

# Anonymised version

Translation

C-395/20 – 1

## Case C-395/20

### Request for a preliminary ruling

**Date lodged:**

19 August 2020

**Referring court:**

Landgericht Düsseldorf (Germany)

**Date of the decision to refer:**

3 August 2020

**Applicants and appellants:**

EP

GM

**Defendant and respondent:**

Corendon Airlines Turistik Hava Tasimacilik A.S.

[...]

[...]

Delivered on 3 August 2020

[...]

**Landgericht Düsseldorf**

**(Regional Court, Düsseldorf)**

**Order**

In the case of

1. EP, [...] 45889 Gelsenkirchen,

2. GM, [...] 45889 Gelsenkirchen,

applicants and appellants,

[...]

v

Corendon Airlines Turistik Hava Tasimacilik A.S., [...] 07200 Antalya, Turkey,  
[...] defendant and respondent,

[...]

the 22<sup>nd</sup> Civil Chamber of the Landgericht Düsseldorf (Regional Court,  
Düsseldorf)

[...]

**has made 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 under Article 267 TFEU: **[Or. 2]**

1. Is a flight cancelled within the meaning of Articles 2(1) and 5(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 (OJ 2004 L 46, p. 1 et seq.) where the operating air carrier postpones a flight booked as part of a package holiday and scheduled to depart at 13:20 (LT) until 16:10 (LT) on the same day?
2. Does the notification nine days prior to the start of the trip of the postponement of a flight from 13:20 (LT) to 16:10 (LT) on the same day constitute an offer of re-routing within the meaning of Article 5(1)(c)(ii) 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.), and, if so, must that offer meet the requirements of Articles 5(1)(a) and 8(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 (OJ 2004 L 46, p. 1 et seq.)?

### Grounds

## I.

The applicants booked a package holiday to Antalya, Turkey, via the Check24 price comparison portal. They received a confirmed booking for the flight from Düsseldorf to Antalya on 18 May 2019 (XC 6408) with the defendant air carrier. The scheduled departure time was 13:20 (LT) and the scheduled arrival time was 17:50 (LT). The defendant air carrier postponed the flight, under the same flight number, to 16:10 (LT) on the same day, so that the scheduled [Or. 3] arrival time was now 20:40 (LT). The flight was subsequently delayed and did not take off until 17:02 (LT), landing at 21:30 (LT).

The applicants claimed compensation from the defendant air carrier, in the amount of EUR 400.00 each, under Articles 5(1)(c) and 7(1)(b) 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 ('the Air Passenger Rights Regulation').

The Amtsgericht (Local Court) dismissed the action and held that boarding had not been denied within the meaning of Articles 2(j) and 4(3) of the Air Passenger Rights Regulation because, although the flight times had changed, the original flight planning had not been abandoned and the applicants had been able to take the rescheduled flight. The Amtsgericht (Local Court) further held that the question as to whether the change of flight time constituted a cancellation or a long delay could be left open, since it was common ground that the applicants had in any event been informed of the change of flight time within the period of between two weeks and seven days before the scheduled time of departure laid down in Article 5(1)(c)(ii) of the Air Passenger Rights Regulation. Finally, the question as to whether the defendant had adequately informed the applicants of their rights under Article 8 of the Air Passenger Rights Regulation could also be left open, since any infringement of the obligation to provide such information would not give rise to a right to compensation under Article 7(1) of the Air Passenger Rights Regulation.

## II.

The foregoing does not stand up to legal scrutiny if the postponement of the flight by almost three hours amounts to its non-operation within the meaning of Article 2(1) of the Air Passenger Rights Regulation and the notification of its postponement does not constitute an offer of re-routing as provided for in Article 8 of the Air Passenger Rights Regulation.

If the flight had been cancelled because of the postponement, the applicants might have a right to compensation under Articles 5(1)(c) and 7(1)(b) of the Air Passenger Rights Regulation in the amount of EUR 400.00 each if the passengers were not informed [of any such cancellation] in good time in accordance with Article 5(1)(c)(ii) of the Air Passenger Rights Regulation and were not offered re-

routing within the meaning of that provision. The defendant air carrier has not invoked extraordinary circumstances within the meaning of Article 5(3) of the Air Passenger Rights Regulation. **[Or. 4]**

### III.

The success of the applicants' appeal depends crucially on whether the postponement of the flight by three hours amounts to its non-operation within the meaning of Article 2(1) of the Air Passenger Rights Regulation. It further depends on whether the notification of the flight's postponement constitutes an offer of re-routing within the meaning of Article 8(1)(b) or (c) of the Air Passenger Rights Regulation.

#### 1.

According to the legal definition contained in Article 2(1) of the Air Passenger Rights Regulation, a 'cancellation' means the non-operation of a flight which was previously planned and on which at least one place was reserved. The 'non-operation' of a scheduled flight must be distinguished from a 'delay' to that flight and is characterised by the fact that the planning for the original flight is abandoned (see the judgment of the ECJ of 19 November 2009 – C-402/07, C-432/07 *Sturgeon and Others v Condor* and *Böck and Others v Air France SA*, [...] paragraph 33 et seq.). The Court of Justice has not as yet clarified whether the planning for a flight must also be assumed to have been abandoned in the case where the flight is postponed by three hours.

#### 2.

Article 5(1)(c)(ii) of the Air Passenger Rights Regulation requires that passengers be informed of the cancellation of their flight within a period of between two weeks and seven days before the scheduled time of departure. Article 5(1)(c)(ii) of the Air Passenger Rights Regulation further requires that passengers be 'offered re-routing' at the same time as they are provided with the aforementioned information. The question, not as yet clarified by the Court of Justice, is whether the mere notification of changed flight times is to be regarded as such an 'offer[...] [of] re-routing' within the meaning of Article 5(1)(c)(ii) of the Air Passenger Rights Regulation. Neither has it yet been clarified whether it is sufficient in this regard that the passenger is in any event offered re-routing in the form of the changed flight times, or whether that offer must in addition meet the requirements of Articles 5(1)(a) and 8(1) of the Air Passenger Rights Regulation, which is to say that the passenger must be given the opportunity to choose from a number of different options.

### IV

[...]