Case C-436/21

Request for a preliminary ruling

Date lodged:

15 July 2021

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

22 June 2021

Applicant and appellant on a point of law:

flightright GmbH

Defendant and respondent in the appeal on a point of law:

American Airlines, Inc.

BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE, GERMANY)

ORDER

[…]

in the case of

flightright GmbH, […]

[…] Potsdam,

Applicant and appellant on a point of law,

[…]

v

American Airlines Inc., […] Fort Worth, Texas (United States of America),

Defendant and respondent in the appeal on a point of law

[…]

Subsequent to the oral hearing of 18 May 2021, the Tenth Civil Law Chamber of the Bundesgerichtshof (Federal Court of Justice, 'BGH') […] [formation of the court]

made the following order:

The proceedings are stayed.

The following questions on the interpretation 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 L 46, p. 1 et seq.) and the Agreement on air transport between the Swiss Confederation and the European Community of 21 June 1999 (OJ 2002 L 114, p. 73) are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:

1. If a travel agency combines connecting flights from different air carriers into one transport operation, charges the passenger an overall price and issues a single electronic ticket for the journey, do these qualify as direct connecting flights within the meaning of Article 2(h) of the Regulation, or does there also need to be a specific legal relationship between the operating air carriers?

2. If there needs to be a specific legal relationship between the operating air carriers:

   Is it sufficient if two successive connecting flights, to be operated by the same air carrier, are combined in a reservation of the kind described in Question 1?

3. If Question 2 is answered in the affirmative:

   Are Article 2 of the Agreement and the reference to Regulation (EC) No 261/2004 in the Annex to Decision No 1/2006 of the Community/Switzerland Air Transport Committee of [18 October 2006] (OJ 2006 L 298, p. 23) to be interpreted as meaning that the Regulation also applies to passengers boarding a flight to a third country at an airport in Switzerland?

Grounds:

1 I. The applicant, acting under assigned rights, is taking action against the defendant for payment of compensation under Regulation (EC) No 261/2004 ('the Regulation' or 'the Flight Compensation Regulation').

2 Via a travel agency, the assignor booked a flight from Stuttgart to Zurich with the air carrier Swiss and flights from Zurich to Philadelphia and from Philadelphia to Kansas City with the defendant for 25 July 2018. The first and second flights ran on schedule. On the last leg of the journey, the flight departed late. The assignor arrived in Kansas City with a delay of more than four hours. By its action, the applicant sought compensation of EUR 600.

3 The Amtsgericht (Local Court) dismissed the action. The applicant's appeal on the merits was unsuccessful. By the appeal on a point of law, leave for which was granted by the appeal court, the applicant continues to pursue the form of order sought at first instance. The defendant contests the appeal.

4 II. The appeal court held that the defendant was not obliged to pay compensation.

5 According to the case-law of the Court of Justice of the European Union, the Flight Compensation Regulation applies when a passenger boards a flight in an airport located in the territory of a Member State. According to the invoice submitted by the travel agency, in the present case, individual flights run by different air carriers were combined to reach the desired final destination. From the passenger's point of view, it was a single booking. It was irrelevant whether he booked the journey to his final destination directly with the air carrier or through a travel agency.

6 However, the defendant was not the operating air carrier of a flight departing from the territory of a Member State. There was nothing to suggest that the defendant had accepted a contractual undertaking to transport the assignor from Stuttgart to Kansas City. It did also not appear that the defendant had assumed responsibility for transport under a code-sharing agreement. Each individual air carrier was responsible for running their own connecting flights. The defendant was therefore liable only for transport on the two legs of the journey from Zurich to Philadelphia and from Philadelphia to Kansas City.

7 III. The decision as to the appeal on a point of law hinges on the interpretation of Articles 2, 3 and 7 of the Flight Compensation Regulation and possibly of the Agreement on air transport between the Swiss Confederation and the European Community ('the Agreement').

8 1. Pursuant to Article 3(1)(a), the Flight Compensation Regulation applies to passengers departing from an airport located in the territory of a Member State.

