Anonymised version

Case C-252/20

Request for a preliminary ruling

Date lodged:

10 June 2020

Referring court:

Amtsgericht Hamburg (Germany)

Date of the decision to refer:

25 May 2020

Applicant:

CY

Defendant:

Eurowings GmbH

Certified copy

Amtsgericht Hamburg (Local Court, Hamburg)

[…]

Order

In the case of

CY, […] Witzhave

- Applicant -

[…]

v

Eurowings GmbH, […] Düsseldorf

- Defendant -

[…]

the Amtsgericht Hamburg makes the following order: […]

The proceedings are stayed.

The following questions on the interpretation 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] are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:

1. Can a right to compensation under Article 7 of Regulation (EC) No 261/2004 also exist when a passenger misses a directly connecting flight due to a relatively minor delay in arrival, resulting in a delay in arrival at the final destination of three hours or more, where the two flights were operated by different air carriers and the booking was not made through the air carrier which operated the flight on the first segment of the journey and against which a claim has been made in the main proceedings? **[Or. 2]**

2. If the answer to Question 1 is in the affirmative:

Is the air carrier which actually operated the delayed flight on the first segment of the journey the ‘operating air carrier’ within the meaning of Article 5(1)(c) and Article 7(1) of Regulation (EC) No 261/2004 or is the air carrier which operated the punctual flight on the second segment of the journey, via which both flights were booked, the ‘operating air carrier’ within the meaning of Article 5(1)(c) and Article 7(1) of Regulation (EC) No 261/2004?

3. If both air carriers are to be regarded as ‘operating air carriers’ within the meaning of Article 5(1)(c) and Article 7(1) of Regulation (EC) No 261/2004:

Does the passenger have a choice, that is to say, can he or she make a claim against either of the air carriers?

Grounds:

A. Summary of the facts

1. The applicant has made a claim against the defendant seeking compensation of EUR 400 under Regulation (EC) No 261/2004.

2. The applicant booked air travel from Hamburg to Cairo via Zurich for 23 October 2016 through a travel agency. The booking confirmation was issued by Swiss International Air Lines AG. According to the booking confirmation, carriage was arranged as follows: from Hamburg to Zurich on flight LX 4413 (scheduled time of departure 7.00 on 23 October 2016 and scheduled time of arrival 8.25 on 23 October 2016) and from Zurich to Cairo on flight LX 236 (scheduled time of departure 9.05 on 23 October 2016 and scheduled time of arrival 14.05 on 23 October 2016).

3. The flight from Hamburg to Zurich was marketed under a codeshare agreement by Swiss under flight number LX 4413 and by the defendant under flight number EW 4762. Under the codeshare agreement with Swiss, the defendant operated the flight from Hamburg to Zurich (LX 4413) under flight number EW 4762, using its own aircraft and staff.

4. The flight from Hamburg to Zurich operated by the defendant was late, landing in Zurich at 8:46. The applicant then missed her connecting flight to Cairo operated by Swiss **[Or. 3]**, as she had only 19 minutes' connecting time. The minimum connecting time for this connection was 30 minutes. The applicant was therefore transferred to a later connection to Cairo via Milan and landed in Cairo with a delay of over five hours.

5. The applicant argues that, under the codeshare agreement, the defendant was the operating air carrier of the delayed flight from Hamburg to Zurich and is therefore liable for compensation on that ground alone, and that the defendant marketed its flight number EW 4762 in the Amadeus booking system, in which it specifically offered its flights for the purpose of combining various flight segments.

6. The defendant contends that, in the case where a connecting flight is missed due to a slight delay in the arrival of the first flight, a right to compensation exists only if both the feeder flight and the connecting flight were operated by the same air carrier, and that the air carrier which operated the first flight bears no risk in respect of onward flights operated by a different air carrier.

B. The grounds for making a reference for a preliminary ruling to the Court of Justice

7. In order to reach a decision, the referring court requires an answer from the Court of Justice of the European Union to the questions referred.

