

Case C-434/20

Request for a preliminary ruling

Date lodged:

16 September 2020

Referring court:

Landgericht Frankfurt am Main (Germany)

Date of the decision to refer:

2 September 2020

Applicant and appellant:

flightright GmbH

Defendant and respondent:

SunExpress Günes Ekspres Havacilik A.S.

[...]

Order

In the case of

flightright GmbH [...], Potsdam,

applicant and appellant

[...]

v

SunExpress Günes Ekspres Havacilik A. S. [...], Antalya,

defendant and respondent

[...] **[Or. 2]**

the 24th Civil Chamber of the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, Germany) [...],

on 2 September 2020, 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 pursuant to Article 267 TFEU:

- 1. Must Articles 4 and 7 of Council Regulation (EC) No 261/2004 of 11 February 2004 be interpreted as meaning that a rebooking onto another, earlier flight by which the passenger reaches his final destination 10 hours and 1 minute before the scheduled arrival time of the flight originally booked constitutes a case of denied boarding triggering an obligation to pay compensation?**
- 2. In the event that the answer to question 1 is in the affirmative, must the passenger, even in that event, have presented himself for check-in and boarding at the time indicated and no later than 45 minutes before the published departure time of the originally booked flight – as required in principle by Article 3(2) and Article 2([j]) of Council Regulation (EC) No 261/2004 of 11 February 2004) – in order for that regulation to be applicable and, more specifically, in order to give rise to a case of denied boarding triggering an obligation to pay compensation, even though this was in fact no longer possible because the passenger had taken the rebooked earlier replacement flight? [Or. 3]**

Grounds

The applicant, acting under assigned rights, seeks compensation for denied boarding pursuant to EC Regulation No 261/2004 ('the Regulation').

As part of a package tour, the assignors had confirmed bookings for a flight to be operated by the defendant from Frankfurt to Antalya on 18 April 2019 (YQ141), which was scheduled to depart at 18.40 and scheduled to arrive in Antalya at 23.05. One day before departure, on 17 April 2019, they were informed by the tour operator that they had been rebooked onto a different, earlier flight (XQ143) scheduled to depart at 09.02 and scheduled to arrive in Antalya at 13.04. The assignors took this flight. Having taken the replacement flight, the assignors reached their destination at the earlier time of 13.04 on 18 April 2019, that is to say 10 hours and 1 minute before the scheduled arrival time of the originally booked flight.

By judgment of 28 November 2019, the Amtsgericht Frankfurt (Local Court, Frankfurt, Germany) dismissed the action on the ground that there was neither a cancellation within the meaning of Article 5 of the Regulation nor a 'long delay in arrival'. Nor was it a case of denied boarding within the meaning of Article 4 of the Regulation. First, the assignors were not expressly denied boarding since, contrary to Articles 3(2) and 2(j) of the Regulation, they did not present themselves for check-in and boarding at the time indicated and at least 45 minutes

before the published departure time of the flight originally booked. Moreover, the assignors did not have to wait as a result of the rebooking. Indeed, they were able to spend half a day longer at their holiday destination. According to the spirit and purpose of the Regulation, it is only cases of delayed arrival, not cases of arrival earlier than planned, which are eligible for compensation.

By its appeal, the applicant maintains its claim that the transfer to a different, earlier flight must be regarded as a case of denied boarding. **[Or. 4]**

The outcome of the appeal depends crucially on whether a rebooking against the passenger's will which led to an arrival time at the final destination earlier than would have been the case on the originally booked flight constitutes a case of denied boarding.

The Court of Justice has not yet ruled on that question. It is true, that, in its judgment of 30 April 2020 (Case C-191/19), the Court of Justice held that, in the case where the first of two flights comprising a single booking is rebooked, against the passengers' will, to a later flight, there is no entitlement to compensation where, notwithstanding that the first leg of the journey was rebooked, the passengers are able to catch the connecting flight forming the second leg and, as a result, reach their final destination without delay at the 'arrival time originally scheduled'. It is true that the rebooking of one leg of a flight causes inconvenience. However, that inconvenience is not to be considered 'serious', and thus eligible for compensation under the Regulation, in the case where the passenger reaches his final destination at the 'original planned arrival time'.

