

# Anonymised version

Translation

C-335/23 – 1

## Case C-335/23

### Request for a preliminary ruling

**Date lodged:**

26 May 2023

**Referring court:**

Landgericht Frankfurt am Main (Germany)

**Date of the decision to refer:**

23 February 2023

**Applicant and appellant:**

MN

**Defendant and respondent:**

Qatar Airways

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**Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, Germany)** [...]

### Order

**In the case of**

MN, [...] Gehrden,

applicant and appellant

[...]

v

Qatar Airways (Q.C.S.C.) [...] Frankfurt am Main,

defendant and respondent

[...]

the 24th Civil Chamber of the Regional Court, Frankfurt am Main, [...] **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 pursuant to Article 267 TFEU:**

- 1. Is Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 to be interpreted as meaning that the passenger travels free of charge under the first alternative in [the first sentence of] Article 3(3) of that regulation in the case where he or she is required to pay only fees and aviation taxes for the flight ticket?**

- 2. If the first question is answered in the negative:**

**Is Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 to be interpreted as meaning that it does not concern a fare available (indirectly) to the public within the meaning of the second alternative in [the first sentence of] Article 3(3) of that regulation in the case where the flight was booked as part of a special offer provided by an air carrier for a limited period and in limited quantity, and which was available only to a certain group of professions?**

- 3. If the second question is also answered in the negative and Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 is regarded as applicable:**

**(a) Is Article 8(1)(c) of that regulation to be interpreted as meaning that there must be a temporal link between, on the one hand, the original booked and cancelled flight and, on the other, the desired re-routing at a later date?**

- (b) How should that temporal link, if necessary, be defined?**

### **Grounds**

The appellant seeks re-routing under Article 8(1)(c) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 ('the Air Passenger Rights Regulation').

The appellant had a paid and confirmed booking with the respondent as an operating air carrier [...] on the route from Frankfurt am Main via Doha to Sydney, as well as corresponding return flights. The outbound flight to Doha was supposed to take place on 6 August 2021, with a connecting flight to Sydney on 7 August 2021. The return flight from Sydney to Doha was scheduled for 22 August 2021 and the connecting flight to Frankfurt am Main for 23 August 2021. The appellant booked the tickets as part of a strictly time-limited special offer provided by the respondent, called 'Teacher Promo'. That special offer was addressed only to certain professions (inter alia, teachers and doctors) and limited to a certain number of tickets (approximately 20 000). According to the booking confirmation, the ticket price paid by the appellant came to EUR 197.40. This consisted of a EUR 0.00 Ticket Fare and EUR 197.40 for Taxes and Carrier-imposed Fees. Due to the effects of the Coronavirus pandemic, the flights at issue were cancelled by the respondent. The appellant subsequently sought, at first instance, a new travel date of 24 or 25 July 2022 and, with respect to the return flights, 13 or 14 August 2022. Following an amendment to her action at the appeal stage, the appellant now seeks re-routing in summer 2023. The respondent refuses to provide the re-routing.

The Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main, Germany) dismissed the action by judgment of 18 July 2022 [...]. [Details of the reasoning of the Local Court, Frankfurt am Main, which referred to the case-law of the Oberlandesgericht Köln (Higher Regional Court, Cologne, Germany) set out below]

The appellant [...] has brought an appeal against the judgment of the Local Court, Frankfurt am Main [...]. She submits that Article 8(1)(c) of the Air Passenger Rights Regulation does not require a temporal link between the original journey and the re-routing. Rather, she argues, the decision on the alternative date is a matter solely for the passenger. She maintains that the air carrier may object only for reasons relating to lack of capacity.

The respondent contends that the appeal should be dismissed and claims that the Air Passenger Rights Regulation, under Article 3(3) thereof, is not applicable. It argues that the appellant booked the tickets as part of a strictly time-limited special offer provided by the respondent, called 'Teacher Promo'. According to the respondent, the appellant was required to pay only fees and aviation taxes, and therefore acquired the tickets free of charge.

First of all, the outcome of the appeal depends essentially on whether the Air Passenger Rights Regulation is applicable in the present case.

The appellant purchased the flight ticket as part of a special offer provided by the respondent. The appellant had to pay only the aviation taxes and fees described in the booking confirmation as 'Taxes and Carrier-imposed Fees', whereas the ticket fare came to EUR 0.00. In that context, the Chamber first is uncertain whether, in such a case, the passenger travels 'free of charge' within the meaning of the first

alternative in [the first sentence of] Article 3(3) of the Air Passenger Rights Regulation.

If the first question is answered in the negative, that is to say, the passenger does not travel free of charge in the case where he or she is required to pay only taxes and fees, the outcome of the appeal will then turn on the question of whether the ‘Teacher Promo’ special offer involves a reduced fare not available directly or indirectly to the public.

The flights at issue were booked as part of that special offer provided by the respondent for a limited time and in limited quantity, and which was available only to certain professions.

