Case C-918/19

Request for a preliminary ruling

Date lodged:

16 December 2019

Referring court:

Landgericht Hamburg (Germany)

Date of the decision to refer:

9 December 2019

Applicant and appellant:

GDVI Verbraucherhilfe GmbH

Defendant and respondent:

Swiss International Air Lines AG

Landgericht Hamburg

(Regional Court, Hamburg)

[…]

Order

In the case of

GDVI Verbraucherhilfe GmbH, […] 90402 Nuremberg

- applicant and appellant -

[…]

v

SWISS International Air Lines AG, […] 4052 Basel, Switzerland

- defendant and respondent -

[…]

the Landgericht Hamburg […] ordered as follows on 9 December 2019:

I. The proceedings are stayed.

II. The following questions on the interpretation 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 (OJ L 46 of 17 February **[Or. 2]** 2004, p. 1 et seq.) and of the Agreement on air transport of 21 June 1999 between the Swiss Confederation and the European Community, as amended by Decision No 2/2010 of the Community/Switzerland Air Transport Committee of 26 November 2010, are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:

1. Is the Agreement on air transport of 21 June 1999 between the Swiss Confederation and the European Community, as amended by Decision No 2/2010 of the Community/Switzerland Air Transport Committee of 26 November 2010, to be interpreted as meaning that 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, is applicable, in accordance with its Article 3(1)[(b)], also to passengers who depart on a flight from a third country and land at an airport in Switzerland in order subsequently to embark on a flight to a Member State?

2. If the first question is answered in the affirmative: Does this applicability for courts of a Member State also cover the case-law of the Court of Justice, according to which passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights have been cancelled (CJEU, judgment of 19 November 2009 — Cases C-402/07 and C-432/07)?

3. Can a right to compensation under Article 7 of Regulation (EC) No 261/2004 also exist when a passenger does not catch a directly connecting flight due to a relatively minor delay in arrival, with the result that there is a delay in arrival at the final destination of three **[Or. 3]** hours or more, but the two flights were operated by different air carriers and the booking confirmation was issued by a tour operator who combined the flights for its customers?

Grounds:

1. A. The applicant, acting under assigned rights, is seeking to recover from the defendant compensation payments each amounting to EUR 600 pursuant to 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 (OJ L 46 of 17 February 2004, p. 1 et seq.; 'the Regulation', 'the Air Passenger Rights Regulation'). On the basis of the preliminary outcome of the taking of evidence, the applicant is entitled to institute these proceedings.

2. The two assignors booked flights from Bangkok Suvarnabhumi Intl to Hamburg, via Zurich, for 14 May 2016 via a tour operator. The flight from Bangkok to Zurich, which was operated by the defendant, was scheduled to land in Zurich at 7:30 p.m. The assignors were then scheduled to fly to Hamburg at 8:20 p.m. with the air carrier Eurowings. It is common ground that the flight did not land in Zurich until 8:20 p.m. According to the preliminary outcome of the taking of evidence, the assignors missed their connecting flight to Hamburg and arrived there at 10:30 a.m. on the following day, thus with a delay of 12 hours and 45 minutes. The defendant, which is established **[Or. 4]** in the Swiss Confederation, had rebooked the assignors onto a flight departing the following day, and had provided them with assistance at the airport and accommodation in a hotel.

3. The Amtsgericht (Local Court) dismissed the action. The applicant is pursuing its requests by way of its appeal. The defendant contests the appeal.

4. B. The decision on the appeal requires an answer from the Court of Justice of the European Union to the three questions referred.

5. The Amtsgericht took the view that the case-law of the European Court of Justice on treating delays as cancellations (CJEU, judgment of 19 November 2009 — Cases C-402/07 and C-432/07) was not applicable vis-à-vis the Swiss Confederation, as that case-law did not merely interpret the Regulation, but created a new constituent factor.

6. The successful outcome of the appeal therefore depends on the applicability of the Air Passenger Rights Regulation and the interpretation of Article 7 of that regulation.

