

**Case C-672/20****Request for a preliminary ruling****Date lodged:**

10 December 2020

**Referring court or tribunal:**

Landesgericht Korneuburg (Austria)

**Date of the decision to refer:**

23 November 2020

**Appellant, defendant at first instance:**

L GmbH

**Respondent in the appeal, applicant at first instance:**

FK

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[...] **LANDESGERICHT KORNEUBURG (REGIONAL COURT, KORNEUBURG, AUSTRIA)**

The Regional Court, Korneuburg, sitting as a court of appeal, [...] in the case of the applicant **F\*\*\*\*\* K\*\*\*\*\*** [...] versus the defendant **L\*\*\*\*\* GmbH** [...], concerning the appeal by the defendant against the judgment of the Bezirksgericht Schwechat (District Court, Schwechat, Austria) of 26 August 2020 [...], has made the following

**O r d e r:**

[I] The following questions are referred to the Court of Justice of the European Union **for a preliminary ruling** pursuant to **Article 267 TFEU**:

[1] Is 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 ('Air Passenger Rights Regulation') to be interpreted as meaning **that the Regulation applies to a passenger who has already [Or. 2] checked in online before arriving at the airport and is not carrying any checked baggage;**

**acknowledges the flight delay shown on the airport's departure board, waits at the departure gate for further information and makes an enquiry at the air carrier's counter regarding the departure of the booked flight; does not receive any explanation as to whether and when the flight will leave nor any offer of a replacement flight from the defendant's staff; and thereupon books another flight to his final destination himself, without boarding the originally booked flight?**

[2] Is Article 5(3) of the Air Passenger Rights Regulation to be interpreted as meaning that an air carrier is not obliged to pay compensation in accordance with Article 7 of the Regulation, **if it arrives at the passenger's final destination after a delay of eight hours and nineteen minutes, because the aircraft was damaged by a lightning strike during the first of three preceding flights; the technician from the air carrier's contracted maintenance company who was called in after landing found only minor damage that did not affect the airworthiness of the aircraft ('some minor findings'); the second of three preceding flights went ahead; however, during the course of a pre-flight check before the third of three preceding flights, it emerged that the aircraft was not fit for further use for the time being; and the air carrier therefore used a replacement aircraft in place of the originally intended, damaged aircraft, which completed the third of the preceding flights with a departure delay of seven hours and forty minutes?**

[3] Is Article 5(3) of the Air Passenger Rights Regulation to be interpreted as meaning **that the reasonable measures to be taken by the air carrier include offering to rebook the passenger on a different flight, which would have enabled him to reach his final destination with a delay of five hours [Or. 3] (and actually did so as a result of the booking made on his own initiative), even though the air carrier operated the flight with a replacement aircraft in place of the now unfit aircraft, with which the passenger would have reached his final destination with a delay of eight hours and nineteen minutes?**

[II] [...] [Stay of proceedings]

#### **G r o u n d s :**

The applicant had a confirmed booking for the following flight operated by the defendant:

- OE 105 from Palma (PMI; Spain) 21 October 2019, 14.30, to Vienna (VIE; Austria) 21 October 2019, 16.50.

The route from Palma (PMI) to Vienna (VIE) covers a distance of less than 1 500 kilometres calculated using the great circle route method.

According to the defendant's claims, the aircraft originally intended for this flight was used for the following flights on 21 October 2019:

[1] OE 1318 from Vienna (VIE) 7.30, to Bergamo (BGY; Italy) 9.00. The flight ran on time.

[2] OE 1319 from Bergamo (BGY) 9.25, to Vienna (VIE) 10.55. The flight ran but its departure was delayed by two hours and fifteen minutes, and its arrival was delayed by two hours and forty minutes.

Furthermore, the aircraft should have been used for the following subsequent flights: **[Or. 4]**

[3] OE 100 from Vienna (VIE) 11.30, to Palma (PMI) 13.55. The flight ran – with a replacement aircraft – but its departure was delayed by seven hours and forty minutes, and its arrival was delayed by seven hours and forty-one minutes.

[4] OE 105, the flight in question. The flight ran – with the same replacement aircraft – but its departure was delayed by eight hours and twenty-six minutes, and its arrival was delayed by eight hours and nineteen minutes.