I. Question 1

8. The applicant might have a right to compensation under Article 7(1)(c) of Regulation (EC) No 261/2004.

9. It is settled case-law of the Court of Justice that delay is tantamount to cancellation of the flight within the meaning of Article 7(1) of Regulation (EC) No 261/2004. Therefore, compensation can also be claimed for such delays under Article 5(1)(c), read in conjunction with Article 7(1), of Regulation (EC) No 261/2004, if arrival at the final destination is delayed by three hours or more (see judgments of 19 November 2009, *Sturgeon and Others*, C-402/07, EU:C:2009:716, paragraph 41 et seq., and of 23 October 2012, *Nelson and Others*, C-581/10, EU:C:2012:657, paragraph 28 et seq.). This also applies when a relatively minor delay **[Or. 4]** results in a long delay in arrival at the final destination due to missing a connecting flight (see judgment of 26 February 2013, *Folkerts*, C-11/11, EU:C:2013:106, paragraph 25 et seq.). However, the judgment in *Folkerts* concerned a situation in which both the feeder flight and the connecting flight were operated by the same air carrier (see judgment of 26 February 2013, *Folkerts*, C-11/11, EU:C:2013:106, paragraph 18).

10. The Court of Justice has not decided to date whether the same applies where, as in this case, the feeder flight and the connecting flight were not operated by the same air carrier.

11. The Bundesgerichtshof (Federal Court of Justice, Germany) stayed the proceedings in a similar case and referred a question on the interpretation of the Air Passenger Rights Regulation to the Court of Justice that was essentially identical to Question 1 above […]. The Court of Justice did not rule on the question referred [Case C-479/16], as the Bundesgerichtshof withdrew it when the claim was acknowledged in the proceedings before it.

12. The Bundesgerichtshof reasoned as follows:

13. ‘(d) It could follow from the spirit and purpose of Article 7 of Regulation (EC) No 261/2004 that a right to compensation can exist only when the airline that caused the delay in arrival at the final destination approved the combination of successive flights by issuing or approving the booking confirmation. This issue has not been definitively clarified in the case-law of the Court of Justice of the European Union.

14. (aa) It is apparent from the case-law of the Court of Justice that a right to compensation can in any case exist when several successive flights are booked with the air carrier against which the claim for payment of compensation is made.

15. In the decisions in which a right to compensation arose from a delay in arrival at the final destination of a directly connecting flight, the successive flights were booked with the air carrier named in the claim in the main proceedings ([…], *Folkerts*, C-11/11, […], paragraph 18); […], and order of 4 October 2012, **[Or. 5]** *Rodríguez Cachafeiro and Others*, C-321/11, […], paragraphs 10 and 34). Other decisions of the Court of Justice, in which the concept of a flight within the meaning of the Regulation was of significance, also concern cases in which the passenger had booked all relevant flights with the air carrier against which he later

brought a claim for compensation (see […], *Emirates Airlines*, C-173/07, […], paragraph 13; […], *Sturgeon and Others*, C-402/07, […], paragraph 11; and […], *Nelson and Others*, C-581/ 10, […], paragraph 15.

16. (bb) That is not the situation in the present case.

17. According to the findings of the appeal court, the two flights were operated by different air carriers. The booking itself was not made with those companies but rather with a tour operator. The tour operator also issued the booking confirmation […]. In the absence of findings to such effect, it cannot be assumed that the defendant issued or approved a ticket for the two flights itself.

18. (cc) In relation to this factual situation, the Regulation itself and the case-law of the Court of Justice cited above do not provide any sufficiently certain conclusions.

19. According to Article 3(2)(a) of the Air Passenger Rights Regulation, that regulation is applicable only if the passenger has a confirmed reservation on the flight concerned. This presupposes, under Article 2(g) of the Air Passenger Rights Regulation, that the reservation has been accepted and registered by the air carrier or tour operator. The latter can be in the form of a ticket, within the meaning of Article 2(f) of the Air Passenger Rights Regulation, issued or authorised by the air carrier or its authorised agent, or in another document.

20. It is very clear from the Regulation that a passenger can have a right to compensation against the operating air carrier even when that air carrier was not involved in the individual booking or its confirmation but permitted an agent or a tour operator to accept and confirm such a booking. The air carrier must in this case assume responsibility for the booking confirmation issued by the agent or tour operator as if it were one of its own. **[Or. 6]**

21. However, it cannot be unequivocally inferred from this that an air carrier must also assume responsibility for the booking confirmation of an agent or a tour operator in so far as it relates to another flight operated by another air carrier. With regard to such a flight, the agent or tour operator acts primarily in the place of the air carrier that operates this flight. From the air carriers' point of view, the situation thus appears similar to when a passenger makes several separate bookings himself with different air carriers for successive flights. In the latter scenario, the Commission assumes, in any event, in its guidelines on the interpretation of the Air Passenger Rights Regulation, that no right to compensation exists (Commission Guidelines of 10 June 2016, C(2016) 3502 final, Section 4(d)(A)(ii), p. 17).

