

Case C-451/20**Request for a preliminary ruling****Date lodged:**

23 September 2020

Referring court:

Landesgericht Korneuburg (Austria)

Date of the decision to refer:

25 August 2020

Applicant:

Airhelp Limited

Defendant:

Austrian Airlines AG

[...]

In the case brought by the applicant, **Airhelp Ltd.**, [...] Central Hong Kong (HK), [...] against the defendant, **Austrian Airlines AG**, 1300 Vienna Airport, Austria, [...] for **EUR 300** [...] on occasion of the defendant's appeal against the judgment of the Bezirksgericht Schwechat (District Court, Schwechat, Austria) of 6 April 2020, the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria), sitting as appellate court in a closed session,

ordered as follows:

[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] Must Article 3(1) 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 (Flight Compensation Regulation) be interpreted as meaning **that the [Or. 2] Regulation also applies to an air route booked under a single booking but consisting of two flights, both of which are operated by (the same)**

Community air carrier, if both the place of departure of the first flight and place of arrival of the second flight are in a third country and only the place of arrival of the first flight and the place of departure of the second flight are in the territory of a Member State?

If Question [1] is answered in the affirmative:

[2] Must Article 5(1)(c)(iii) 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 (Flight Compensation Regulation) be interpreted as meaning **that a passenger is entitled to compensation under Article 7(1) of that Regulation even if, on the alternative flight offered to him, his scheduled arrival time at the final destination would have been less than two hours after the scheduled arrival time of the cancelled flight, but he does not actually arrive within that time.**

[II] The appeal proceedings are stayed pending delivery of the preliminary ruling from the Court of Justice of the European Union [...].

Reasons:

The passenger N***** T***** had a confirmed booking for the air route to be operated by the defendant [Or. 3]

- OS 656 from Chişinău (KIV) to Vienna (VIE) with the scheduled flight times on 29 May 2019, 3:55 p.m. to 4:40 p.m., and
- OS 25 from VIE to Bangkok (BKK) with the scheduled flight times 29 May 2019, 11:20 p.m. to 30 May 2019, 2:20 p.m.

Flight OS 656 was cancelled less than seven days before the scheduled departure. The defendant therefore re-routed the passenger to flight TK 68 from Istanbul (IST) to BKK with the scheduled flight times 30 May 2019, 1:25 a.m. to 3:00 p.m. (It was not possible to determine how and at what times the passenger was transported from KIV to IST). Flight TK 68 arrived in BKK at 4:47 p.m. and thus with a delay of 1 hour and 47 minutes.

The passenger would have therefore reached his final destination BKK on flight TK 68 40 minutes later than on flight OS 25, which he had originally booked, had it been operated according to schedule. However, the actual delay of flight TK 68 in relation to the scheduled arrival of flight OS 25 was 2 hours and 27 minutes.

(Incidentally, flight OS 25 – which was not cancelled but which could not be used by the passenger because of the cancellation of inbound flight OS 656 – reached BKK at 3:15 p.m., i.e. 55 minutes late).

The distance between KIV and BKK is more than 3,500 km according to the great-circle method.

The passenger assigned his right to the applicant pursuant to Article 7 of the Flight Compensation Regulation; the latter accepted the assignment.

Relying on Article 5(1)(c) in conjunction with Article 7(1)(c), (2) of the Flight Compensation Regulation, the **applicant** seeks an award of EUR 300 and submits, in essence, that the passenger is entitled to compensation on the ground that the defendant did not offer to re-route him [**Or. 4**] to enable him to actually reach his final destination BKK within two hours from the scheduled arrival of flight OS 25. However, the defendant is entitled to reduce the compensation pursuant to Article 7(2) of the Regulation because he reached his final destination within four hours.

The **defendant** challenges the order sought, contends that the action should be dismissed and argues, in summary, that the passenger cannot claim compensation on the ground that flight TK 68 flight was scheduled to arrive at 3:00 p.m.