9 In accordance with the case-law of the Court of Justice of the European Union, the applicability of the Flight Compensation Regulation to a flight with several connections, if that flight is to be regarded as a single unit, must be assessed with regard to the place of a flight's initial departure and the place of its final destination (judgment of 31 May 2018, *Wegener*, C-537/17, […], paragraphs 25 and 26; judgment of 11 July 2019, *České aerolinie*, C-502/18, […], paragraph 16;

order of 12 November 2020, *KLM Royal Dutch Airlines*, C-367/20, […], paragraph 19).

10 Thus, the Flight Compensation Regulation is only applicable in the present case if the three flights booked by the assignor are to be considered as a single flight, or if the two flights operated by the defendant at least constitute a single unit and Article 3(1)(a) of the Regulation also applies to a flight boarded in Switzerland.

11 2. Whether a flight is to be regarded as one unit is also relevant to the question of who can be held liable to pay compensation for a delay of three or more hours in reaching the final destination.

12 In this regard, the Court of Justice has ruled that any operating air carrier which participated in the performance of at least one of those connecting flights is liable to pay that compensation, regardless of whether or not the flight which that carrier operated was the cause of the long delay to the passenger's arrival at his or her final destination (judgment of 11 July 2019, *České aerolinie*, C-502/18, […], paragraphs 20-26; order of 12 November 2020, *KLM Royal Dutch Airlines*, C-367/20, […], paragraphs 28 and 29).

13 The concept of 'final destination' is defined in Article 2(h) of the Regulation as being the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight (judgment of 26 February 2013, *Folkerts*, C-11/11, […], paragraph 34).

14 3. According to the case-law of the Court of Justice, the concept of 'connecting flight' must be understood as referring to two or more flights constituting a whole for the purposes of the right to compensation for passengers provided for in the Flight Compensation Regulation.

15 That is the case when two or more flights were booked as a single unit. It is irrelevant in that regard whether the individual flights are effected using the same or different aircraft (judgment of 11 July 2019, *České aerolinie*, C-502/18, […], paragraphs 16 and 27; order of 30 April 2020, *flightright*, C-939/19, […], paragraph 18; order of 12 November 2020, *KLM Royal Dutch Airlines*, C-367/20, […], paragraphs 19 and 29). This also applies if solely the first flight departed from an airport situated in the territory of a Member State, and the second departed from and arrived at airports situated in the territory of a third state (judgment of 31 May 2018, *Wegener*, C-537/17, […], paragraphs 19 and 20).

16 4. Pursuant to Article 2(g) of the Regulation, 'reservation' means that the passenger has proof which indicates that the reservation has been accepted and registered by the air carrier or tour operator. Inter alia, said proof may take the form of a ticket within the meaning of Article 2(f) of the Regulation, which has been issued or authorised by the air carrier or its authorised agent.

17 In the present case, neither of the two operating air carriers itself issued a ticket, but only the travel agency with whom the reservation was made.

18 The travel agency issued an invoice for an ‘agency agreement’ showing a standard ‘subscription price’ for the flights in question and for the return flight from Kansas City to Stuttgart via Chicago and Heathrow. It is also clear from the invoice that the travel agency issued a single electronic ticket for the flights, the number of which – sometimes with additional figures – was duplicated on the boarding cards for the three flights in question.

19 5. This raises the question of whether, if a travel agency combines connecting flights from different air carriers into one transport operation, charges the passenger an overall price and issues a single electronic ticket for the journey, this qualifies as a single reservation which combines a flight with one or more connecting flights to form a whole, or whether there also needs to be a specific legal relationship between the operating air carriers.

20 a) According to the now settled case-law of the Court of Justice, a contract consisting of a single reservation for the entire journey establishes the obligation, for an air carrier, to carry a passenger from the place of departure to the final destination.

21 The same applies when an operating air carrier with which the passengers concerned do not have contractual relations operates only the carriage on a flight which does not finish at the final destination (judgment of 7 March 2017, *flightright and Others*, C-274/16, […], paragraphs 71 and 72; order of 13 February 2020, *flightright*, C-606/19, […], paragraph 29). Under the second sentence of Article 3(5) of the Flight Compensation Regulation, where an operating air carrier which has no contract with the passenger performs obligations under the Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger.

