husband could have made themselves known to the defendant's staff and asked to be checked in earlier.

At first instance, the Amtsgericht Düsseldorf (Local Court, Düsseldorf) dismissed the action by judgment [...] given on 5 December 2019.

In giving the reasons for its decision, the Amtsgericht Düsseldorf stated that this is not a case of 'denied boarding' within the meaning of Article 4 and Article 2(j) of the Regulation because the applicant and her husband did not present themselves at the gate before boarding closed and it was not made clear to them either at the gate or beforehand that they would not be accepted onto the flight they had booked. The Regulation sets out only minimum rights and does not provide for compensation in every situation in which a passenger is denied boarding.

The [applicant] lodged an appeal against that judgment in the manner and within the time limit prescribed. It is that appeal on which this Chamber is now called upon to give a ruling.

In setting out the grounds for her appeal, the applicant states that the Amtsgericht was wrong to find at first instance that the conditions governing 'denied boarding' within the meaning of Article 4 and Article 2(j) of the Regulation were not met. First, the Amtsgericht disregards the fact that the applicant and her husband were indeed denied boarding, as soon as they presented themselves at the check-in desk after having reached the front of the queue at approximately 07:00, that is to say five minutes before the scheduled departure. Even if denied boarding at such a late stage is considered to be no longer sufficient [to warrant compensation], the defendant has in any event been 'organisationally negligent'. It has a duty to organise operations at the airport in such a way as to ensure that passengers who present themselves at the check-in desk at or before the time indicated can always make their flight in time. The defendant failed to discharge that duty because the applicant and her husband were not checked in in time, even though they had joined a queue for check-in two hours before the scheduled departure. The defendant is therefore liable to pay compensation for denied boarding. **[Or. 5]**

The defendant defends the judgment at first instance.

II.

The success of the [applicant's] appeal turns crucially on the questions set out above.

In particular:

The applicant might be entitled to compensation for denied boarding in the amount of EUR 400 for herself and her husband respectively, and thus EUR 800 in total, pursuant to Article 4(3) and Article 7(1)(b) of the Regulation.

This might be a case of ‘denied boarding’ within the meaning of Article 2(j) and Article 4 of the Regulation.

If boarding is denied to passengers against their will, the operating air carrier must immediately compensate them in accordance with Article 7 of the Regulation (see Article 4(3) of the Regulation). According to the legal definition provided in Article 2(j) of the Regulation, ‘denied boarding’ means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2) of the Regulation, except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documents.

Pursuant to Article 3(2)(a) of the Regulation (to which the legal definition given in Article 2(j) refers), passengers must have a confirmed reservation on the flight concerned and present themselves for check-in as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent or, if no time is indicated, not later than 45 minutes before the published departure time.

1.

First of all, it might be irrelevant that the assignors did not present themselves ‘for boarding’ at the times indicated in Article 3(2) of the Regulation and that, for that reason, they were also not denied boarding at the boarding gate (departure gate). It is true that, according to its wording, Article 2(j) [Or. 6] of the Regulation requires boarding to have been denied even though the passengers presented themselves ‘for boarding’ under the conditions laid down in Article 3(2) of the Regulation. That wording is therefore the first indication that passengers must always present themselves in good time at the boarding gate and must have been denied boarding at the boarding gate too.

Thus, the Bundesgerichtshof (Federal Court of Justice, Germany) (‘the BGH’), too, has held that a passenger who wishes to make a claim for denied boarding must in principle have been present at the boarding gate. Accordingly, if the passenger joins the queue in good time but is not checked in in good time because of high demand, there is no denied boarding. In those circumstances, it is open to the passenger to take action himself to prompt the air carrier to deny him boarding by word or deed. This is because Regulation No 261/2004 does not contain a comprehensive set of rules providing for rights to compensation, refunds and assistance in every case in which passengers are either not carried or not carried at the time they were due to have been. The Regulation simply establishes minimum rights for passengers in the event of denied boarding against their will, flight cancellations or flight delays. Those minimum rights are statutory rights that do