7. I. The applicability of the Air Passenger Rights Regulation depends on the interpretation of the Agreement on air transport between the Swiss Confederation and the European Community of 21 June 1999, as amended by Decision No 2/2010 of the Community/Switzerland **[Or. 5]** Air Transport Committee of 26 November 2010, ('the Air Transport Agreement').

8. 1. The international jurisdiction of German courts is determined by the place of performance of the main service of the contract on which the flight is based.

9. (a) The German courts have jurisdiction pursuant to the second indent of Article 5(1)(b) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 ('the Lugano Convention'), which entered into force for Switzerland on 1 January 2011 (*Amtliche Sammlung des Schweizer Bundesrechts* [Official Compendium of Swiss Federal Law, 'Swiss OC'] 2010, 5609).

10. (b) In the case of a flight, the place of arrival is also to be regarded as the place of performance of the characteristic services, a circumstance which is decisive for Article 5(1) of the Lugano Convention. In this respect, the place of arrival of the last flight is decisive in the present case, since the flight connection was scheduled to take place without any significant stay at the airport of transfer (see, regarding the reverse case of the place of departure, in detail and with further references: Bundesgerichtshof [Federal Court of Justice, 'BGH'], request for a preliminary ruling of 9 April 2013 [in Case C-259/13] […] paragraph 9 et seq.).

11. 2. The applicant's entitlement to compensation depends on whether the Air Passenger Rights Regulation is applicable to the Bangkok-Zurich flight operated by the defendant.

12. (a) Neither the place of departure nor the destination of this flight is situated **[Or. 6]** in a Member State of the European Union. Nor is the defendant an air carrier of the European Union. However, pursuant to the Air Transport Agreement and Decision No 1/2006 of the Community/Switzerland Air Transport Committee constituted under Article 23(4) of that Agreement (OJ 2006 L 298, p. 23), as well as the successor Decision No 2/2010 (OJ 2010 L 347, p. 54; Swiss OC 2011, 205), the Air Passenger Rights Regulation has also been applicable to the territory of Switzerland since 1 December 2006. In both decisions the Air Passenger Rights Regulation is listed as forming part of the annex to the Agreement of 21 June 1999. Article 2 of the Agreement states that the provisions listed in the annex are to apply to the extent that they concern air transport or matters directly related to air transport as mentioned in the annex to the Agreement.

13. (b) However, it has not yet been decided whether this application also covers cases where the flight departs from a third country, has its destination in Switzerland and is operated by a Swiss air carrier.

14. (c) The present Chamber is inclined to take the view, like the Bundesgerichtshof in the reverse case of a flight which departed from the territory of Switzerland and travelled to a third country, that such flights are also covered. The Bundesgerichtshof stated the following in this regard (BGH, request for a preliminary ruling of 9 April 2013 [in Case C-259/13] […] paragraphs 23 and 24):

15. 'The second indent of the Annex to the Air Transport Agreement, as amended by Decision No 2/2010 of the Air Transport Committee, provides that where any of the acts listed in the Annex contain references to Member States of the European Community or **[Or. 7]** European Union, the references are, for the purpose of the

Agreement, to be understood to apply equally to Switzerland. It follows that Article 3(1) of the Air Passenger Rights Regulation could apply in such a way that it is sufficient for rights under that Regulation to arise that the place of departure, or, in the case where an air transport undertaking is established in the European Union or in Switzerland, the place of arrival, of a flight is situated in Switzerland.

16. Such an interpretation of the Air Transport Agreement and the Annex thereto would correspond not only to its wording but also to the objective of harmonising regulations on air transport within Europe, including the territory of Switzerland, set out in the preamble to that agreement. Thereunder, air transport undertakings in Switzerland can and must operate under the same conditions as those in the Member States of the European Union. Consumers and customers of air transport undertakings should find the same quality standards in Switzerland and accordingly be able to enforce the same rights against these undertakings in Switzerland as in the Member States of the European Union, and the air transport undertakings for their part should be subject to the same conditions of competition. It would be difficult to reconcile this with a situation where the Air Passenger Rights Regulation was applicable only to passengers who embarked on a flight in the territory of Switzerland to an airport in the territory of a Member State of the European Union. This is because, pursuant to Article 3(1)(a) of the Air Passenger Rights Regulation, the Regulation is also applicable to passengers who fly to a third country from an airport in the European Union.'

