

Case C-650/23 [Hembesler] ⁱ**Request for a preliminary ruling****Date lodged:**

31 October 2023

Referring court:

Landesgericht Korneuburg (Austria)

Date of the decision to refer:

22 August 2023

Appellant (defendant at first instance):

E EAD

Respondent (applicant at first instance):

DW

REPUBLIC OF AUSTRIALANDGERICHT KORNEUBURG, (REGIONAL COURT KORNEUBURG,
AUSTRIA)**ORDER**

The Landesgericht Korneuburg (Regional Court Korneuburg, Austria), acting as the appellate court in the case of **D***** W*******, [...], the applicant, v **E***** EAD** [...], the defendant, on account of **EUR 400** [...], makes the following order, in camera, in the defendant's appeal against the judgment of the Bezirksgericht Schwedat (District Court Schwechat) of 27 March 2023, 1 C 253/20x-48:

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

‘Must Article 7(1), Article 4(3) and Article 2(j) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of

ⁱ The present case is designated by a fictitious name which does not correspond to the actual name of a party to the proceedings.

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, be interpreted as meaning that the operating air carrier is obliged to compensate a passenger in the case where, in the context of a package tour, the passenger has a confirmed reservation by a tour operator on a return flight, the tour operator informed the passenger on the day before the planned (return) flight that the flight had been rescheduled due to a change in flight number, flight time and final destination; the passenger therefore did not present himself for boarding for the flight originally booked under the conditions laid down in Article 3(2) of the regulation; however, the flight originally booked is actually operated as planned and the air carrier would also have carried the passenger if he had presented himself for boarding under the conditions laid down in Article 3(2) of that regulation?'

II. The proceedings are stayed pending delivery of the preliminary ruling of the Court of Justice of the European Union.

GROUND:

Facts:

The applicant had booked a package with the tour operator T ***** GmbH, which included, inter alia, a (return) flight from Heraklion (HER, Greece) to Linz (LNZ, Austria). The tour operator sent the passenger a supporting document confirming the booking of flight BUC 8739/H6 8739 on 29 September 2019 from Heraklion to Linz with the departure time at 18.00 and the arrival time at 20.00 which the defendant was to operate.

On 28 September 2019, the passenger received notification from the tour operator that the flight plan for the return flight had been changed and the departure from Heraklion would not take place as indicated in the travel documents, but instead on flight A3 7327, departing on 29 September 2019 at 23.30 with Vienna-Schwechat (VIE, Austria) as the final destination. There is no indication that this notification was caused by any behaviour of the operating air carrier.

The defendant is a chartering undertaking and, on that basis, makes non-autonomous flight reservations; it is a member of IATA. It received, approximately 24 hours before departure, a list of passengers with the forenames and surnames of all passengers to be carried; it was not provided with other contact details by the tour operator. The applicant's name did not appear on that passenger list. On 29 September 2019, the defendant operated flight BUC 8739/H6 8739, essentially according to plan.

Due to the notification from the tour operator of 28 September 2019, the passenger did not appear the following day for check-in for flight BUC 8739/H6 8739. If he had presented himself for boarding on time and had

produced proof of his reservation, the defendant would nevertheless have transported him on the flight in question.

The flight distance between Heraklion and Linz is more than 1 500 km but not more than 3 500 km.

Main proceedings:

The **applicant** sought – on the basis of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 (Regulation No 261/2004) – compensation of EUR 400, plus interest, and – in so far as this is still of interest in the appeal proceedings – stated the following: The changes made by the tour operator are attributable to the operating air carrier. If the tour operator is authorised to issue a ticket on behalf of the defendant, nothing to the contrary could apply to any subsequent changes of the reservation. Where a passenger is informed that he or she has been transferred from one flight to another, he or she cannot be criticised for not having presented himself or herself at the check-in counter for the flight originally booked. The rebooking that had previously taken place had already had the effect of denying him boarding against his will. It is therefore ultimately a case of denied boarding subject to compensation.

