

**Case C-474/22**

**Request for a preliminary ruling**

**Date lodged:**

15 July 2022

**Referring court:**

Bundesgerichtshof (Germany)

**Date of the decision to refer:**

3 May 2022

**Defendant and appellant on a point of law:**

Laudamotion GmbH

**Applicant and respondent in the appeal on a point of law:**

Flightright GmbH

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**BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE, GERMANY)**

**ORDER**

[...]

in the case of

Laudamotion GmbH, [...]

[...] Schwechat (Austria),

defendant and appellant on a point of law,

[...]

v

Flightright GmbH, [...],

[...] Potsdam,

applicant and respondent in the appeal on a point of law,

[...]

Further to the hearing held on 3 May 2022 [...], the Tenth Civil Chamber of the Federal Court of Justice

ordered as follows:

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 2004 L 46, p. 1 et seq.), are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Does the right to compensation for a delay in a flight of more than three hours after the scheduled time of arrival under Articles 5, 6 and 7 of the Regulation require that, in accordance with Article 3(2)(a) thereof, the passenger must present himself or herself for check-in at the time indicated by the air carrier, the tour operator or an authorised travel agent, but not later than 45 minutes before the published departure time, or is the case of a long delay in the above sense exempt from that requirement – as in the case where a flight is cancelled?
2. In the event that the right to compensation is not exempt, on the sole basis of the occurrence of a long delay in the above sense, from the requirement for passengers to present themselves for check-in, does such an exemption apply where the passenger had sufficiently reliable information indicating that the flight would arrive only with a long delay in the above sense?

Grounds:

- 1 I. The applicant, acting under assigned rights, seeks to recover from the defendant compensation for the delayed operation of a flight under Regulation (EC) No 261/2004 ('the Regulation' or 'the Air Passenger Rights Regulation').
- 2 The assignor booked a flight from Düsseldorf to Palma de Mallorca, which was to be operated by the defendant on 26 June 2018 and was scheduled to land at 10:15 a.m. The assignor did not take the flight. The flight was operated with a delay of 3 hours and 32 minutes.
- 3 The applicant brought a claim for compensation in the amount of EUR 250. The Amtsgericht (Local Court) dismissed the action. Following the appeal on the

merits brought by the applicant, the appellate court upheld the action. By its appeal on a point of law, for which leave was granted by the appellate court, the defendant seeks the restoration of the judgment delivered at first instance.

- 4 II. The appellate court considered that the assignor had effectively assigned to the applicant his claims against the defendant and that the latter, as the operating air carrier, was obliged to pay compensation due to the occurrence of a delay of more than three hours.
- 5 The assignor, the appellate court found, had booked the flight. That flight had arrived more than three hours after the scheduled time of arrival. It was irrelevant that the assignor had not taken the flight, because the flight had become useless to him due to the fact that he had missed a business appointment by reason of the delay. The requirements of Article 3(2)(a) of the Air Passenger Rights Regulation were fulfilled. In accordance with the case-law of the Court of Justice of the European Union, a long delay in arrival, of more than three hours, was equivalent to a cancellation. It was not clear why a passenger who had already been notified prior to departure that there would be a delay of more than three hours was nevertheless required to turn up at the airport in order to preserve his or her right to compensation.
- 6 III. The decision on the appeal on a point of law depends on the interpretation of Articles 3, 5, 6 and 7 of the Air Passenger Rights Regulation.
- 7 1. In accordance with Article 3(1) of the Regulation, the application thereof requires that the passenger takes a flight in the territory of a Member State or a flight operated by [an EU] air carrier with a destination in the [European Union]. Unless the passenger has been transferred to another flight, Article 3(2)(a) of the Regulation requires that the passenger has a confirmed reservation and presents himself or herself for check-in in good time – 45 minutes before departure or at a time indicated by the air carrier – before the published departure time; this does not apply in the case of a cancellation as provided for in Article 2(1) and Article 5 of the Regulation.
- 8 Since the assignor had a confirmed reservation but did not present himself for check-in not later than 45 minutes before the published departure time, and, moreover, the flight was not cancelled but was in fact operated, the Air Passenger Rights Regulation is applicable in the present dispute only if the – likewise established – long delay of the flight, of more than three hours, in arrival at the final destination is to be equated with a cancellation for the purposes of the application of Article 3(2)(a) of the Regulation.
- 9 (a) According to the case-law of the Court of Justice of the European Union, air passengers have a right to compensation under Article 5(1)(c) of the Air Passenger Rights Regulation, read together with Article 7(1) of that regulation, where they suffer, upon arrival at their final destination, a loss of time equal to or in excess of three hours (see CJEU, judgment of 19 November 2009, C-402/07

and C-432/07, [...], *Sturgeon and Others*, paragraphs 61, 69; judgment of 23 October 2012, C-581/10 and C-629/10, [...], *Nelson and Others*, paragraph 37; most recently: CJEU, order of 12 November 2020, C-367/20, [...], *KLM Royal Dutch Airlines*, paragraph 27). The Court of Justice based that interpretation of the Regulation on, in particular, the principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. Passengers whose flights are delayed to that extent and those whose flights are cancelled are in comparable situations, for the purposes of compensation provided for under the Regulation, because those passengers suffer similar inconvenience, namely, a loss of time equal to or in excess of three hours in relation to the original planning of that flight (CJEU, judgment of 23 October 2012, C-581/10 and C-629/10, [...], *Nelson and Others*, paragraph 48 et seq. and paragraphs 59 and 60).

