

Case C-196/20

Request for a preliminary ruling

Date lodged:

6 May 2020

Referring court:

Landgericht Düsseldorf (Germany)

Date of the decision to refer:

6 April 2020

Defendant and appellant:

Eurowings GmbH

Applicant and respondent:

Flightright GmbH

[...]

Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany)

Order

In the case between

Eurowings GmbH, [...] Düsseldorf,

defendant and appellant,

[...]

v

Flightright GmbH, [...] Potsdam,

applicant and respondent,

[...]

the 22nd Civil Chamber of Düsseldorf Regional Court,
further to the hearing of 6 March 2020, makes the following

[...]

order:

The proceedings are stayed.

The following questions on the interpretation of EU law are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU: **[Or. 2]**

1. Does a passenger have a ‘confirmed reservation’ within the meaning of Article 3(2)(a) 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 2004 L 46, p. 1 et seq.) if he has received, from a tour operator with which he has a contract, ‘other proof’ within the meaning of Article 2(g) of Regulation No 261/2004, by which he is assured transport on a particular flight, individualised by points of departure and destination, times of departure and arrival and flight number, without the tour operator having made a seat reservation for that flight with the air carrier concerned and having received confirmation from the latter?
2. Is an air carrier to be regarded as an operating air carrier within the meaning of Article 2(b) of Regulation (EC) No 261/2004 in relation to a passenger if, despite the fact that that passenger has a contract with a tour operator which has promised him carriage on a particular flight, individualised by points of departure and destination, times of departure and arrival and flight number, the tour operator has not, however, reserved a seat for the passenger and has therefore not established a contractual relationship with the air carrier in respect of that flight?
3. Can the ‘scheduled time of arrival’ of a flight within the meaning of Article 2(h), Article 5(1)(c), the second sentence of Article 7(1) and Article 7(2) of Regulation (EC) No 261/2004 be determined, for the purposes of compensation for cancellation or long delay in arrival, from ‘other proof’ issued to a passenger by a tour operator, or must the ticket pursuant to Article 2(f) of Regulation (EC) No 261/2004 be taken into account for that purpose?

Grounds:

I.

The applicant, acting under assigned rights, requests that the defendant pay compensation pursuant to Article 7(1)(b) 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 ('the Air Passenger Rights Regulation') owing to a long delay in arrival.

On 24 October 2017, two customers of the applicant ('the assignors') booked a package tour to Mallorca (Spain) with a travel agency, which was offered by the [Or. 3] tour operator ITS Reisen. This tour included carriage by air to Palma de Mallorca and back. The applicant's customers received a document referred to as a 'travel registration' document [...], in which the defendant's flights were listed as, inter alia, outbound flight number EW 7582 from Hamburg to Palma de Mallorca on 22 May 2018, for which the time of departure was specified as 7:30 a.m. and the time of arrival as 10:05 a.m. (all times in local time). The applicant's customers were in fact transported on a flight of the defendant with flight number EW 7582 over a distance of 1 658 km from Hamburg to Palma de Mallorca, but they did not reach their final destination until 9:08 p.m.

The applicant's customers assigned to it any rights to compensation to which they may be entitled under the Air Passenger Rights Regulation. The applicant, acting under assigned rights, now requests that the defendant pay EUR 800.00 on the ground that flight EW 7582 was cancelled on 22 May 2018. The assignors had a confirmed booking for that flight, which was scheduled to depart at 7:30 a.m. and arrive at 10:00 a.m.

At first instance before the Amtsgericht Düsseldorf (Local Court, Düsseldorf), the defendant defended itself by arguing that the assignors had confirmed bookings for flight EW 7582 on 22 May 2018, which was scheduled to depart at 4:20 p.m. and arrive at 7:05 p.m. 'bookingheld', as a contingent of the tour operator, reserved the passenger seats with the defendant on 17 May 2018. On 18 May 2018, 'bookingheld' then named the assignors as passengers for the reserved passenger seats. Flight EW 7582 was operated with a delay in arrival of two hours and six minutes.

The Local Court upheld the action and stated that the 'travel registration' document issued by the tour operator ITS and submitted by the applicant constituted booking confirmation within the meaning of Article 2(g) in conjunction with Article 2(f) of the Air Passenger Rights Regulation. It was 'other proof' within the meaning of Article 2(g) of the regulation. Pursuant to that provision, it was sufficient if the reservation had been accepted by the tour operator. It was clear from the provisions that it was the legislature's intention for only the passenger's point of view to be important in this regard, and the internal agreements and procedures between the contractual and operating air carrier were not relevant. This was justified by the fact that, under the liability scheme of the Air Passenger Rights Regulation, it was not the passenger's contracting partner that was liable to pay compensation, but the operating air carrier, and the