In its judgment of 21 September 2021 (X ZR 79/20), the Bundesgerichtshof (Federal Court of Justice, Germany) held that a discounted fare granted by an air carrier for business trips made by employees of an undertaking which had concluded a corresponding framework agreement is available to the public within the meaning of the first sentence of Article 3(3) of the Air Passenger Rights Regulation. This ruling of the Federal Court of Justice is based on the assumption that a fare is available to the public in the case where it is aimed at an indefinite number of persons who do not have a special relationship with the air carrier going beyond a (potential) customer relationship. In its view, a special relationship in that sense exists only where the discount was not granted solely for the purposes of increasing sales, promotion or customer loyalty, but rather in view of a cooperative or other close relationship. It is generally understood that the notion of ‘the public’ denotes an indefinite number of persons who are not connected to each other in any particular way. That court took the view that, according to those criteria, a fare is available to the public even where not every potential customer would be able to take advantage of it. Rather, what counts is whether the number of persons in question can be determined with sufficient precision and whether those persons are sufficiently connected to each other and can be delimited as a closed category vis-à-vis the public. In the case of the corporate fare, the Federal Court of Justice held that there is no sufficiently close connection between the beneficiaries in the case where, although the offers are not available to everyone, the only thing that the category of beneficiaries has in common is that they fulfil the specified criteria.

The situation in the present case is similar. The special offer was not open to everyone, but only to a category of persons or professions defined by the respondent. The Chamber therefore raises the question whether the case-law of the Federal Court of Justice must also be applied to the present case, such that it concerns a fare accessible to the public, thereby making application of the Air Passenger Rights Regulation possible.

In the present case, the Chamber considers that the respondent’s special offer does not constitute either a frequent flyer programme or a commercial programme

within the meaning of the second sentence of Article 3(3) of the Air Passenger Rights Regulation.

If the first and second questions raised above are answered in the negative, that is to say, the Air Passenger Rights Regulation is applicable, then the outcome of the appeal will further depend on whether the re-routing under Article 8(1)(c) of the Air Passenger Rights Regulation must have a temporal link to the original booked journey.

According to the case-law of the Higher Regional Court, Cologne (OLG Köln, judgment of 26 February 2021 – 6 U 127720; OLG Köln, judgment of 6 May 2022 – 6 U 219/21), in the event of cancellation of a flight by the operating air carrier, the passenger may in principle, under Article 5(1)(a) and Article 8(1)(c) of the Air Passenger Rights Regulation, request re-routing, under comparable transport conditions, to his or her final destination at a later date (that is, later than the earliest opportunity; see Article 8(1)(b) of the Air Passenger Rights Regulation) at the passenger's convenience, subject to availability of seats. The interpretation of the provision demonstrated, in its view, that the re-booking must indeed be provided free of charge, but that there must also be a temporal link to the original journey. That court observes that the wording of Article 8(1)(b) of the Air Passenger Rights Regulation, namely 're-routing, under comparable transport conditions, to [the passenger's] final destination at the earliest opportunity', establishes a clear temporal connection with the passenger's original travel plan. It takes the view that it is therefore logical to give a corresponding interpretation to Article 8(1)(c) of the Air Passenger Rights Regulation, namely 're-routing, under comparable transport conditions, to [the passenger's] final destination at a later date at the passenger's convenience, subject to availability of seats'. The Higher Regional Court, Cologne, refers in this regard to the spirit and purpose of the provision and argues that the legislative framework of the Air Passenger Rights Regulation is aimed at ensuring protection for passengers only during the respective journey. In its view, the provisions of the Air Passenger Rights Regulation do not grant the passenger a general right to free re-booking without any link to the planned journey, for instance in respect of a flight after the original planned journey, at a particularly expensive travel time. Accordingly, Article 8(1) of the Air Passenger Rights Regulation constitutes a kind of warranty claim in the event that the contract is not performed. It considers that, at the same time, Article 8(1)(a) of the Air Passenger Rights Regulation ultimately establishes *ex nunc* a right to rescind the contract in so far as it has not yet been performed or its purpose has been frustrated. Article 8(1)(b) and (c) of the Air Passenger Rights Regulation accordingly constitutes a claim for subsequent performance which is inherently linked to the content of the air transport contract. It observes that such a claim is in principle linked to the original planned journey. According to that court, the question whether the necessary link in that respect is maintained depends on the circumstances of the planned journey, with the claim to re-routing normally having to be classified under German law as a relative fixed-date transaction. While it is not impossible that, where the time of performance has not been complied with, the flight may be provided subsequently, the party entitled to

demand performance has a right to withdraw from the contract. In that court's view, compliance with the time of performance is nonetheless so fundamental that the transaction must depend entirely on the timeliness of the performance. The question of when a delayed service (arrival) no longer makes sense for the passenger and no longer constitutes performance, thereby becoming impossible, is to be determined on the basis of the passenger's original travel plan. That court considers that no other solution is apparent, moreover, from the Commission's non-binding interpretive guidelines on the Air Passenger Rights Regulation (OJ 2016 C 214, p. 5) and the supplement to those guidelines also relating to Covid-19 (OJ 2020 C 89 I, p. 1). That court notes that the Commission is not of the clear opinion that the claim arising from Article 8(1)(c) of the Air Passenger Rights Regulation could even be asserted years later in respect of a wholly different journey.

A re-routing under Article 8(1)(c) of the Air Passenger Rights Regulation would therefore be precluded in the present case. Following an amendment to her action at the appeal stage, the appellant now seeks re-routing in summer 2023. However, the original flights were supposed to take place in August 2021. In view of such a time span, it would no longer be possible, on the basis of the case-law of the Higher Regional Court, Cologne, to take the view that a temporal link exists. That said, the Chamber is uncertain as to whether the wording of the provision can be interpreted as meaning that there must be a temporal link between the original flight and the re-routing, as an unwritten element. In any case, no support for such a position can be found in the wording of the provision, for which reason this question must now be referred to the Court of Justice for interpretation.

[...]