17. In addition, as is also the case in the present dispute, there is often a close connection with **[Or. 8]** the European Union. In the present case, the assignors intended to take a connecting flight to the European Union, namely to Hamburg, immediately after the delayed flight. The Regulation itself links several flights together in such a way that the final destination is taken into account, in particular when calculating compensation pursuant to Article 7 of the Air Passenger Rights Regulation, which is also of decisive importance in the present dispute. If, in such cases, the scope of the regulation were to be limited only to flights flying from Switzerland to the European Union, in line with the view taken by some in Switzerland, this would lead to an undesired difference in treatment of passengers depending on whether or not they subsequently take a direct connecting flight to a Member State (see, in relation to this argument in detail, BGH, request for a preliminary ruling of 9 April 2013 [in Case C-259/13] […] paragraphs 28 and 29).

18. II. The applicant's right to compensation also depends on whether, if the first question referred is answered in the affirmative, the applicability of the Regulation also encompasses the case-law of the Court of Justice of the European Union, according to which passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights have been cancelled, if they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.

19. 1. This question has been answered in the negative in some cases in the German case-law […], which is in line with the view taken by the defendant.

Pursuant to Article 1(2) **[Or. 9]** of the Air Transport Agreement, rulings and decisions given after the cut-off date of 2 June 1999 must be communicated to the Swiss Confederation in order to be recognised there and approved by the Joint Committee. This did not take place with the judgment of the Court of Justice of the European Union of 19 November 2009 in [Joined Cases] C-402/07 and C-432/07 and the judgments following on from this. The courts referred to above conclude from this that, in cases in which proceedings are instigated against a Swiss air carrier, they are unable to use this case-law to substantiate a right, but can refer only to the wording of the Regulation. According to those courts, application of the CJEU case-law, which was in any event based on an analogy with the rights provided for in the Regulation, would constitute a significant encroachment on the national sovereignty of the Swiss Confederation […].

20. 2. The present court is inclined to approach this in a differentiated way. Accordingly, the case-law of the Court of Justice of the European Union on 'long delays' should not indeed be applicable for Swiss courts […]. However, the referring court is not a Swiss court, but a court of a Member State, and is therefore bound by the case-law relating to the Regulation in so far as the latter is applicable to Swiss air carriers. Otherwise, courts of the Member States would have to apply the same regulation to otherwise comparable situations in different ways depending on whether the **[Or. 10]** defendant is an air carrier established in the Swiss Confederation or in the European Union. However, this would be contrary to the second indent of the Annex recast by the Air Transport Committee on the basis of Decision No 2/2010, according to which any references to the Member States of the European Union in the Regulation are to be understood to apply (equally) to the Swiss Confederation.

21. III. Ultimately, entitlement to compensation depends on an interpretation of Article 7 of the Air Passenger Rights Regulation, namely whether that right also exists if the two flights are combined by a tour operator and operated by different airlines.

22. 1. The [applicant's] entitlement to compensation is not excluded on the grounds that both flights took off as scheduled and that only the first flight was delayed and the delay was less than three hours.