22 b) In the Chamber’s view, the case-law of the Court of Justice clarifies the fact that a valid reservation can also be made by third parties who have a direct or indirect contractual relationship with the operating air carrier and have been authorised by that carrier to accept reservations and issue tickets.

23 The Court applied the principle that a flight with one or more connections, booked as a single unit, constitutes a whole for the purposes of the right to compensation for passengers provided for in the Flight Compensation Regulation, even where the booking was made through a tour operator (judgment of 30 April 2020, *Air Nostrum*, C-191/19, […], paragraph 10). The Court of Justice also held that, in the event of cancellation, the air carrier must in principle reimburse the full price paid by the passenger, if the reservation was made via an authorised intermediary and if the price includes a commission for the intermediary, unless the commission was fixed without the knowledge of the air carrier (judgment of 12 September 2018, *Harms*, C-601/17, […], paragraphs 16-19).

24 In the Chamber’s view, that is consistent with the aforementioned rule in Article 2(f) of the Regulation, according to which the necessary authorisation may

be given not only by the air carrier but also by its authorised agent, and with Article 2(g) of the Regulation, according to which it is sufficient for a reservation to be accepted and registered by a tour operator.

25 c) By contrast, the Chamber considers that it has not been definitively clarified whether, if a reservation consisting of several connecting flights operated by different air carriers is made through a travel agency or another authorised third party, there also needs to be a specific legal relationship between those air carriers.

26 aa) According to the case-law of the Court of Justice, in the context of a flight with one or more connections, an operating air carrier that has operated the first flight cannot take refuge behind a claim that the performance of a subsequent flight operated by another air carrier was imperfect (judgment of 11 July 2019, *České aerolinie*, C-502/18, […], paragraphs 27 and 28). Conversely, an operating air carrier which performed the final flight cannot take refuge behind the poor performance of a previous flight operated by a different air carrier (order of 12 November 2020, *KLM Royal Dutch Airlines*, C-367/20, […], paragraphs 29 and 30).

27 It is the Chamber's understanding that the decisions of the Court are based on the premise that there is at least one person who has given a contractual undertaking to transport the passenger from the place of departure of the first flight to the destination of the final flight, and thus under the second sentence of Article 3(5) of the Regulation, each operating air carrier performs obligations under the Regulation on behalf of this person.

28 In both cases in which the Court of Justice held that an air carrier was liable for disruption on a connecting flight operated by another undertaking, the reservation had been made with the air carrier named in the action. The undertakings concerned were also linked to one another by way of a code-sharing agreement (judgment of 11 July 2019, *České aerolinie*, C-502/18, […], paragraphs 8 and 29; order of 12 November 2020, *KLM Royal Dutch Airlines*, C-367/20, […], paragraph 10).

29 bb) In the present case, the only apparent connection between the two operating air carriers is that they allow third parties to act as intermediaries and to issue tickets which combine connecting flights operated by them.

30 The Chamber cannot infer any definitive answer as regards this situation from the aforementioned case-law of the Court of Justice.

31 (1) In the Chamber's view, the principle set out in the second sentence of Article 3(5) of the Regulation can be relied on only where the operating air carriers express upon reservation that they jointly assume responsibility for transporting the passenger from the place of departure of the first flight to the destination of the final flight.

32 According to the case-law of the Court of Justice referred to above, this joint liability can be assumed if one of the air carriers involved accepts or confirms such a reservation and has entered into a code-sharing agreement with the other operating undertakings. In the Chamber's view, similar situations arise if the air carriers involved have come together to form an alliance and advertise their close cooperation to potential customers, or if the air carriers involved are connected under company law, for example as parent and subsidiary companies.

33 (2) In the Chamber's view, it is both obvious and conclusive that air carriers allowing third parties to combine the flights they offer with flights of another undertaking can be seen as sufficient interaction between different air carriers to consider this combination of flights as a single reservation. However, on the basis of the existing case-law, it cannot be definitively concluded that there does not also need to be a specific legal relationship between the operating air carriers.

34 As regards the right to reimbursement of the price of the flight in the event of cancellation, the Court of Justice has held that an air carrier must also cover any commission paid to an intermediary, unless the latter acted without the air carrier's knowledge (judgment of 12 September 2018, *Harms*, C-601/17, […], paragraph 16 et seq.). As the Chamber understands, this does not provide a definitive answer to the question of what legal consequences arise when an intermediary makes a single reservation involving several air carriers.