legislature intended to achieve the highest possible level of protection for the passenger and effective application of the regulation. According to the case-law of the Bundesgerichtshof (Federal Court of Justice) also, travel confirmation was sufficient as booking confirmation [...]. In the present case, the ‘travel registration’ document submitted by the applicant contained a declaration that the booking had been accepted and registered [**Or. 4**] by the tour operator. The characteristic of confirmation of a reservation within the meaning of Article 3(2)(a) of the Air Passenger Rights Regulation was of no independent significance in relation to that. The defendant’s submission could not be considered for procedural reasons. Finally, the question as to whether a cancellation of the flight or a long delay in arrival was to be taken as the basis was also irrelevant to the decision to be given, since, according to the case-law of the Court of Justice of the European Union, they both had the same legal consequences.

II.

This stands up to legal review only if the defendant is to be regarded as the operating air carrier of flight EW 7582 with a scheduled arrival time of 10:05 a.m. and the assignors had confirmed reservations for such a flight.

1.

The applicant takes the view that this is the case; it defends the contested decision.

2.

By contrast, the defendant takes the view that the assignors did not have a confirmed reservation for flight No EW 7582 on 22 May 2018, which was scheduled to arrive at 10:05 a.m. Although a tour operator could also confirm a flight booking, it could do so only if it had been authorised to do so by the air carrier or if the tour operator for its part had made a cover booking (*‘Deckungsbuchung’*) with the air carrier. This necessarily follows from Article 2(f) of the Air Passenger Rights Regulation, because only then could the confirmation of a tour operator establish an entitlement to transport. The applicants did not assert that the tour operator ITS had been authorised to provide the applicants with confirmation for the flight with a scheduled time of arrival of 10:05 a.m., or that the tour operator had a cover booking with the defendant for such a flight. In addition, the latter could also not be regarded as the assignors’ operating air carrier for such a flight within the meaning of Article 2(b) of the Air Passenger Rights Regulation. In order for this to be the case, it would have to have a contract with the assignors. That provision also made clear that an air carrier could not be subject to obligations vis-à-vis a person under the Air Passenger Rights Regulation without any intervention on its part. This was ultimately also confirmed by the second sentence of Article 3(5) of the regulation. As regards a flight scheduled to arrive at 10:05 a.m., the defendant had not fulfilled any obligations under the regulation. [**Or. 5**]

III.

The success of the defendant's appeal depends crucially on whether a booking confirmation from a tour operator, which was not itself based on a booking with the air carrier against which a claim for compensation has been made under Article 7(1) of the Air Passenger Rights Regulation ('cover booking'), can be regarded as a 'confirmed reservation' within the meaning of Article 3(2)(a) of the regulation, and whether, in such a case, the air carrier against which a claim has been made is to be regarded as the 'operating air carrier' within the meaning of Article 2(b) of the Air Passenger Rights Regulation, and whether the 'scheduled time of arrival' of a flight can be determined on the basis of such a booking confirmation from a tour operator.

Passengers are entitled to compensation from the operating air carrier as a result of a long delay in the arrival of a flight where they reach their final destination three hours or more after the arrival time originally scheduled by the operating air carrier (CJEU, judgment of 19 November 2009 — C-402/07, C-432/07, *Sturgeon v Condor and Others*, paragraph 69; confirmed by judgment of 23 October 2012 — C-581/10, C-629/10, *Nelson v Lufthansa and Others*; and also by judgment of 26 February 2013 — C-11/11, *Air France v Folkerts*, paragraph 33).

1.

Pursuant to Article 3(2)(a) of the Air Passenger Rights Regulation, the applicability of that regulation firstly depends on whether the passengers had a 'confirmed reservation on the flight concerned'. The term 'reservation' is defined in Article 2(g) of the regulation. Pursuant to that provision, 'proof' other than a 'ticket' within the meaning of Article 2(f) of the regulation constitutes a 'reservation' if it indicates that the reservation has been accepted and registered by 'the tour operator'. According to the case-law of the Bundesgerichtshof (German Federal Court of Justice), a 'confirmed reservation' can also be derived from an item of proof relating thereto issued by the tour operator, that is to say the travel company, which bindingly indicates the intended carriage by air on a specific flight, typically individualised by flight number and time [...]. The Chamber also takes the view that it follows from the interplay between Article 3(2)(a) and (2)(g) of the regulation that such proof must be sufficient for the applicability of the Air Passenger Rights Regulation. It does not require that the proof of booking issued by the tour operator also be based on a 'cover booking' with the air carrier concerned.

2.