In its **judgment** under appeal, the Bezirksgericht Schwechat (District Court, Schwechat) as the court of first instance allowed the claim. On the basis of the facts established, which are not disputed [...] and are set out above, the court considered the law and took the view that it was clear from the text of the Regulation that [under Article 5(1)(c)(iii) of the Flight Compensation Regulation] the comparison between the scheduled arrival time of the original flight and the actual arrival at the final destination using the re-routed flight was decisive. An air carrier is therefore exempt from payment of compensation if the passenger actually arrives at his final destination using the alternative flight offered no more than two hours after the originally scheduled arrival time. If that was not the case, the passenger would be entitled to compensation for the cancellation of the originally planned flight even if the replacement flight – had it been operated on schedule – would have released the defendant from his obligation to pay compensation. In this case, the passenger on flight OS 25 was scheduled to land at BKK at 2:20 p.m., but in fact he only reached his [**Or. 5**] final destination using flight TK 68 at 4:47 p.m. The claim for compensation – reduced by 50% pursuant to Article 7(2)(c) of the Flight Compensation Regulation – was therefore valid. The court of first instance did not address the question whether the provisions of the Flight Compensation Regulation were even applicable to the facts at issue.

The defendant **appealed** against that judgment to the referring court, requesting that the judgment under appeal be amended to the effect that the order sought be rejected. The appellant claims, in essence, that it is not apparent from the wording of Article 5(1)(c)(iii) of the Flight Compensation Regulation that reference must be made to the actual arrival at the final destination in order to determine the time frame described therein; instead, what matters is the comparison of the scheduled arrival of the flight originally booked and the scheduled arrival of the re-routed flight.

In its **response to the appeal**, the applicant argues in essence that the argument put forward by the court of first instance was correct given that, by focusing on the scheduled arrival time of the re-routed flight, it was not ensured that the passenger was spared the trouble of arriving late at his final destination.

As the **appellate court**, the referring court is called upon to rule on the applicant's claims at second and final instance. In doing so [...] it must confine itself to examining questions of law.

Consideration of the questions referred: [Or. 6]

Question [1]:

Under Article 3(1) of the Flight Compensation Regulation this Regulation applies:

- a) *to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;*
- b) *to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the air carrier operating the flight concerned is a Community carrier.*

It can be inferred from the detailed preliminary considerations set out by the Court of Justice of the European Union in its decision [of 11 June 2020] in Case C-74/19 *Transportes Aéreos Portugueses* [EU:C:2020:460] (paragraph 31 et seq.), which concerned a single air route booked from Fortaleza (Brazil) via Lisbon (Portugal) to Oslo (Norway), that it only considered the Flight Compensation Regulation to be applicable with reference to Article 47(2) of the EEA Agreement in conjunction with Article 126(1) of the EEA Agreement, point 8 of Protocol 1 to the EEA Agreement and Annex XIII to the EEA Agreement, subject to the conditions laid down in the Regulation, for flights that departed or terminated at an airport within Norwegian territory [...]. Accordingly, the stopover in European Union territory (Lisbon) had no effect such as to render the Flight Compensation Regulation applicable.

In the present case, however, this would mean that the Flight Compensation Regulation would not apply to the KIV-VIE-BKK air route booked in the present case.

It is, however, uncertain whether that interpretation was intended by the legislator in the light of the high level of protection aspired to in recital 1 [**Or. 7**] of the Regulation.

If the two flights had not been the subject of a single booking, each of the two flights would have indeed fallen within the scope of the Flight Compensation Regulation on account of the clear wording of Article 3(1) of the Regulation. The

passenger would be deprived of protection solely because of the fact that only a single booking was made.

The additional (scheduled) carriage by the same air carrier, either on a feeder flight into European Union territory or a connecting flight out of European Union territory, would thus deprive the passenger of the protection he would enjoy without the additional flight booked.

Question [2]:

In the present case, the relevant question is whether the provision of Article 5(1)(c)(iii) of the Flight Compensation Regulation,

[that] in case of cancellation of a flight the passengers concerned shall have the right to compensation by the operating air carrier in accordance with Article 7, unless they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival

must be interpreted as meaning that the time frame established therein refers to the scheduled or the actual times of departure and arrival of the re-routed flight. If the focus lies on the scheduled arrival at the final destination (time difference: 40 minutes), there would be no compensation claim; if the focus lies on the actual arrival (time difference: 2 hours and 27 minutes) there would be a valid compensation claim. **[Or. 8]**

In common parlance, ‘allowing’ means that the actual conditions for achieving an objective are established and it therefore depends only on the addressee whether or not they exercise the option offered to them. The legislator could, however, have chosen clearer wording in order to base the right to compensation on the actual circumstances. However, this argument can also be applied in reverse because, even if the legislator had wanted to base the right to compensation only on the scheduled times of the replacement service, this could have also been worded more clearly.

