

Case C-345/19

Request for a preliminary ruling

Date lodged:

16 April 2019

Referring court:

Amtsgericht Düsseldorf (Germany)

Date of the decision to refer:

6 December 2018

Applicant

EUflight.de GmbH

Defendant:

Eurowings GmbH

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Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany)

Order

In the case of

EUflight.de GmbH v Eurowings GmbH

I.

The following question is referred to the Court of Justice of the European Union for interpretation pursuant to Article 267 TFEU:

'Are the provisions of Articles 4, 5, 6 and 7 of Regulation (EC) No 261/2004 to be interpreted as meaning that passengers who are transported to their final destination via the booked flight over an hour before the planned time of departure obtain compensation, by application by analogy of Article 7 of that regulation?

Can that compensation be reduced according to flight distance pursuant to Article 7(2) if the time of arrival precedes the periods of delayed arrival specified therein, or even the scheduled time of arrival?

Is the possibility of a reduction excluded if the time of departure precedes the scheduled time of departure by the same amount of time provided for by the delay limits in Article 7(2) (that is, more than two, three or four hours)?'

II.

After being subrogated to the rights of two parties who assigned to it their rights ('the assignors), the applicant seeks compensation of EUR 250 for each assignor pursuant to Article 7(1)(a) [of Regulation] (EC) 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 Flight Passenger Rights Regulation'). [Or. 2]

The defendant is a German air carrier. The assignors booked a flight from Munich to Paris with the defendant, flight number EW1926, which was scheduled to take off in Munich at 5:20 p.m. on 1 January 2018 and land in Paris at 6:45 p.m.

The flight was cancelled and the assignors were provided with replacement transportation on flight LH2234, which took off in Munich at 3:54 p.m. on 1 January 2018 and landed in Paris at 5:20 p.m. on the same date. The assignors therefore reached their final destination 1 hour and 25 minutes before the planned time of arrival, but their journey also started 1 hour and 26 minutes earlier than planned.

III.

It is firstly questionable whether such a flight that departs prematurely falls within the scope of Article 7 and then whether the analogy that may be found in the aforementioned case extends to the entire article, and therefore also to the offsetting possibility in Article 7(2).

1.

It is questionable whether a 'premature departure' of the flight that is then actually operated justifies the payment of compensation in the first place if it is premature by more than one hour but less than three hours.

According to the case-law of the Court (judgment of 19/11/2009 [, *Sturgeon and Others*,] C-402/07 [and C-432/07, EU:C:2009:716, 'the *Sturgeon* decision']), the application by analogy of Article 7 to delays required a comparison of the situation of passengers whose flights are delayed with that of passengers whose

flights are cancelled (paragraph 50). The reason for the compensation was that damage consisting in a loss of time can be redressed only by compensation (paragraphs 52-54). In the judgment, it is held that those affected find themselves in comparable situations as regards damage consisting in a loss of time (paragraph 54).

In paragraph 57, the Court seeks to establish the relevant loss of time by means of the provision [of] Article 5(1)(c)(iii). In so doing, it calculates the total from the timeframe within which alternative transport must be provided without compensation in the event of a cancelled flight. The Court explicitly takes the 'duration' into account. Immediately thereafter, in paragraph 58, the requirement of equal treatment is explicitly addressed again. In paragraph 61, the loss of time is once again described exclusively as a delay equal to or in excess of three hours. In paragraph 62, the Court then finds reason to distinguish between a simple delay of 2 hours or more, pursuant to Article 6, and a 'long' delay, in recital [Or. 3] 15, whereby it clearly seeks to justify the unintentional legislative lacuna in Article 6 for long delays, which is required for an analogy.

The *Sturgeon* decision did not place passengers on cancelled flights on a completely equal footing with passengers on delayed flights. The reason for this is that, according to the current case-law of the Court, passengers who suffer a delay of more than two hours but less than three hours should not receive compensation, despite suffering the same loss of time as in the case of a cancellation. Therefore, the question of reduction also arises only in respect of long-haul flights (paragraph 63).

