

Case C-705/23

Request for a preliminary ruling

Date lodged:

17 November 2023

Referring court:

Landgericht Düsseldorf (Germany)

Date of the decision to refer:

2 November 2023

Applicant and appellant:

Flightright GmbH

Defendant and respondent:

Condor Flugdienst GmbH

[...] [Case numbers]

Landgericht Düsseldorf (Regional Court, Düsseldorf)

Order

In the case of

Flightright GmbH, [...] Berlin, [Germany]

applicant and appellant,

[...]

v

Condor Flugdienst GmbH, [...] Neu-Isenburg,

defendant and respondent,

[...]

on 2 November 2023

the 22nd Civil Chamber of the Landgericht Düsseldorf (Regional Court, Düsseldorf),

[...]

makes the following order:

The proceedings are stayed.

The following question is referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of EU law pursuant to Article 267(1)(b) and Article (3) TFEU:

Is Article 4 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] to be interpreted as meaning that there is a case of denied boarding of a passenger by an air carrier in the form of preemptive denied boarding even in the case where a tour operator informs the passenger, by means of notification of a change of reservation, that the flight has been cancelled, but the flight has not been cancelled by the air carrier and, moreover, the flight is actually duly performed as anticipated?

Grounds:

I.

The applicant is seeking compensation from the defendant for the denied boarding of two passengers on the basis of assigned rights.

Passengers ... and ... ('the assignors') booked, through a tour operator, a package tour to Fuerteventura for the period from 18 July 2020 to 30 July 2020. The services falling within the scope of the package tour also included carriage by air from Düsseldorf to Fuerteventura and back. The flights were to be performed by the defendant. The assignors were notified by their tour operator that the outbound flight on 18 July 2020 (flight number DE 1456) had been cancelled. A change of reservation was made for a flight on 20 July 2020 (flight number likewise DE 1456). The assignors claim that the tour operator informed them of this only eight days before the departure date. The defendant has denied this across the board. The original flight on 18 July 2020 was indisputably not cancelled, but duly performed. However, following the notification by the tour operator, the assignors did not turn up at the airport on 18 July 2020, but presented themselves there only on 20 July 2020.

The assignors have assigned their rights to the applicant. The applicant brought an action before the Amtsgericht Düsseldorf (Local Court, Düsseldorf) seeking payment of compensation totalling EUR 800.00 pursuant to Article 4(3) and Article 7(1)(b) of Regulation (EC) No 261/2004 in conjunction with Paragraph 398 of the Bürgerliches Gesetzbuch (German Civil Code; ‘the BGB’).

The applicant relies on the fact that the defendant must be held responsible for the conduct of the tour operator. In that regard, pre-emptive denied boarding by the defendant is to be assumed, which gave rise to the asserted rights. The defendant contends that the present case is not one of denied boarding. That would require conduct on the part of the air carrier. In this case, however, the notification was made by the tour operator. Moreover, it duly performed the flight.

In the proceedings at first instance before the Local Court, Düsseldorf, [...] a default judgment was issued, by which the action was dismissed. The applicant lodged an objection to this. By judgment of 3 November 2022 [...] the Local Court, Düsseldorf, upheld the default judgment dismissing the action.

The applicant has appealed against that judgment [...]. [...]

II.

The success of the defendant’s appeal depends decisively on the question set out above of whether pre-emptive denied boarding by means of notification of a change of reservation or notification of a cancellation by the tour operator can also constitute denied boarding within the meaning of Article 4 of Regulation (EC) No 261/2004. This question has not yet been clarified by either the EU courts or the highest courts.

Specifically:

1.

In the event that the above question is answered in the affirmative, the applicant would, in the present case, be entitled to compensation in the amount of EUR 800.00 pursuant to Article 4(3) and Article 7(1)(b) of Regulation (EC) No 261/2004 on the basis of assigned rights. The question is therefore relevant to the decision.

a)

In particular, reasons justifying denied boarding within the meaning of the last clause of Article 2(j) of Regulation (EC) No 261/2004 have neither been submitted nor are otherwise apparent. Application by analogy of Article 5(1)(c)(i) to (iii) of Regulation (EC) No 261/2004 is also out of the question in the context of rights associated with denied boarding pursuant to Article 4(3) and Article 7 of Regulation (EC) No 261/2004 (see judgment of 26 October 2023, *LATAM Airlines Group*, C-238/22, EU:C:2023:815, paragraph 40 et seq.). As a result, there was no

need to clarify the question of whether the assignors had already been informed of the change of reservation more than eight days before the date of the flight.

b)

In so far as it is only on appeal that the defendant disputed for the first time that the assignors had a confirmed reservation within the meaning of Article 3(2)(a) of Regulation (EC) No 261/2004, this would seem to ultimately be irrelevant. On the one hand, it is hereby precluded on appeal [...]. On the other hand, this court is of the opinion that it is apparent from an overall examination of the ‘vouchers’ dated 26 June 2020 (Annex K1), the travel confirmation and invoice dated 9 July 2020 (Annex K2) and the notification of a change of reservation (Annex K2) that the assignors originally had a confirmed reservation by the tour operator for flight DE 1456 on 18 July 2020.