23. It is true that the Bangkok-Zurich and Zurich-Hamburg flights are two separate flights within the meaning of the Regulation (see in detail in this regard: BGH, request for a preliminary ruling of 19 July 2016 [in Case C-479/16] […] paragraph 17). However, where separate flights are directly connecting flights and the delay of the first flight results in passengers missing the connecting flight, as in the present case, there may still be a right to compensation. According to the case-law of the Court of Justice of the European Union (CJEU, judgment of 19 November 2009, *Sturgeon and Others*, C-407/07 and C-432/07 [EU:C:2009:716] […] paragraph 40 et seq.; judgment of 23 October 2012, *Nelson and Others*, **[Or. 11]** C-581/10 and C-629/10, [EU:C:2012:657] […] paragraph 28 et seq.) and the Bundesgerichtshof ([…] request for a preliminary ruling of 19 July

2016 [in Case C-479/16] […] paragraph 14), this requires a loss of time equal to or in excess of three hours at the final destination within the meaning of Article 2(h) of the Regulation. That right does not require fulfilment of the requirements relating to a delay in departure within the meaning of Article 6(1)(a) to (c) of the Air Passengers Rights Regulation (CJEU, judgment of 26 February 2013, *Folkerts*, C-11/11, [EU:C:2013:106] […] paragraph 37).

24. This is the case here; in particular, only a short stay in Zurich was scheduled between the two flights.

25. 2. However, in the present case, the defendant did not combine the flights itself, and it only operated the first, delayed flight segment. Rather, the flights were combined by a tour operator.

26. The BGH was seised of a comparable case in the context of an appeal on a point of law against a judgment of the Landgericht Hamburg […] […]. The BGH stayed the proceedings and referred to the Court of Justice a question on the interpretation of the Air Passenger Rights Regulation that was essentially identical to one of the present questions. However, the BGH withdrew the question referred for a preliminary ruling after the defendant had accepted the claim in that case. The BGH (request for a preliminary ruling of 19 July 2016 [in Case C-479/16] […] paragraph 27 et seq.) stated the following in this regard:

27. ‘(d) It could follow from the spirit and purpose of Article 7 of the Air Passenger Rights Regulation that a right to compensation can exist only **[Or. 12]** 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.

28. (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.

29. In the decisions in which a right to compensation arose from a delayed arrival at the destination of a directly connecting flight, the successive flights were booked with the air carrier named in the claim in the main proceedings (judgment of the Court of Justice … *Folkerts*, … paragraph 18, and order of 4 October 2012, *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 concerned cases in which the passenger had booked all relevant flights with the air carrier against which he later brought a claim for compensation (see judgments of the Court of Justice … *Emirates Airlines* … paragraph 13; *Sturgeon and Others*, … paragraph 11; and *Nelson and Others* … paragraph 15).

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

31. According to the findings of the appeal court, the two **[Or. 13]** flights were carried out by different air carriers. The booking itself was not made with these companies but rather with a tour operator. The tour operator also issued the booking confirmation submitted [as Annex K1]. 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.

32. (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.

33. According to Article 3(2)(a) of the Air Passenger Rights Regulation, that regulation is only applicable 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.

34. 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. 14]**

35. 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 claim for compensation exists (Commission Guidelines of 10 June 2016 — C(2016) 3502 final, p. 17, Section 4(d)(A)(ii)).

36. (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.

37. (1) The Air Passenger Rights Regulation provides that different types of booking confirmations 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 which a tour operator has combined would also be in line with the aim, defined in recitals 1 to

4, of ensuring a high level of protection for passengers and taking 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 which **[Or. 15]** confer rights on air passengers must be interpreted broadly (see, to that effect, judgment of the Court of Justice of the European Union in *Sturgeon and Others*, … paragraph 45), whereas the terms used in a provision which represents a derogation from a principle or, more specifically, from Community rules for the protection of consumers are in principle to be interpreted narrowly (see, to that effect, judgment of the Court of Justice of the European Union of 22 December 2008, *Wallentin-Hermann*, C-549/07, … paragraph 17).

38. (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.

39. In the case where an air carrier with which two successive flights have been booked refuses transport 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 of Justice has 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 (judgment of the Court of Justice **[Or. 16]** in *Rodríguez Cachafeiro and Others*, … paragraph 34).

40. 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.

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

42. 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.’

43. C. In the view of the present Chamber, a decision therefore cannot be reached on the applicant's appeal without an answer to the questions referred for a preliminary ruling.

[…]