The **defendant** challenged the application, contended that the action should be dismissed and argued – still in so far as it is still of interest in the appeal proceedings – that the flight in question had been operated essentially according to plan. The rebooking of the applicant's reservation by the tour operator took place without consulting it. That rebooking does not constitute a 'denied boarding' attributable to the air carrier. Similarly, the applicant cannot claim a right to compensation, due to his failure to appear on time for check-in. Even after the reservation had been changed, he still had a confirmed reservation for the original flight and, if he had appeared in good time for boarding, he would have been transported.

By the **judgment under appeal**, the court of first instance ordered the defendant to pay the sum of EUR 400 plus interest and to reimburse the appellant's legal costs. From a legal point of view, it assessed the facts essentially explained at the start – partly undisputed and partly found to be unchallengeable under national procedural laws (Article 501(1) of the Austrian Zivilprozessordnung (Austrian Code of Civil Procedure, the 'ZPO') – to the effect that it was irrelevant whether the airline or the travel operator had made the rebooking. The change of reservation is attributable to the defendant air carrier and is to be regarded as denied boarding. Since the applicant was thus informed by the tour operator of the 'changed flight times' (in fact, rebooking onto a different flight) and the defendant must be held responsible for those changes, the fact that he did not present himself for check-in in good time has no bearing on the applicant's claim based on having been denied boarding. The defendant did not claim that there were reasonable grounds to deny boarding within the meaning of Article 2(j) of Regulation

No 261/2004. Given that the applicant had a confirmed reservation for the flight in question, that he could not be asked to present himself for check-in in good time (because of the notification of the ‘change of flight times’) and that he was denied boarding against his will, and that there were also no reasonable grounds for the denied boarding, this was a case of denied boarding within the meaning of Article 4(3) of Regulation No 261/2004. In that regard, it was irrelevant whether the defendant was in a direct contractual relationship with the applicant or could influence the list of passengers or could rebook passengers or issue air tickets independently, since the defendant could seek redress against other persons, including third parties, in particular the tour operator.

It is against that judgment that the **appeal** brought by the defendant on the ground of incorrect legal assessment is directed, requesting that the judgment under appeal be amended so as to dismiss the action; in addition, as regards the question of the attribution to the air carrier of the change of reservation made by the tour operator as a ‘denied boarding’, the defendant suggests that more detailed questions be referred to the Court of Justice of the European Union for a preliminary ruling. It argues, in essence, that the facts do not constitute denial and that the change of reservation by the tour operator is not attributable to it.

The applicant contends that the appeal should not be granted.

The Landesgericht Korneuburg (Regional Court Korneuburg) is called upon, as the court of appeal, to adjudicate at second and last instance on the claim made by the applicant.

The question referred:

The claimant bases his claim (most recently) explicitly on ‘denied boarding’ under Article 4(3) of Regulation No 261/2004. According to the legal definition in Article 2(j) of Regulation No 261/2004, denied boarding means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2) of the Regulation, except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation. The concept of ‘denied boarding’ relates not only to cases where boarding is denied because of overbooking but also to those where boarding is denied on other grounds (judgment in Case C-22/11).

The concept of ‘denied boarding’ therefore includes the following four elements, which are cumulative:

- denied boarding against the will of the passenger;
- the existence of a confirmed reservation on the flight;
- presence in good time for check-in, and

- the absence of a reasonable reason for denied boarding [...].

In a case of ‘denied boarding’, the operating air carrier must pay the passenger compensation in accordance with Article 7 of Regulation No 261/2004 (Article 4(3) of Regulation No 261/2004).

The appellate court starts from the principle, in settled case-law, that the claim requirement of being present for boarding in good time may cease to exist and that the default in performance of denied boarding already exists (if the other conditions for claims – a confirmed reservation and the absence of reasonable grounds for denied boarding – are met), if the passenger has already been informed, whether accurately or not, that he or she will not be transported on the booked flight or that the latter will not take place (‘anticipated denied boarding’); Landesgericht Korneuburg (Regional Court Korneuburg) 22 R 332/21 k; 22 R 118/22s; 22 R 120/23m; 22 R 343/21 b; RIS-Justiz RK00000040 [...]). First, the passenger’s appearance for a flight in respect of which he or she has already been informed in advance that he or she will not be transported constitutes a meaningless formal act; second, the appearance of the passenger (for the original flight that is the basis of the claim, of course) is precisely not a condition for the application of Regulation No 261/2004 in the case of rebooking under Article 3(2)(b) of that regulation (cf. Amtsgericht Bremen (Local Court Bremen, Germany) 18 C 73/10 [...]).