It is therefore sensible to refer to other language versions of the text of the Regulation. The English version

‘...are offered re-routing, allowing them to ...’

and the French version

‘...un réacheminement leur permettant ...’

are broadly equivalent to the German version while the Dutch

‘...[hun een] andere vlucht naar hun bestemming wordt aangeboden die niet eerder dan één uur voor de geplande vertrektijd vertrekt en hen minder dan twee uur later dan de geplande aankomsttijd op de eindbestemming brengt.’

and the Danish version

‘... og får tilbudt en omlægning af rejsen, så de kan afrejse højst en time før det planlagte afgangstidspunkt og ankomme til det endelige bestemmelsessted senest to timer efter det planlagte ankomsttidspunkt.’

seem to clearly focus on the actual departure and arrival times, while the Italian version

‘...e sia stato loro offerto di partire con un volo alternativo non più di un’ora prima dell’orario di partenza previsto e di raggiungere la destinazione finale [Or. 9] meno di due ore dopo l’orario d’arrivo previsto.’

does not seem to consider the actual arrival time to be decisive.

As far as the appellate court can see, the prevailing case-law of the national courts interprets the provision in question as requiring the scheduled arrival time of the cancelled flight to be compared to the actual arrival time of the replacement flight. [...]

Similarly, in its judgment [of 27 June 2018, *flightright v Eurowings* (C-130/18, EU:C:2018:496)], the Court of Justice also relied on the difference between the scheduled arrival of the cancelled flight and the actual arrival of the replacement flight; however, the facts underlying that case did not show whether or not the difference between the scheduled arrival of the cancelled flight and the actual arrival of the replacement flight was more than two hours or not. Nor did the question referred in that case refer to the interpretation of Article 5(1)(c) of the Flight Compensation Regulation, but to the conflict between it and the decision of the European Court of Justice of 19 November 2009 in *Sturgeon and Others* (Joined Cases C-402/07 and C-432/07, EU:C:2009:716)].

However, the applicant’s argument that the flight times of the replacement flight should be taken into account is entirely convincing, however, because it presents two examples to show that, if only the actual times of the replacement flight are taken into account this may lead to results that clearly contradict the purpose of the Flight Compensation Regulation, i.e. to ensure a high level of protection for passengers, for whom [Or. 10] denied boarding, cancellations or long delays cause trouble (recitals 1 and 2).

Example 1:

The flight times of the flight cancelled at short notice are 10:00 a.m. to 12:00 noon. The passenger receives an offer for a replacement flight with an off-block time of 07:00 a.m. However, that flight is subsequently subject to a two-and-a-

half-hour delay and eventually leaves with an off-block time of 09:30 a.m. Although, in this case, the passenger is inconvenienced twice, namely first in terms of receiving an offer that does not meet the criteria of Article 5(1)(c)(iii) of the Regulation (which may also mean that he has to arrive at the airport significantly earlier than anticipated) and, thereafter, in terms of a delay (even if this is less than three hours), he would not be entitled to compensation. In cases such as these, the air carrier operating the cancelled flight would even be 'rewarded' for the delay of the replacement flight.

Example 2:

The flight times of the flight cancelled at short notice are 10:00 a.m. to 12:00 noon. The passenger is offered a replacement flight with an off-block time of 09:00 a.m. This reduces the trouble for the passenger because he merely has to 'suffer' a flight transfer while, essentially, staying within the scheduled travel times. The passenger does not, however have a right to compensation. If the flight in question is dispatched earlier than planned because of rapid boarding (for example, because a much lower volume of passengers is transported on the replacement flight), which means that it has an earlier off-block time of say 8:55 a.m., this would give the passenger a right to compensation because the flight departs more than an hour before the flight originally booked. The air carrier would therefore have been better placed to have taken its time boarding, and the passenger receives compensation for the fact that the flight departs a few minutes earlier even though – in contrast to the previous example [Or. 11] – his flight times have barely changed. In this case, the air carrier of the cancelled flight would be 'punished' for the rapid boarding of the operating air carrier.