35 In another judgment, the Court of Justice applied the principle that an operating air carrier which has no contract with the passenger must be regarded in cases of doubt as fulfilling the freely consented obligations vis-à-vis the contracting partner of the passenger concerned, without clarifying in detail with whom the reservation was made or who confirmed the reservation (judgment of 13 February 2020, *flightright*, C-606/19, […], paragraph 8). As the Chamber understands, it cannot be inferred conclusively from this that a reservation through a travel agency or another authorised third party is sufficient. It cannot be ruled out that the reservation in the original case on which that decision was based was confirmed by one of the operating air carriers, and that this fact was not mentioned in the decision simply because this point was not disputed.

36 6. The Senate suggests that a reservation at a single price and the issuing of a single ticket for all legs of the journey should be considered sufficient to rely on the aforementioned principles concerning a single reservation. Thus, in the present case, the defendant would be required to pay compensation, because it undertook to transport the assignor from Stuttgart to Kansas City.

37 As the Chamber has already pointed out in a previous decision (BGH, decision of 19 July 2016, X ZR 138/15, […], paragraph 34), it is clear from Article 2(f) of the Regulation that a passenger can have a right to compensation against the operating air carrier even when that air carrier was not involved in the individual reservation or its confirmation but permitted an agent or a tour operator to accept and confirm such a reservation. The air carrier must in this case assume responsibility for the

booking confirmation issued by the agent or tour operator as if it were one of its own.

38 b) In the Chamber's view, this interpretation is supported by the level of protection provided by the Flight Compensation Regulation and the case-law of the Court of Justice of the European Union based thereon.

39 Recitals 1 to 4 of the Flight Compensation Regulation state the objective of ensuring a high level of protection for passengers and of taking the requirements of consumer protection into account. The Court of Justice inferred from this principle that the provisions of the Regulation conferring rights on air passengers must be interpreted broadly (see, in this regard, judgment of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, […], paragraph 45), while when terms appear in a provision which constitutes a derogation from a principle or, more specifically, from EU rules for the protection of consumers, they must be read so that that provision can be interpreted strictly (see, in this regard, judgment of 22 December 2008, *Wallentin-Hermann*, C-549/07, […], paragraph 17).

40 Upholding a right to compensation is also consistent with the previously expressed view of the Court of Justice on responsibility for performance obligations assumed under the booking confirmation (BGH, order of 19 July 2016, X ZR 138/15, […], paragraph 38 et seq.).

41 In the case where an air carrier with which two successive flights have been booked refuses carriage on the second flight on the assumption that the passenger can no longer catch this flight due to the delay in the arrival of the first flight, the Court of Justice has previously upheld a right to compensation. The Court of Justice has regarded as crucial in this regard the fact that the right should compensate for the inconvenience arising on account of an irreversible loss of time of three hours or more, and that an operating air carrier must in any case be responsible for this inconvenience when it is established that the loss of time is attributable to it – either because it is responsible for the delay to the first flight operated by it, or because it mistakenly assumed that the passengers concerned would not be able to present themselves at the gate in time for the connecting flight, or because it sold tickets for successive flights for which the time available to catch the connecting flight was insufficient (judgment of 4 October 2012, *Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor*, C-321/11, […], paragraph 34).

42 From the perspective of the passengers whom the right to compensation is intended to protect, a comparable situation exists where the air carrier did not issue or authorise the tickets for successive flights itself, but rather permitted a tour operator to issue such tickets and thereby also to combine flights which are operated by different air carriers.

43 d) This does not just apply to cases where the individual flights are operated by air carriers that have entered into a code-sharing agreement (see, in this regard,

Opinion of Advocate General Tanchev of 6 June 2018 in Case C-186/17, […], paragraph 41) or have a legal relationship of another kind.