not arise from the contract of carriage which the passenger has concluded with, for example, the air carrier. Furthermore, Article 12(1) of the Regulation leaves it to (national) contract law to determine whether an air carrier whose conduct has led to a case of denied boarding within the meaning of the Regulation is under any further obligation to assume liability (see BGH, indicative order of 16 April 2013 – X ZR 83/12, NJW-RR 2013, pp. 1462, 1463). In that case too, however, the BGH had not come to any conclusions with respect to whether there had been an express refusal at the check-in desk, the BGH having expressly held that even an early denial of boarding, which takes place before the passenger presents himself at the boarding gate, may be covered by Regulation No 261/2004, provided that such a denial is clearly communicated to the passenger (see BGH, loc. cit., paragraph 11).

In a later decision concerning a transfer to another flight (rebooking) made several days before the scheduled time of departure, however, the BGH made it clear that, in a case of early denied boarding which is communicated to the passenger [Or. 7] before he has presented himself for check-in, it is not a condition of claiming compensation for denied boarding that the passenger should have presented himself on time for check-in and at the boarding gate. On the contrary, neither presentation for check-in nor presentation at the boarding gate is material in the case where the air carrier has previously communicated to the passenger in unambiguous terms its intention not to carry him ('pre-emptive' denied boarding; see BGH, judgment of 17 March 2015 – X ZR 34/14, NJW 2015, pp. 2181, 2182, paragraph 8 et seq.). The Regulation does not expressly envisage the situation where a passenger is denied boarding before he even presents himself at the boarding gate. On the contrary, Article 2(j) of the Regulation specifically defines denied boarding as the refusal at the boarding gate to accept a passenger who is willing to board the flight. It may nonetheless be the case, in the light of the high level of protection which Regulation 261/2004 strives to achieve, that presentation at the departure gate may not be required on every occasion as a condition of entitlement to compensation (see BGH, loc. cit., paragraph 11).

However, since the Court of Justice has not – so far as this Chamber can tell – ruled on the possibility of pre-emptive denied boarding even at the check-in desk and prior to arrival at the gate, that question falls to be referred to that court for a preliminary ruling.

2.

If it is assumed that an airline may deny boarding for the purposes of Article 2(j) of the Regulation not only at the boarding gate (departure gate) but also beforehand at the check-in desk (see in this regard Section 1.), the further question arises as to the point up to which boarding may still be denied in this way. In the view of this Chamber, the refusal to board the applicant and her husband at the check-in desk at approximately 07:00 on 27 May 2018, that is to say five minutes before the scheduled time of departure, can no longer be regarded as a legally relevant case of denied boarding because it was clear that boarding had already

closed and it was no longer possible for the applicant and her husband to be accepted onto the flight. Thus, the BGH too has held that *boarding can no longer be refused once the aircraft has left the stand [Or. 8] and the boarding of a further passenger is no longer actually possible* (see BGH, judgment of 30 April 2009 – Xa ZR 78/08, NJW 2009, pp. 2740, 2741, paragraph 9).

Since there is – so far as this Chamber can tell – no case-law of the European Court of Justice on this issue either, these questions fall to be referred to that court for a preliminary ruling.

3.

According to the case-law of the BGH, the fact that, after the applicant and her husband failed to make it to the check-in desk in good time, the defendant re-booked them onto a different flight the following day does not constitute a case of denied boarding either. The BGH takes the view that a rebooking made after late presentation at check-in does not constitute a case of denied boarding within the meaning of Article 2(j) of the Regulation (see BGH, judgment of 30 April 2009 – Xa ZR 78/08, NJW 2009, pp. 2740, 2742, paragraph 20).

Since there is – so far as this Chamber can tell – no case-law of the European Court of Justice on this issue either, these questions too fall to be referred to that court for a preliminary ruling.

4.

In the event that denied boarding at the check-in desk at such a late stage, that is to say only minutes before departure and after boarding has closed, does not fall within the scope of Article 2(j), the further question arises as to whether the requirement of an express denial of boarding may, exceptionally, be waived entirely in the present case on account of ‘organisational negligence’, meaning that the passenger is nonetheless entitled to compensation under Article 7(1) of the Regulation.