22. (dd) In the view of the present Chamber, there are still some factors supporting the view that a right to compensation can also exist when the booking confirmation for successive flights is issued by a tour operator.

23. (1) The Air Passenger Rights Regulation provides that different types of booking confirmation have in principle the same legal effect. It is also noted, in recital 5, that the protection should also apply to passengers in the context of package tours. An obligation to meet claims in relation to flights combined by a tour operator would also be in line with the aim, defined in recitals 1 to 4, of ensuring a high level of protection for passengers, and the need to take account of the requirements of consumer protection, as well as with the principle, inferred therefrom by the Court of Justice, that the provisions of the Regulation conferring rights on air passengers must be interpreted broadly (see, to that effect, […], *Sturgeon and Others*, C-402/07, […], paragraph 45), whereas the terms used in a provision which constitutes a derogation from a principle or, more specifically, from Community rules for the protection of consumers must be read so that that provision can be interpreted strictly (see, in that regard, judgment of 22 December 2008, *Wallentin-Hermann*, C-549/07, […], paragraph 17).

24. (2) In the view of the present Chamber, upholding a right to compensation is also consistent with the previously expressed view of the Court of Justice on responsibility for performance obligations assumed under the booking confirmation.

25. In the case where an air carrier with which two successive flights **[Or. 7]** have been booked refuses carriage on the second flight on the assumption that the passenger can no longer catch this flight due to the delay in the arrival of the first flight, the Court of Justice has previously upheld a right to compensation. The Court regarded as crucial in this regard the fact that the right should compensate for the inconvenience arising on account of an irreversible loss of time of three hours or more, and that an operating air carrier must in any case be responsible for this inconvenience when it is established that the loss of time is attributable to it — either because it is responsible for the delay to the first flight operated by it, or because it mistakenly assumed that the passengers concerned would not be able to present themselves at the gate in time for the connecting flight, or because it sold tickets for successive flights for which the time available to catch the connecting flight was insufficient ([…], *Rodríguez Cachafeiro and Others*, C-321/11, […], paragraph 34).

26. From the perspective in any event of the passengers whom the right to compensation is intended to protect, a comparable situation exists where the air carrier did not issue or authorise the tickets for successive flights itself, but rather permitted a tour operator to issue such tickets and thereby also to combine flights which are operated by different air carriers.

27. (ee) Nonetheless, the present Chamber does not feel that it can make a decision itself.

28. An application by analogy of the principles developed by the Court of Justice to the factual situation in the present case seems, based on the above, to be

appropriate. However, this is not unequivocally clear from the previous decisions of the Court of Justice.'

29. The referring court agrees with those considerations.

II. Question 2

30. By its judgment of 11 July 2019 ([…], C-502/18, EU:C:2019:604) concerning a flight from Prague to Bangkok via Abu Dhabi which comprised several separate flights to be considered as a single flight, the Court of Justice found the defendant, České aerolinie, to be the operating, and therefore the liable, air carrier under the Air Passenger Rights Regulation. The first flight, operated by České aerolinie, was on time and it was only the **[Or. 8]** second flight, operated by Etihad Airways under a codeshare agreement, that was late. The Court of Justice based its judgment on the fact that České aerolinie was the passenger's counterparty and that a high level of protection for passengers means that the passenger's counterparty is to be held liable as the operating air carrier, especially since it has the facility to take recourse against the air carrier which actually operated the delayed flight.

31. If these principles established by the Court of Justice are applied to the facts in this case, that might mean that Swiss, which issued the booking confirmation in this case, should be regarded as the operating air carrier, not the defendant […]. However, the Court of Justice has not yet ruled on a factual situation that is comparable to the facts in this case.

III. Question 3

32. If, in this case, both Swiss, as the applicant's counterparty, and the defendant, which actually operated the delayed feeder flight using its own aircraft and staff under a codeshare agreement, are to be regarded as operating air carriers within the meaning of Article 5(1)(c) and Article 7(1) of Regulation (EC) No 261/2004, the question then arises as to whether the passenger must make a claim against her counterparty or whether she has a choice, that is to say, she can make a claim against either of the air carriers. Again, this is a question that has not yet been addressed by the Court of Justice.

Dr Kaiser
Judge of the Amtsgericht

[…]