44 As stated above, the authorisation required by Article 2(f) of the Regulation may be given not only by the air carrier but also by its authorised agent. Where such an agent acts on behalf of several providers and offers air travel in the form of a single reservation for multiple connecting flights operated by different air carriers, it seems logical to protect the passenger's faith that the individual air carriers are not responsible solely for transport on the respective flight operated by them, but jointly for transport from the journey's place of departure to its final destination.

45 IV. If a combination of individual flights by a travel agency is insufficient to create a link between connecting flights run by different air carriers, the decision in the present case hinges on whether the two flights operated by the defendant at least can be considered as a whole and whether the fact that this combined flight departed from Switzerland is sufficient for the Regulation to apply.

46 1. As regards the two flights from Zurich to Kansas City via Philadelphia, the Chamber understands in the present case that there is already a sufficient link, as both flights were to be operated by the defendant and the latter allowed the travel agency to make combined bookings of this kind. The purpose of the second question referred for a preliminary ruling is to determine whether that understanding is correct.

47 2. The flight consisting of those two legs did not depart from the territory of a Member State. Therefore, if applicable, the further question arises as to whether the Flight Compensation Regulation applies where passengers depart on a flight from Switzerland.

48 a) Under Article 2 of the Agreement, the rules set out in its Annex apply in so far as they relate to air transport or directly related matters as listed in the Annex.

49 According to point 7 of the Annex, these rules include the Flight Compensation Regulation. This reference was inserted by Decision No 1/2006 (OJ 2006 L 298, p. 23) of the Air Transport Committee established under Article 21 of the Agreement, which is authorised to make changes to the Annex in the light of newly adopted legislation pursuant to Article 23(4) of the Agreement.

50 The second indent of the introduction to the Annex provides that where any of the acts listed in the Annex contain references to Member States of the European Union, the references are, for the purpose of the Agreement, to be understood to apply equally to Switzerland.

51 In an earlier decision (BGH, decision of 9 April 2013, X ZR 105/12, […], paragraph 22), the Chamber inclined towards the view that, on the basis of these provisions, such flights departing from Switzerland and having a destination in a third country also fall within the scope of the Regulation (see also Landgericht

Korneuburg (Regional Court, Korneuburg, Germany) judgment of 15 July 2014, 21 R 106/14g). That assessment has not changed.

52 As the Chamber pointed out in that decision, such an interpretation would be consistent not only with the wording of the Agreement but also with the objective, set out in its preamble, of aligning the rules relating to air transport in Europe, including the territory of Switzerland.

53 Thereunder, air transport undertakings in Switzerland can and must operate under the same conditions as those in the Member States of the European Union. Consumers and customers of air transport undertakings should find the same quality standards in Switzerland and accordingly be able to enforce the same rights against these undertakings in Switzerland as in the Member States of the European Union, and the air transport undertakings for their part should be subject to the same conditions of competition.

54 It would be difficult to reconcile this with a situation where the Flight Compensation Regulation was applicable only to passengers who embarked on a flight in the territory of Switzerland to an airport in the territory of a Member State of the European Union. This is because, pursuant to Article 3(1)(a) of the Regulation, the Regulation is also applicable to passengers who fly to a third country from an airport in the European Union.

55 c) By contrast, the Zivilgericht des Kantons Basel-Stadt (Civil Court for the Canton of Basel-Stadt, Switzerland) took the view that the Flight Compensation Regulation only applied to passengers boarding a flight in Switzerland if their destination was a Member State of the European Union (Zivilgericht Basel-Stadt (Civil Court, Basel-Stadt), decision of 11 March 2011, […]; decision of 20 June 2011, […]; decision of 15 May 2012, […]).

56 That is why the Chamber has referred the question to the Court of Justice for a preliminary ruling.

57 d) At this initial stage, nothing has changed,

58 Thus far it appears that the Schweizer Bundesgericht (Federal Supreme Court, Switzerland) has not yet ruled on this issue […] [reference to national literature]. The Court of Justice was unable to respond to the previous question referred by the Chamber because that case was resolved in another way.

[…] [Names of the judges who took part in the deliberations]

Previous instances:

AG Nürtingen (Local Court, Nürtingen, Germany), decision of 14 March 2019 – 12 C 96/19 –

LG Stuttgart (Regional Court, Stuttgart, Germany), decision of 12 December 2019 – 5 S 93/19 –