As the Court of Justice held in the judgment of 21 December 2021, *Azurair and Others*, C-146/20, C-188/20, C-196/20, C-270/20, EU:C:2021:1038, a passenger also has a ‘confirmed reservation’ within the meaning of Article 3(2)(a) of Regulation (EC) No 261/2004 in the form of ‘other proof’ within the meaning of the second indent of Article 2(g) of Regulation (EC) No 261/2004 where the tour operator submits to that passenger, with whom it has a contract, a document by which he or she is assured transport on a particular flight, individualised by points of departure and destination, times of departure and arrival, and the flight number, even in cases where that tour operator has not received confirmation from the air carrier concerned as to the times of departure and arrival of that flight, it being for the national courts to ascertain whether the tour operator’s document constitutes ‘other proof’ in the case at hand, in particular as regards whether the flight times indicated are described as ‘expected flight times’ (judgment of 21 December 2021, *Azurair and Others*, C-146/20, C-188/20, C-196/20, C-270/20, EU:C:2021:1038 paragraphs 43, 50 and 51). The ‘vouchers’ dated 26 June 2020 (Annex K1) each contain an individualisation of the flight on 18 July 2020 by flight number, flight date and flight times. There are no apparent restrictions as to their binding nature. Nor does their description as a ‘Gutschein’ preclude this. The German term ‘Gutschein’ means ‘voucher’ in English. The supporting document need not necessarily be described as a ‘confirmation of reservation’. Nor does it appear to be a non-binding option or similar. Contrary to the defendant’s assertions, it is not apparent from the confirmation of reservation and invoice dated 9 July 2020 that the assignors were never booked on flight DE 1456 on 18 July 2020 and that from the outset there was only a reservation for flight DE 1456 on 20 July 2020. Indeed, at the top on the right it is stated ‘reservation/change dated 9 July 2020’. Furthermore, the wording of the notification of a change of reservation (‘Due to cancellation, your booked flights on 18 July and 30 July 2020 can no longer be offered. We know that this news is disappointing to you. We apologise for any inconvenience this may cause. As an alternative, we can book the following flights for you at the same price’) indicates a firm flight reservation for 18 July 2020 that had already been booked beforehand.

2.

The question of whether pre-emptive denied boarding by means of notification of a change of reservation or notification of a cancellation by the tour operator can also constitute denied boarding within the meaning of Article 4 of Regulation (EC) No 261/2004 has not yet been clarified by either the EU courts or the highest (German) courts.

a)

By order of 7 October 2008 the Bundesgerichtshof (Federal Court of Justice, Germany) had already referred the above question to the Court of Justice by way of a request for a preliminary ruling pursuant to Article 267 TFEU (see Federal Court of Justice, order for a reference for a preliminary ruling of 7 October 2008, X ZR 96/06, [C-525/08], NJW 2009, p. 285). The case was removed from the register of the Court of Justice because there was no longer any need to adjudicate [order of the President of the Court of 15 January 2010, *Bienek*, C-525/08, not published, EU:C:2010:17].

b)

[...] [National case-law]

3.

This court considers that the question might be answered in the affirmative.

In favour of an affirmative answer it might be argued that, unlike in the French and Spanish language versions, which are drafted in the active voice and expressly name the operating airline as the entity denying passengers boarding, many other language versions (such as the English, Swedish, Dutch, Danish, Italian, Portuguese and German versions), by dint of being drafted in the passive voice, leave it open as to who issues the denial (see Federal Court of Justice, order for reference for a preliminary ruling of 7 October 2008, X ZR 96/06, NJW 2009, pp. 285, 286 paragraph 9; judgment of 17 March 2015, X ZR 34/14, NJW 2015, pp. 2181, 2184 paragraph 26).