However, the Chamber takes the view that the decisive factor for the applicant's entitlement to seek compensation from the defendant is whether the latter had assured the travel company ITS Reisen that it would transport the assignors on flight EW 7582 [Or. 6] on 22 May 2018 with a scheduled time of arrival of 10:05 a.m., because only then would it have intended to operate the thus individualised

flight on behalf of the tour operator ITS Reisen also, which has a contract with the assignors (Article 2(b) of the Air Passenger Rights Regulation) and therefore has legal capacity to be sued as the operating air carrier of that flight. However, such an intention on the part of the air carrier necessarily requires that the tour operator had previously notified the passenger concerned of its wish to have him transported on a flight offered to interested parties by the air carrier. However, such a notification constitutes a reservation by the tour operator. The Chamber takes the view that it is therefore also always necessary for the tour operator to have made a ‘cover booking’ and, without such a booking, ‘proof’ within the meaning of Article 2(g) of the Air Passenger Rights Regulation issued by the tour operator is not sufficient for the purposes of compensation for denied boarding, cancellation or long delay.

3.

In the Chamber’s view, the ‘arrival time originally scheduled’ within the meaning of the aforementioned case-law of the Court of Justice cannot be derived from an item of proof issued by a tour operator without having consulted the air carrier concerned.

Article 2(h), Article 5(1)(c), Article 6(1), the second sentence of Article 7(1), and Article 7(2) of the Air Passenger Rights Regulation also refer to the ‘scheduled time of arrival’. In the judgment in the *Air France v Folkerts* case, the Court of Justice stated that a delay must be assessed, for the purposes of the compensation provided for in Article 7 of the regulation, in relation to the scheduled arrival time at the final destination; regarding the concept of ‘final destination’, it referred, in paragraph 34, to the definition in Article 2(h) of the Air Passenger Rights Regulation. Pursuant to that provision, ‘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. In this respect, the Court of Justice has therefore based the determination of the final destination on the ticket pursuant to Article 2(f), that is to say the paper document giving entitlement to transport, or something equivalent in paperless form, issued or authorised by the air carrier or its authorised agent, that is to say the physical or electronic document embodying the passenger’s entitlement to transport. It has not relied on ‘other proof’ within the meaning of Article 2(g) of the Air Passenger Rights Regulation (‘reservation’).

Were this to be applied to the determination of the scheduled time of arrival for the purposes of compensation, it would be concluded that the ‘ticket’ issued to the passenger must be decisive in this respect also, meaning that any diverging information in the ‘reservation’ is irrelevant. Thus, in the present case, the assignors’ ‘travel registration’ document of 24 October 2017 [...] is excluded from the outset as the basis for determining the scheduled time of arrival, [Or. 7] irrespective of whether it can be regarded as a ‘confirmed reservation’ within the meaning of Article 3(2)(a) of the Air Passenger Rights Regulation in the first place. Furthermore, it also does not fulfil the requirements for a ‘ticket’ pursuant to Article 2(f) of the regulation either, because it cannot be assumed that it is the

means by which an agent authorised by the defendant has issued ‘entitlement’ to transport on the flights specified. The ‘travel registration’ document only allows the assumption that it is intended to document the registration to a package tour organised by ITS Reisen. There is no document that can clearly be identified as a ‘ticket’ in the present case.

In any event, however, the Chamber considers that the ‘scheduled time of arrival’ cannot be derived from ‘other proof’ issued by a tour operator that does not have a contract with the air carrier in respect of the flight concerned. Flight planning is a matter solely for the air carrier. An air carrier has planned a flight if it has included it in its flight plan and therefore defined it by points of departure and destination and times of departure and arrival, assigned a flight number to it and released it for booking [...]. As long as there is no reservation, that is to say a booking for a seat on such a flight, the air carrier can change or cancel the planning without passengers being able to derive any claims for compensation from it; this is evident from Article 2(1) of the regulation. It follows that ‘other proof’ within the meaning of Article 2(g) of the Air Passenger Rights Regulation that has been issued by a tour operator prior to such a reservation is not capable, at least in such a case, of substantiating claims for compensation. This militates against the assumption that such ‘other proof’ is sufficient in any event to substantiate claims for compensation if the air carrier concerned does not operate the flight referred to in the proof or operates it at different times.

4.

Nor can Article 13 of the Air Passenger Rights Regulation do anything to change this outcome, because the Chamber is unable to see how the air carrier against which a claim has been made could seek compensation from the tour operator if they do not have a contractual relationship but the air carrier must meet claims for compensation under the Air Passenger Rights Regulation that are asserted against it for failure to comply with a flight schedule that it did not even draw up itself. In this respect, the Chamber takes the view that the requirement of ensuring a high level of protection for passengers (recital 1 of the Air Passenger Rights Regulation) cannot justify a different outcome either. In the tour operator with which the passenger concerned is contractually bound, the latter has a party against [Or. 8] which he can seek compensation for individual damage suffered as a result of having relied on the incorrect flight planning information provided by the tour operator.

5.

[...]

IV.

[...]