

Anonymised version

Translation

C-560/19 — 1

Case C-560/19

Request for a preliminary ruling

Date lodged:

23 July 2019

Referring court:

Juzgado de lo Mercantil n.º 3 de Valencia (Spain)

Date of the decision to refer:

11 July 2019

Applicant:

GT

Defendant:

Air Nostrum Líneas Aéreas del Mediterráneo, S.A.

... [identification of the proceedings and the parties]

ORDER

... [identification of the referring court]

Place: VALENCIA

Date: 11 July 2019

FACTS

FIRST.- *Main proceedings in which the request for a preliminary ruling is made.*

Ms GT brought an action against the airline Air Nostrum Líneas Aéreas del Mediterráneo, S.A. claiming payment of the financial compensation of EUR 600 provided for in 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, on the grounds that she had experienced a delay of more than 24 hours after the scheduled arrival time at her final destination. She also claimed compensation of EUR 99.65 for loss and damage caused by the delay on the grounds that she had missed one night in a hotel at her destination, which she had reserved in advanced and for which she had to pay.

The facts set out in the application are as follows:

1).- The applicant purchased from Iberia — a company whose business is the carriage of passengers holding tickets which it sells — a flight from Alicante to Chicago, as evidenced by document number 3 in the application. The flight comprised two legs:

- The first leg was from Alicante to Madrid on 9 September 2018 at 09.40 hours, arriving in Madrid at 10.50 hours. That leg was operated by the airline Air Nostrum, Líneas Aéreas del Mediterráneo, S.A.

- The second leg was from Madrid to Chicago on the same day, departing at 11.55 hours and arriving at the destination at 14.20 hours. That leg was operated by Iberia.

2).- The first flight (Alicante-Madrid) was delayed on arrival in Madrid. The applicant states that the delay was one hour. The defendant acknowledges that there was a delay but contends that it was 30 minutes.

3).- As a result of that delay, the passenger missed the connecting flight on the second leg.

4).- The passenger was put on a different flight and arrived at her final destination, Chicago, more than 24 hours late.

SECOND.- *Request for a preliminary ruling*

The present request arises in the context of proceedings ... [domestic procedural issues]. In considering its judgment, this court finds that there is a need to refer a question for a preliminary ruling.

THIRD.- *Identification of the parties and interveners*

The parties to the main proceedings are Ms GT, ... [name of lawyer], applicant, and Air Nostrum Líneas Aéreas del Mediterráneo, S.A., ... [name of lawyer], defendant.

LAW

FIRST.- *Legal framework under European Union law.*

- 1.- Recital 7 in the preamble to Regulation (EC) No 261/2004 ... states: ‘In order to ensure the effective application of this Regulation, the obligations that it creates should rest with the operating air carrier who performs or intends to perform a flight, whether with owned aircraft, under dry or wet lease, or on any other basis.’
- 2.- Article 2 of Regulation [(EC) No] 261/2004 provides: ‘*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.*’
- 3.- Article 2 of Regulation [(EC) No] 261/2004 provides that ‘*“final destination” means the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected.*’

The judgment in *Folkerts*, Case C-11/11, of 26 February 2013 held that: ‘... *in the case of directly connecting flights, it is only the delay beyond the scheduled time of arrival at the final destination, understood as the destination of the last flight taken by the passenger concerned, which is relevant for the purposes of the fixed compensation under Article 7 of Regulation No 261/2004.*’

- 4.- Article 3(5) of Regulation [(EC) No] 261/2004 provides: ‘*This Regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2. Where an operating air carrier which 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.*’
- 5.- Article 5(1)(c) of Regulation [(EC) No] 261/2004 provides that, in case of cancellation of a flight, the passengers concerned are to ‘*have the right to compensation by the operating air carrier in accordance with Article 7 ...*’
- 6.- Article 7(1) of Regulation [(EC) No] 261/2004 governs financial compensation, stating: ‘*Where reference is made to this Article, passengers shall receive compensation amounting to:*
 - (a) *EUR 250 for all flights of 1500 kilometres or less;*
 - (b) *EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 kilometres;*
 - (c) *EUR 600 for all flights not falling under (a) or (b).*

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger’s arrival after the scheduled time.’