The intention of the legislator to extend the protection of the Regulation to flights forming part of package tours might, however, also support seeing changing a package traveller's reservation as denying him or her boarding on the (originally) booked flight. It should also be borne in mind that, from the point of view of a passenger who has not consented to a change of reservation, a change of reservation is equivalent to denying him or her boarding on the planned flight. Accordingly, a change of reservation can conceptually be broken down into a denial of the planned boarding and a reservation on a new flight. It may therefore be necessary to include a change of reservation as a constituent factor of denial of boarding in order to protect package air passengers from being deprived of the protection afforded by the Regulation in that – unlike scheduled air passengers –

they are not turned back at the boarding gate, but are already booked on another flight beforehand, because in the case of package flights it will already be foreseeable in advance more often than in the case of scheduled flights whether or not enough seats will be available for all the passengers expected at the gate (see Federal Court of Justice, order for reference for a preliminary ruling of 7 October 2008, X ZR 96/06, NJW 2009, pp. 285, 286 paragraph 10 et seq.).

Article 3(2)(b) of Regulation (EC) No 261/2004 could be invoked as a further argument. According to that provision, the Regulation also applies where passengers have been transferred by an air carrier or tour operator from a flight for which they had a reservation to another flight, irrespective of the reason. Given that the Regulation is therefore intended to also apply in cases of a ‘transfer’ of a passenger to another flight by the tour operator, irrespective of the reason, that could militate in favour of the passenger having a right to compensation for denied boarding in such a case. This is because in cases of a ‘transfer’ to another flight, i.e. a change of reservation, it is possible that there is neither a cancellation nor a long delay. Denied boarding alone then merits consideration. It would, however, be illogical if the legislator were to first expressly widen the scope in such situations, but then deny an ensuing right to compensation for denied boarding. On the other hand, the Court of Justice has already held that it follows from Article 3(2)(b) of Regulation (EC) No 261/2004 ‘that Regulation No 261/2004 applies in particular to a situation in which an air passenger has been transferred by the air carrier, following the cancellation of his [or her] booked flight, on a re-routing flight to his [or her] final destination.’ It does therefore apply this provision to cancellation situations, but only ‘in particular’.

Finally, the Court of Justice has held that a ‘confirmed reservation’ within the meaning of Article 3(2)(a) of Regulation (EC) No 261/2004, containing individualised flight data, which widens the scope of the Regulation, may also be issued by the tour operator, even if the airline has not confirmed the flight times concerned to the tour operator, i.e. there is no ‘cover booking’ (judgment of 21 December 2021, *Azurair and Others*, C-146/20, C-188/20, C-196/20, C-270/20, EU:C:2021:1038, [...] paragraph 51). The Court of Justice based that solution on the fact that several provisions of that Regulation do not distinguish between tour operators and air carriers for the purposes of their application (for example, the first indent of Article 3(2)(a) and Article 3(2)(b) of Regulation (EC) No 261/2004). In addition, it would be contrary to the objective of ensuring a high level of protection for air passengers, set out in recital 1 of that Regulation, to take the view that a reservation can be confirmed only by the air carrier, thereby placing on the passenger the burden of checking the information provided by the tour operator. The Regulation seeks to ensure that the risk of tour operators providing false information to passengers in the course of their activities is assumed by the air carrier. In that context, passengers do not participate in the relationship between air carriers and tour operators and cannot be required to obtain information in that regard (judgment of 21 December 2021, *Azurair and Others*, C-146/20, C-188/20, C-196/20, C-270/20, EU:C:2021:1038, paragraphs 46 et seq.).

That decision could be transposed to the present case of a change of the passenger's reservation by the tour operator due to a 'flight cancellation'. This is because in that regard too, equal treatment of the operating air carrier and the tour operator might be assumed. It would probably be contrary to the protective purpose of Regulation (EC) No 261/2004 to establish a high level of consumer protection if the passenger could not challenge the air carrier in respect of a change of reservation by the tour operator. The change of reservation by the tour operator could be considered to fall within the air carrier's sphere of risk. If, moreover, the operating air carrier has to accept being challenged in respect of a confirmation of reservation that is not covered by a cover booking, the same should also apply, a fortiori, to denied boarding in the form of a change of reservation by the tour operator. Furthermore, even in cases such as the present one, the passenger cannot reliably assess whether the cause of the denied boarding stems from the sphere of the tour operator or that of the airline. Such a change of booking may be due to overbooking or internal booking errors on the part of the airline, but may equally well be due to under-purchasing of flight quotas or internal problems on the part of the tour operator. A passenger whose reservation is changed by the tour operator is not in a position to identify or influence the cause.

Since, however, this question has not yet been clarified by the Court of Justice and a completely certain answer to the question cannot be inferred from its previous case-law either, action under Article 267(1)(b) and Article 267(3) TFEU is appropriate.

III.

[...] [Signatures]

[...]

[Signature overview]