Initially, therefore, there is therefore reason to believe that only a delay and not a premature operation of the same flight should justify compensation.

In addition, in the [order] of 27 June 2018[, *flightright*,] C-130/18 [EU:C:2018:496], paragraphs 21 and 22, the Court draws a distinction between cancellation and delay that justified compensation for a loss of time of just two hours or more in the case of cancellations (albeit reduced compensation), but only for a loss of time of three hours or more in the case of delays.

In my opinion, however, the above considerations do not necessarily preclude compensation in the case of a premature departure (and then also arrival with a delay of less than three hours).

This is because a 'premature departure' should be entirely capable of constituting a loss of time to be compensated with money. Accordingly, arriving over one hour before schedule also does not preclude compensation due to cancellation. The fact that, in the *Sturgeon* decision, the Court focuses on a loss of time in relation to the 'duration' of a flight (or is 'waiting time' intended?) appears to be incoherent and somewhat vague. The reason is that passengers of cancelled flights are compensated even though they have not suffered a loss of time at all, because the replacement flight was of the same duration.

The damage therefore actually consists in not a loss of time, but rather a loss of the possibility (within the timeframe of one hour before and two hours after the scheduled time of arrival) of disposing of one's time in the manner originally planned. Therefore, Article 5(1)(c)(iii) clearly protects not only the time after the scheduled time of arrival, but also the time before the scheduled time of departure. In this respect, [Or. 4] the passenger (or his freedom to dispose of his time) enjoys even more protection (namely an hour more).

The regulation does not actually contain any provision on forced premature departure on the same flight. The clear provisions in Article 6 for delays of 2 hours or more therefore do not preclude an unintentional legislative lacuna and thus a possible analogy. The situation required for an analogy — the required comparable situation of the passengers — exists. Accordingly, there is good reason to believe that passengers who are transported on the same flight more than one hour before the time of departure are entitled to compensation by analogy to Article 7.

2.

In my opinion, a possible analogy must lead to the application of the whole of Article 7 in any event. However, it is then questionable whether premature transportation constitutes re-routing within the meaning of Article 8, to which reference is made.

Article 8(1)(b) provides for re-routing to the final destination, under comparable transport conditions and 'at the earliest opportunity'. However, this is presumably supposed to refer only to the transportation of the passenger at the earliest opportunity after the originally planned time of departure.

According to the wording of the regulation itself, it governs only cases of delay; cases in which the passenger arrives at the final destination earlier than planned are not governed by the regulation. In light of the recitals of the regulation, it can be assumed that 'at the earliest opportunity' within the meaning of Article 8(1)(b) in any event refers to a time after the original time of departure. Accordingly, recital 13 in the preamble to the regulation states that passengers should be adequately cared for while awaiting a later flight. Recital 18 also refers to care for passengers awaiting a later flight.

This is also supported by the fact that the regulation is intended to reduce the trouble and inconvenience to passengers caused by cancellation of flights. Carriers should therefore be induced to inform passengers of cancellations in a timely manner within the meaning of Article 5(1)(c) before the scheduled time of departure and to offer them re-routing that enables the passengers [Or. 5] to make other arrangements accordingly. In this respect, the requirements imposed on re-routing are understandably inversely proportional to the advance notice via which passengers learn of the cancellation. In this respect, the spirit and purpose of the regulation should be taken into account only by means of an understanding of

Article 7(2)(a) according to which a reduction of entitlement to compensation is out of the question if it is not possible to stay within the limits of what can reasonably be expected, as defined in Article 5(1)(c), and the passenger must therefore depart over an hour before the scheduled time of departure.

However, if it were considered that the fact that the term ‘may’ (‘kann’, ‘podrá’ etc.) is used in all language versions allows for a decision based on equitable principles, a reduction in the event that a flight is brought forward and arrives prematurely by three hours and more would certainly be inequitable. This is possibly not the case if it arrives prematurely by less than three hours, however.

IV.

The case is stayed pending the final ruling from the Court of Justice.

[...] [Place, date]

[...] [Name of the judge who delivered the order]

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