- 7.- In the judgment in *Sturgeon*, Joined Cases C-402/07 and C-432/07, of 19 November 2009 and the judgment in *Nelson*, Joined Cases C-581/10 and C-629/10, of 23 October 2012, a long delay to the arrival time was treated in the same way as cancellation of the flight.
- 8.- Article 5(1) of [Council] Directive 90/314/[EEC] provides that Member States are to take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.
- 9.- Article 13 of Regulation [(EC) No] 261/2004 provides: *‘In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable.’*
- 10.- Paragraph 2.2.3 of the Commission Notice of 15 June 2016 states: *‘In accordance with Article 3(5), the operating air carrier is always responsible for the obligations under the Regulation and not, for example, another air carrier which may have sold the ticket. The notion of operating air carrier is presented in recital 7.’*
- 11.- In *Bossen*, C-559/16, of 7 September 2017, it was held that the provisions of Regulation [(EC) No 261/2004] *‘provide for a right to compensation for passengers without distinction as to whether they reach their final destination by means of a direct flight or an air journey with connecting flights.’*

SECOND.- *Uncertainties which justify the request for a preliminary ruling*

1.- As stated above under the heading ‘Law’, the EU legislation appears to indicate that it is the operating air carrier which is required to pay the compensation provided for in Article 7 of Regulation [(EC) No] 261/2004, irrespective of who sold the ticket; that is to say, irrespective of who the contractual carrier is. That situation appears to be clear where a travel agency sold the ticket and, therefore, entered into a contract with the passenger. The uncertainty arises where the ticket is sold by a company which provides air passenger transport but does not operate the flight because, as a result of an alliance between airlines, the flight is actually operated by a different company. That is the situation at issue in the main proceedings. Iberia sold the ticket and it is a company providing air passenger transport. However, Iberia did not operate the flight from Alicante to Madrid because that leg of the flight was actually operated by another company, in this case, Air Nostrum, under alliances of which the two companies are members.

Accordingly, the question arises as to whether the obligation to pay compensation under Article 7 of Regulation [(EC) No] 261/2004 is incumbent solely and exclusively on the company which actually operates the flight, or whether it is also possible for that obligation to be incumbent on a company which does not operate the flight but with which the passenger has a contract and which also operates passenger flights. In other words, the question is whether a company which provides air passenger transport and which sells the ticket but which does not operate the flight, that is, does not actually perform the flight, can be considered to come within the concept of ‘*operating air carrier*’.

Therefore, the first question raised is: in relation to Article 2(b) and Article 3(5) of Regulation [(EC) No] 261/2004, can a company which provides air passenger transport and which sells the ticket but which does not actually operate the flight be considered to come within the concept of ‘*operating air carrier*’?

2.- If the reply to that [question] is in the negative, the question arises of who has to pay the compensation when two or more airlines are involved in the operation of the same flight, where that flight includes a connection.

As stated, the case-law of the Court of Justice of the European Union has held that the decisive criterion for the purposes of the obligation to pay compensation is a delay of more than three hours beyond the scheduled arrival time at the final destination. That is regardless of whether the cause of the delay occurred as a result of late departure, during the flight or as a result of a late connecting flight.

It is the latter situation which creates uncertainties as to how the of Regulation [(EC) No 261/2004] should be interpreted. The difficulty at issue arises where, as in the main proceedings, the flight is composed of two legs, each leg is performed by an operating air carrier and there is a missed connection owing to a delay on the first leg; to be specific, where the delay on the first leg is less than three hours but the delay on arrival at the final destination is more than three hours as a result of the missed connection.

In the case of separate flights, there is no doubt that there would be no right to compensation.

The difficulty is where there is a single flight with a connection. In this case, the first operating airline performed the flight with a delay to the scheduled arrival time but that delay was less than three hours. However, as a result of the delay on that first leg of the flight, there was a long delay on arrival at the final destination.

Therefore, the questions which arise are: does the right to compensation for passengers under Article 7 of Regulation [(EC) No] 261/2004 exist where the flight is composed of more than one leg and, as a result of a short delay (less than three hours) on one leg, there is a long delay (more than three hours) on arrival at the final destination because of a missed connection? If the answer is in the affirmative, where the different legs are operated by different carriers, is the obligation to pay compensation under Article 7 of Regulation [(EC) No] 261/2004

incumbent on the operating carrier on whose leg there was a short delay (less than three hours) which, however, caused the missed connection and, therefore, a long delay (more than three hours) on arrival at the final destination?

OPERATIVE PART

THIS COURT DECIDES: On those grounds, to request a preliminary ruling from the Court of Justice of the European Union on the following questions:

1.- Can a company which provides air passenger transport and which sells the ticket but which does not actually operate the flight be considered to come within the concept of ‘*operating air carrier*’?

2.- If the answer to the previous question is in the negative, does the right to compensation for passengers under Article 7 of Regulation [(EC) No] 261/2004 exist where the flight is composed of more than one leg and, as a result of a short delay (less than three hours) on one leg, there is a long delay (more than three hours) on arrival at the final destination because of a missed connection? If the answer is in the affirmative, where the different legs are operated by different carriers, is the obligation to pay compensation under Article 7 of Regulation [(EC) No] 261/2004 incumbent on the operating carrier on whose leg there was a short delay (less than three hours) which, however, caused the missed connection and, therefore, a long delay (more than three hours) on arrival at the final destination?

...

... [closing wording and signature]