There is nothing in the wording of Article 5(1)(c)(ii) and (iii) of the Flight Compensation Regulation to suggest that that provision was intended to make a distinction with regard to the replacement service in such a way that departure times are determined on the basis of scheduled flight times whereas the arrival times are determined on the basis of the actual hours of arrival.

In addition, the following shall be taken into account: in accordance with its wording ('*are offered*') the provision to be interpreted appears to assume that the air carrier is required to reimburse only a (realistic and acceptable) offer for a replacement service, namely that it is only required to re-route passengers to a replacement flight, which does not have to be operated by the air carrier itself. It does not, therefore, have to operate the replacement service itself but must merely 'enable' the passenger to use such service. The question is therefore whether any delay of the replacement flight, which may not lie within its sphere of responsibility should in fact be attributable to the air carrier being held liable, or whether it has already fulfilled all its obligations by offering to re-route the passenger (and doing so in the event that the passenger accepts the offer) and is therefore able to avert a compensation claim.

That must be taken into consideration in particular in the light of the recent decision of the Court of Justice [of 12 March 2020, *Finnair* (C-832/18, EU:C:2020:204)], according to which the inconvenience caused to a passenger by the cancellation of the booked flight and the long delay of the replacement flight must be assessed separately and may, where appropriate, give rise to two **[Or. 12]** rights to compensation (judgment [...] *Finnair* paragraph 31).

If one were to focus on the actual arrival time of the replacement flight, that could lead to different legal consequences in comparable situations.

Example 3:

The flight short-term cancelled flight should have reached the final destination at 15: 00. The replacement flight offered to the passenger actually reached the final destination at 8:00 p.m.

First alternative

The air carrier re-routes the passenger onto a replacement flight intended to reach the final destination at 4:00 p.m.

In that case, the passenger would have two claims to compensation: first, against the air carrier which should have operated the cancelled flight on the grounds that the actual arrival of the replacement flight is delayed by five hours compared to the scheduled arrival time of the cancelled flight and, therefore, the limits of Article 5(1)(c)(iii) of the Flight Compensation Regulation are not complied with; second, against the air carrier operating the replacement flight on the grounds that its flight was subject to a significant delay in arrival at the final destination of four hours in relation to its own flight schedule.

Second alternative

The air carrier re-routes the passenger onto a replacement flight scheduled to reach the final destination at 6:30 p.m.

In that case, the passenger receives compensation from the air carrier scheduled to operate the cancelled flight; however, he does not receive any compensation from the air carrier operating the replacement flight since the latter was only 1 hour and 30 minutes delayed in relation to his own flight schedule.

In both cases, the passenger suffers the same inconvenience: the cancellation of the original flight and the five-hour delay in relation to the scheduled arrival time of the cancelled flight. **[Or. 13]**

If, however, the focus was placed on the scheduled rather than the actual arrival of the replacement flight, the passenger would receive only one compensation payment in both cases; in the first alternative, from the air carrier operating the

replacement flight and in the second alternative, from the air carrier operating the cancelled flight.

Thus, from the referring court's point of view, an interpretation according to which it is required to refer to the actual time of arrival of the replacement service when assessing whether the requirements for the exemption laid down in Article 5(1)(c)(iii) (and (ii)) of the Flight Compensation Regulation have been met is likely to lead to solutions which give rise either to different legal consequences for similar circumstances or which take away an apparent claim from the passenger even though his level of inconvenience has increased. Such interpretations appear to be contrary to the purpose of the Regulation, in particular recitals 1 and 2.

Since that question has not yet been definitively clarified in the case-law of the Court of Justice – as far as the referring court can see – and since the referring court intends to give an interpretation that differs from that of other decisions of national courts, the court was obliged to refer the matter for a preliminary ruling.

[...]

Landesgericht Korneuburg (Regional Court, Korneuburg) [...]

Korneuburg, 25 August 2020

[...]

WORKING DOCUMENT