The **applicant** claimed from the defendant payment of EUR 250 plus interest as compensation under Article 5 [(1)(c)(iii)] in conjunction with Article 7 [(1)(a)] of the Air Passenger Rights Regulation and based his claim on the delayed arrival time of flight OE 105 of over eight hours. [...] [applicant's submission, reproduced below by the court of appeal in so far as it is relevant]

The **defendant** [...] asserted that the applicant did not board flight OE 105; for this reason, the Air Passenger Rights Regulation cannot be applied in accordance with Article 3(2)(a) therein. [...] **[Or. 5]** [...] [defendant's submission, reproduced below by the court of appeal in so far as it is relevant]

With the contested **judgment**, the District Court, Schwechat, sitting as the court of first instance granted the relief sought and made the findings shown above in question [1] concerning the applicant's actions at Palma airport (PMI). The District Court, Schwechat, did not make any findings regarding the cause of the delay. It stated that, from a legal perspective, whether or not the applicant actually boarded the delayed flight after checking in is of no relevance for the outcome of the proceedings. It evidently assumed that a lightning strike constitutes an extraordinary circumstance in the sense of Article 5(3) of the Air Passenger Rights Regulation, and disputed a number of the measures considered reasonable by the defendant. Among other things, there was no submission made in the proceedings in relation to potentially rebooking passengers onto another flight from Palma (PMI) to Vienna (VIE), nor was any explanation submitted as to why the defendant was unable to immediately organise a replacement aircraft for flight OE 105 from Palma (PMI). It pointed out that the defendant must have already anticipated at around 09.00 as soon as the lightning strike occurred **[Or. 6]** that this could cause a considerable delay to subsequent rotations, even if ultimately no relevant damage was found during inspection.

[...]

[...] [submissions] [...] The Regional Court, Korneuburg, sitting as a **court of appeal**, is called on to rule on the applicant's claims at second and final instance.

On the **questions referred**:

On question [1]:

The interpretation of Article 3(2)(a) of the Air Passenger Rights Regulation is in dispute in two respects in this specific case:

[a] Firstly, it is necessary to examine whether the applicant presented himself for check-in on time. According to the findings of the court of first instance, the applicant checked in online and obtained a boarding pass this way.

On the one hand, it could be argued that the check-in procedure was already completed when the boarding pass was issued by the air carrier. On the other hand, it could be argued that it is sufficient for the passenger to be present for boarding instead of presenting himself for check-in.

Ultimately, it is open to question whether the 'time indicated' referred to in Article 3(2)(a) of the Air Passenger Rights Regulation is that which corresponds to the schedule, or whether the time stated in the case of delay should be applied. **[Or. 7]**

In the view of the referring court, it is sufficient in this specific case that the applicant was issued with a boarding pass electronically by the defendant, and he appeared at the departure gate on time with reference to the flight schedule. On the other hand, the referring court also considers it not necessary for the passenger to continue to wait at the departure gate after the originally scheduled departure time and then to have to present himself again at the departure gate or a counter for the time stated for the delayed flight, 45 minutes before the published departure time for the delayed flight if need be.

This question has not been considered by the Court of Justice to date.

[b] The other sub-aspect concerns the question of whether the passenger must be carried on the delayed flight itself or whether the entitlement to compensation still exists even if he organises replacement transport himself due to the (greater) delay.

[...] [Case-law in Germany and Austria] [...] The parties in dispute both base their arguments on the reasoned order of the Court of Justice of 24 October 2019 in Case C-756/18, *easyJet Airline*. **[Or. 8]** The starting point of this decision is the question referred for a preliminary ruling, namely how the passenger is required to prove that he presented himself for check-in.

Based on the Court's answer, it can be argued on the one hand that such proof is to be provided in different ways, depending on whether the passenger is carried on

the delayed flight or not. The former case does not require presentation of the boarding pass, while the latter case does require it. However, the Court's answer may also be interpreted as meaning that, in the event that the air carrier claims that the passenger was not carried on the delayed flight, the passenger is required to submit the boarding pass in order to prove that he did present himself for check-in on time and had been carried on the delayed flight.

[...] [national case-law] [...] The referring court rather tends towards the view that the entitlement to compensation exists irrespective of whether or not the passenger boards the delayed flight. In this specific case, an option for replacement transport was available that could have brought the passenger to his final destination sooner than the delayed flight, and **[Or. 9]** indeed did so. Should the passenger now decide to reach his final destination by different means instead of the delayed flight, he has already been caused inconvenience as a result of the longer waiting time on the one hand and the rebooking process on the other hand, which should be compensated for through payment of compensation.

However, the question has been answered in different ways by several courts in the European Union, meaning that an opinion from the Court of Justice is required.

On question [2]:

The defendant based its argument on the existence of an extraordinary circumstance in the sense of Article 5(3) of the Air Passenger Rights Regulation as the cause of the (significant) delay, and stated that the first of the three flights preceding the originally booked flight was affected by a lightning strike. This consequently required an inspection and, following the second of the preceding flights, repairs on the aircraft that was originally intended for use. This circumstance was expressly disputed by the applicant in the proceedings before the court of first instance, but this court did not make any findings in this regard.

However, the applicant also claimed during the proceedings before the court of first instance that a lightning strike could never constitute an extraordinary circumstance in any case; unlike a bird strike, it rather concerns a typical risk associated with the operation of an aircraft, because there is interaction between the aircraft and the electrical field in a storm cloud, which causes the aircraft to attract lightning. The applicant makes reference to scientific testing in this regard.