The European Union judicature has not as yet clarified whether a situation such as that here, where the passengers joined the queue for the check-in desk in good time (in this instance, some two hours) before departure but, owing to organisational shortcomings on the part of the defendant (such as not opening enough check-in desks, short staffing and not providing information to passengers over the public announcement system) and/or on account of disruptions affecting the airport (such as, as in this instance, a baggage carousel malfunction), do not reach the front of the queue at the check-in desk [Or. 9] until a point in time (in this instance, five minutes before the scheduled time of departure) by which boarding has already closed and, for that reason, passengers are no longer being accepted onto the flight, constitutes a case of ‘denied boarding’ within the meaning of Article 2(j) of the Regulation.

It is true that, in accordance with the abovementioned case-law of the German BGH, the Regulation provides for only minimum rights and does not cover every situation in which a passenger – for whatever reasons – is denied boarding (see BGH, indicative order of 16 April 2013 – X ZR 83/12, NJW-RR 2013, pp. 1462 and 1463; judgment of 30 April 2009 – Xa ZR 78/08, NJW 2009, pp. 2740, 2741 et seq., paragraph 13 et seq.). However, this Chamber is uncertain whether, in the light in particular of the objective pursued by Regulation (EC) 261/2004 of guaranteeing a high level of protection for passengers, the European Court of Justice would not regard such a situation as falling within the concept of ‘denied boarding’ within the meaning of Article 2(j).

An argument in favour of that position might be that the act by the passenger of joining the queue for the check-in desk in good time marks the point at which the passenger’s responsibility comes to an end and the air carrier’s sphere of influence begins. From that point onwards, the passenger ceases to be able to bring any influence to bear on his progress in the queue. The air carrier, on the other hand, can in principle control the organisation of check-in, for example by opening additional check-in desks.

Furthermore, airlines must manage their operations in such a way as to ensure that passengers presenting themselves before the time indicated can check in in good time and board their flight. Any breakdown in that process resulting from short staffing, data processing disruptions or baggage handling issues, and from the long queues at check-in which such problems cause, is arguably the responsibility of the carrier alone. Otherwise, it would ultimately be in the gift of the air carrier to deny a passenger his rights, for instance by deliberately slowing down the check-in process (in cases where flights are overbooked, for example) or ‘producing’ long queues (by opening too few desks, for instance). It is, in addition, common practice for an airline to put out a further, special, call requesting or inviting passengers whose flight is about to close imminently to report for check-in, and, for those passengers that present themselves in response to such a call, to create or have available a speedier means of checking in in good time. **[Or. 10]**

What is more, the 45-minute deadline laid down in Article 3(2)(a) of the Regulation is intended in particular to give passengers legal certainty as to the latest point in time by which they must present themselves for check-in in order to be able to assert their right to board the flight. If, on the other hand, the relevant criterion were the actual time of check-in, passengers would hardly ever be able to determine with any certainty when they must present themselves for check-in. They would have to take into account every conceivable delay to the check-in process. This is virtually impossible because passengers can neither specifically anticipate what might cause delays nor properly assess the scale or duration of individual delays. What is more, air carriers are able, on the basis of the reservations made, to estimate from the outset how many passengers are likely to present themselves at a given check-in desk. Passengers who have checked in online and have paid in advance for checked baggage can certainly be expected to

present themselves for check-in. Operating air carriers are not without options even if they expect check-in to be hampered by obstacles or bottlenecks. For they are at liberty, pursuant to Article 3(2)(a) of the Regulation, to stipulate, in advance and in writing (including by electronic means), a more generous period of time within which passengers must have presented themselves for check-in.

In so far as the defendant considers that passengers who are running out of time [to check in] cannot simply stand silently by in the queue, but must actively make themselves known to the airline's staff or else expose themselves to the accusation of contributory negligence, there are compelling arguments to support that view too.

As the European Court of Justice has not yet given a ruling on that question, this too falls to be referred to that court for a preliminary ruling.

III.

[...] [national rules of procedure]

[...]

[Or. 11] [...]

Landgericht Düsseldorf

(Regional Court, Düsseldorf)

WORKING DOCUMENT