- 10 (b) The equivalence between a long delay in arrival at the destination within the meaning of the case-law of the Court of Justice and a cancellation for the purposes of the application of Article 3(2)(a) of the Regulation could be supported by the similarity of the inconvenience which may be caused to the passenger in each situation, from which it might be inferred that, in the case also of a long delay within the meaning of the case-law of the Court of Justice, the right to compensation cannot be made dependent on the passenger presenting himself or herself for check-in not later than 45 minutes before the departure time.
- 11 However, the two situations also differ in significant aspects. Whereas it is certain that the planned flight will not be operated in the case of a cancellation, and passengers cannot therefore be expected from the outset to present themselves for check-in for a flight that is no longer being operated in order to be entitled to claim compensation under Articles 5 and 7, the situation may be different where a delay becomes apparent before the flight is operated but the passenger does not have, at the latest 45 minutes before the departure time, sufficiently reliable information indicating that the flight will be operated with a delay of more than three hours.
- 12 (c) Moreover, such equivalence could be undermined by the order of the Court of Justice, in accordance with which Article 3(2)(a) of the Regulation must be interpreted as meaning that passengers who have a confirmed reservation on a flight with a delay of 3 hours or more on arrival cannot be denied compensation under the Regulation solely on the ground that, upon claiming compensation, they failed to prove that they were present for check-in for that flight by means of a boarding card, unless it can be established that those passengers were not transported on the delayed flight (CJEU, order of 24 October 2019, C-756/18, [...], *easyJet Airline*, paragraphs 33 and 34).
- 13 That decision could be based on the understanding of the Court of Justice that the entitlement to assert a claim for compensation for a long delay requires, in accordance with Article 3(2)(a) of the Air Passenger Rights Regulation, that a

passenger who was not transported on the delayed flight must in any event have presented himself or herself for check-in, a fact which he or she can prove by means of the boarding card or other evidence.

- 14 2. However, it might also be possible that a long delay in arrival at the destination within the meaning of the case-law of the Court of Justice is to be equated with a cancellation for the purposes of the application of Article 3(2)(a) of the Regulation only where not only was the flight delayed by three hours or more on arrival, but the situation was also comparable to a cancellation in other respects.
- 15 Passengers whose flight was cancelled are exempt from the requirement to present themselves for check-in at the time indicated, but not later than 45 minutes before the published departure time, because the announcement of the cancellation establishes that the flight will no longer be operated and passengers can therefore no longer check-in for that flight.
- 16 That situation could be comparable to one in which the passenger has, for example not later than 45 minutes before the published departure time, sufficiently reliable information indicating that the flight can be operated only with a delay in arrival at the destination of more than three hours. This is because, under those conditions, it is established with sufficient certainty that the flight can arrive at its destination only with a long delay, with the result that there is a situation comparable to a cancellation from the point of view of the passenger.
- 17 By contrast, the situation might not be comparable with a cancellation of a flight in cases where a delay is not announced, or a delay in departure is announced but the passenger does not have, for example not later than 45 minutes before the published departure time, sufficiently reliable information indicating that the flight will reach the destination with a delay of more than three hours. Since, under those conditions, a long delay comparable to a cancellation of the flight is not to be expected, there could be justification for the presumption that a passenger is entitled to assert a claim for compensation in the event of a long delay only where he or she did in fact present himself or herself for check-in for the flight at the time indicated, but not later than 45 minutes before the published departure time, and there was a delay of more than three hours in reaching the place of arrival.
- 18 Such an understanding of Article 3(2)(a) of the Regulation would be in line with a judgment of the Bundesgerichtshof (Federal Court of Justice; 'BGH'), in which it was held that a passenger who had missed a connecting flight forming part of a single booking on account of a delayed flight and who did not take a replacement flight offered to him or her by reason of the missed connecting flight – whereby it was certain from the outset that, on that replacement flight, the passenger would reach his or her final destination no earlier than three hours after the scheduled time of arrival – but instead flew back to the airport of departure, is entitled to compensation on the ground of a considerable delay, particularly since the passenger in such a case had in any event presented himself or herself for check-in

for the first flight (see BGH, judgment of 13 November 2013 [...] paragraphs 8 and 9).

- 19 IV. Accordingly, the questions set out in the operative part of the present order must be referred to the Court of Justice for a preliminary ruling pursuant to the third paragraph of Article 267 TFEU.
- 20 The questions of law have not been clarified by the case-law of the Court of Justice to date. The decision of the Court of Justice of 24 October 2019 (C-756/18, [...] *easyJet Airline*) concerned different issues and only marginally considered the situation in which a passenger might not have been transported on the delayed flight.
- 21 Moreover, a preliminary ruling should not be dispensed with on the ground that a request for a preliminary ruling on similar questions is already pending before the Court of Justice in Case C-517/21. First, the questions raised by that request for a preliminary ruling are not entirely identical to those raised in the present dispute. Second, with regard to the request for a preliminary ruling which is already pending, it cannot be predicted with certainty what course those proceedings before the Court of Justice will take and whether, in that respect, the questions raised will in fact be answered or the proceedings will be terminated prematurely, for example due to procedural acts of the parties.

[...]