In its judgment in Joined Cases C-146/20, C-188/20, C-196/20 and C-270/20, the Court of Justice of the European Union ruled that Article 3(2)(a) of Regulation No 261/2004 must be interpreted as meaning that the passenger has a ‘confirmed reservation’, within the meaning of that provision, where the tour operator submits to that passenger with whom it has a contract, ‘other proof’, within the meaning of Article 2(g) of that regulation, 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 the tour operator has not received confirmation from the air carrier concerned as to the times of departure and arrival of that flight. In support of its statement of reasons, the Court of Justice of the European Union holds, inter alia, that several provisions of Regulation No 261/2004 do not distinguish between tour operators and air carriers. 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 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. Regulation No 261/2004 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 in Joined Cases C-146/20, C-188/20, C-196/20 and C-270/20, paragraph 47 et seq.).

In the present case, the question arises as to the limits on the attribution of declarations by the tour operator to the air carrier. If, unlike the situation in the Court's proceedings in cases C-188/20 and C-196/20, it is not necessary to assess the issue of a booking confirmation by a tour operator, but the exercise of an 'anticipated denial of boarding', a reference to Article 2(g) of the regulation is not directly obvious.

According to the appeal court, the same considerations as those set out in paragraph 47 et seq. of the judgment of the Court of Justice of the European Union of 21 December 2021 (C-146/20, C-188/20, C-196/20 and C-270/20) militate in favour of the air carrier being held responsible for the acts and declarations of the tour operator in circumstances such as those of the present case, even if the air carrier was able to prove that it would nevertheless have transported the passenger if he had appeared on time for check-in.

A similar question has already been the subject of a request for a preliminary ruling by the Landgericht Düsseldorf (Regional Court Düsseldorf, Germany) of 20 July 2020 (Court of Justice of the European Union, C-365/20). The question referred in that case as to whether boarding is denied within the meaning of Article 4(3), Article 2(j) of Regulation No 261/2004 where passengers are transferred by a tour operator with which they have a package tour contract onto another flight, a few days before the scheduled time of departure, after the tour operator had previously given them binding confirmation of a flight individualised by places and times of departure and arrival, as well as by the flight number, remained unanswered, however, especially since the case was removed from the register. Already in that request for a preliminary ruling, the Landgericht Düsseldorf (Regional Court Düsseldorf) had rightly considered that it was doubtful whether a change of reservation made by the tour operator from which the passenger had purchased the package tour, and not by the airline, also constituted such denied boarding. By way of explanation, it stated that the fact that the operating air carrier could not, in certain circumstances, have any influence on a change of reservation made by the tour operator (for example, where the tour operator rebooked because it had to transport a larger number of package tour travellers than the number of seats it had booked with the carrier) could mitigate against such an interpretation. That could preclude the air carrier from being held liable for the conduct of the tour operator which is not subject to its instructions. On the other hand, in the case of a transfer (change of reservation), flight passengers on a package tour will often be unable to check who actually instigated the change if this is not disclosed to them but they merely receive the information that a transfer is to take place. This may suggest that transfers by third parties such as the tour operator should not be treated differently from transfers by the air carrier itself. After all, under Article 13 of the regulation, the airline has the possibility of seeking redress from the tour operator in accordance with national law.

The question referred for a preliminary ruling must be addressed in order for the court of appeal to be able to give a definitive ruling on the appeal. If the Court

answers the question referred in the affirmative, the claimant is entitled to compensation and the defendant's appeal could not be upheld. If the Court answers the question referred in the negative, on the other hand, the appellant does not have a rightful claim and the defendant's appeal should therefore be upheld and the judgment at first instance set aside by dismissing the action.

[...]

Landgericht Korneuburg (Korneuburg Regional Court), Section 22

Korneuburg, 22 August 2023

[...]

WORKING DOCUMENT