The clarification of the question of whether a lightning strike is eligible, in principle, to constitute an extraordinary circumstance is therefore already a necessary condition for enabling the court of appeal to resolve this specific case, despite the circumstances not being established on this point, **[Or. 10]** because, if the question is answered in the negative, it is able to confirm the contested judgment to the effect of rejecting the appeal, without the court of first instance having to order further findings.

The referring court has always assumed that a lightning strike constitutes an extraordinary circumstance in the sense of Article 5(3) of the Air Passenger Rights Regulation [...]. [...]

The court of appeal is considering departing from its established case-law to date on the basis of the following considerations: Civil aviation has always transported passengers using aerodynamic lift; in short, it uses the circulation of air around the wings. It could be concluded from this that the atmospheric conditions are inherent in the normal exercise of aviation. Unstable atmospheric conditions – and therefore also lightning – could therefore be attributable to the air carrier; damage caused to the aircraft by lightning would, by its nature or origin, be inherent in the normal exercise of the activity of the air carrier, and therefore differs from a bird strike (see judgment of the Court of Justice of the European Union of 4 May 2017 in Case C-315/15, *Pešková and Peška*, paragraph 24).

In view of the fact that evidence from the domain of physics may be required, and that the court of appeal would have to ask the court of first instance to obtain this after the contested judgment is set aside, the court requires clarification from the Court of Justice as to whether a lightning strike can, in principle, give rise to an extraordinary circumstance in the sense of Article 5(3) of the Air Passenger Rights Regulation. **[Or. 11]**

### On question 3

In its appeal, the defendant objects to the legal opinion of the court of first instance that it did not make any submission regarding any rebooking for the applicant. The appellant counters the argument by the court of first instance with the assertion that it provided sufficient submissions in relation to a reasonable measure: in order to minimise the delay of flight OE 105, it swapped the original aircraft and made available a replacement aircraft from its own fleet. It therefore ran the flight, albeit with a delay. In the case of a delay, the rebooking of passengers already cannot logically constitute an economically tolerable measure, as this would result in a situation in which the delayed flight would have to be run as an empty flight, especially if all passengers that should have been carried on this flight had been rebooked beforehand.

The applicant opposes this viewpoint – as does the court of first instance – with the legal opinion of the Court of Justice in its judgment of 11 June 2020 in Case C-74/19, *Transportes Aéreos Portugueses*, according to which the air carrier must deploy all the resources at its disposal to ensure reasonable, satisfactory and timely re-routing of passengers on both cancelled and delayed flights; this includes seeking alternative direct or indirect flights which may be operated by other air carriers, whether or not belonging to the same airline alliance, arriving at a scheduled time that is not as late as the next flight of the air carrier concerned (judgment in *Transportes Aéreos Portugueses*, paragraph 59). [...] **[Or. 12]** [...] [...] The appellant does not dispute this argument further, and apparently takes the

view that using a replacement aircraft to operate the flight with a delay constitutes taking all reasonable measures.

The present circumstances clearly differ from those that were presented before the Court of Justice in Case C-74/19, in which the passenger was unable to make his connecting flight as a result of a delay and therefore reached his final destination with a significant delay; it was therefore necessary to rebook the missed connecting flight onto a replacement flight. The Court of Justice clarified the requirements that apply to this rebooking under EU law.

In the present case, the defendant could have carried the applicant on the booked flight – albeit with a significant delay; rebooking was not necessary. However, the applicant on the specific flight connection had a different option available to allow him to reach his final destination far earlier than if he took the defendant's delayed flight, but still with a significant delay. The defendant did not offer this option to the applicant; the latter took this flight of his own accord.

The court of appeal takes the view that the rebooking in this specific case would have certainly been economically tolerable and the organisational effort manageable, but that this argument only holds true when considering the case of one individual passenger. **[Or. 13]** Rebooking all passengers onto one flight, or more if need be, that leaves earlier and arrives at the final destination earlier, could be intolerable overall. To this extent, these specific circumstances differ from those that formed the basis for the judgment in *Transportes Aéreos Portugueses*, because they concerned the rebooking of an individual passenger on one specific connecting flight and not the rebooking of all passengers who had to wait for a delayed replacement flight. Therefore, the question to be resolved by the court of appeal has not been conclusively clarified by the Court of Justice, especially not in its remarks in the judgment in *Transportes Aéreos Portugueses*. Establishing when it is unreasonable for the air carrier to arrange rebookings in the case of a delayed flight because it is being required to make an intolerable sacrifice, requires more detailed clarification by the Court of Justice.

The consideration of all questions is necessary for the court of appeal to enable it to reach a final decision on the appeal. Depending on whether the passenger is covered by the scope of the Regulation, either the contested judgment is to be immediately revised to the effect that the claim is rejected, or we consider further examination (question 1). If a lightning strike is not considered to constitute an extraordinary circumstance, the contested judgment must be confirmed in any case (question 2). Depending on whether the air carrier has successfully proven that it took all reasonable measures simply by operating the flight with a delay using a replacement aircraft, the contested judgment is to either be confirmed or revised to the effect of rejecting the claim (question 3).

[...] **[Or. 14]**

[...]