However, the foregoing case is not comparable to the present one. First, the present case does not concern a single booking comprising connecting flights. In addition, and more specifically, the assignors in this case did not reach their final destination at the 'original planned arrival time', but 10 hours and 1 minute before the scheduled arrival time.

The fact that, where a passenger is informed of a cancellation less than seven days before the scheduled departure time, rights to compensation are excluded, in accordance with Article 5(1)(c)(iii) of the Regulation, only if that passenger is offered re-routing enabling him to depart no more than one hour before the scheduled departure time and to reach his final destination no more than two hours after the scheduled arrival time, might indicate that, even in the event of a rebooking, rights to compensation may exist where the offered replacement flight departs more than one hour earlier than the booked flight or arrives more than one hour earlier at the final destination.

A further argument in favour of the assumption of a case of denied boarding triggering an obligation to pay compensation might be that, although an earlier flight may in theory make for a longer stay at the final destination, this is not necessarily what the passenger wants, for example because the flight was not part

of a holiday trip, or because the earlier arrival makes it necessary to pay for an additional night's accommodation at the destination, or because the flight [Or. 5] arrives at night. All of these inconveniences might justify compensation.

In the event that such a rebooking onto an earlier flight constitutes a case of denied boarding within the meaning of Article 4 of the Regulation, the further question arises as to whether the Regulation is applicable in this instance too, that is to say, whether (as required by Article 3(2) of the Regulation) the passenger must have presented himself for check-in at the time indicated and whether (as required by Article 2([j]) of the Regulation) the passenger must also have presented himself for boarding.

Whether those requirements must be met without exception, that is to say, in particular, whether the applicability of the Regulation is subject to the essential condition that the passenger must have presented himself to check in for the originally booked flight at the time indicated even in the case where – as in this instance, in which the passenger was notified of the rebooking in good time and took the replacement flight, which was earlier than the flight originally booked – that would not actually have been possible, has not as yet been the subject of a clear ruling from the Court of Justice, not even, in particular, in its judgment of 30 April 2020 (Case C-191/19). That case also concerned a situation in which the passenger was rebooked onto another flight against her will. The Court of Justice criticised the fact that it was not clear from the question referred whether the applicant in that case had in fact presented herself for check-in within the time limits laid down in Article 3(2) of the Regulation. It is true that it might be inferred from this that, in the view of the Court of Justice, a passenger must have presented himself for check-in even in the case of pre-emptive denied boarding. However, it is not inconceivable that the Court of Justice adheres to that requirement only in the case where – unlike in this instance – the passenger decides not to take the rebooked replacement flight and instead continues to request carriage on the flight originally booked. Whether, on the other hand, the passenger must have presented himself for boarding even in the case where – as here – he takes the rebooked replacement flight is a question which the judgment of the Court of Justice of 30 April 2020 (Case C-191/19) leaves open. [Or. 6]

In the case of so-called pre-emptive denied boarding, that is to say a rebooking of which the passenger is notified several days before the scheduled departure, the requirements of Articles 3(2) and 2([j]) of the Regulation might be dispensable. According to the case-law of the Bundesgerichtshof (Federal Court of Justice, Germany) [...], Regulation 261/2004 must be teleologically construed as meaning, in essence, that, in a case of so-called pre-emptive denied boarding, the passenger cannot nonetheless be required to present himself for check-in and boarding. In view of the high level of protection sought by Regulation 261/2004, it would not be in the passenger's interests to require him to present himself at the airport and request carriage if it were clear from the outset that he would be denied boarding. That would be absurdly formalistic. Moreover, it would be contrary to good faith if an air carrier could prevent the conditions of entitlement

to compensation for denied boarding from being met by refusing to allow passengers to check in and gain access to the boarding gate. Consequently, the Bundesgerichtshof considers that in cases of so-called ‘pre-emptive denied boarding’, the right to compensation cannot be made conditional upon the passenger’s appearance for check-in.

[...]

WORKING DOCUMENT