

Case C-336/21

Request for a preliminary ruling

Date lodged:

27 May 2021

Referring court or tribunal:

Landesgericht Korneuburg (Austria)

Date of the decision to refer:

4 May 2021

Appellant:

L

Respondent:

F

BW

SW

[...]

Landesgericht Korneuburg (Regional Court, Korneuburg, Austria) [...]

The Region Court, Korneuburg, sitting as an appeal court [...] in the joined cases brought by the applicants [1] (21 C 51/20p) F***** GmbH, [2] (21 C 71/20d) B***** W*****, [3] (21 C 72/20a) S***** W*****[...] [...] against the defendant L***** GmbH, [...] [...] concerning the appeal lodged by the defendant against the judgment of the Bezirksgericht Schwechat (District Court, Schwechat, Austria) of 29 April 2020, 21 C 51/20p-11 [...], has made the following

Order:

[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 5(3) 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 **[Or. 2] 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 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 with a delay of 7 hours and 41 minutes, because the aircraft was damaged by a lightning strike during the first of two 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 preceding flight went ahead; however, during the course of a pre-flight check before the preceding flight, 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 flight with a departure delay of 7 hours and 40 minutes?**

[2] 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 passengers on a different flight, which would have enabled them to reach their final destination with less of a delay, even though the air carrier operated the flight with a replacement aircraft in place of the now unfit aircraft, with which the passengers reached their final destination with a longer delay?**

[II] [...] [stay of proceedings] **[Or. 3]**

Grounds:

P***** S*****, the second applicant and the third applicant each had a confirmed booking for flight OE 100 operated by the defendant, due to depart from Vienna (VIE) at 11.30 on 21 October 2019 and arrive at Palma de Mallorca (PMI) at 13.55 on 21 October 2019.

The defendant ran the flight, but it was delayed, with an actual departure time of 19.10 and actual arrival time of 21.36. The planned route covered a distance of less than 1 500 kilometres, as measured by the great circle route method. P***** S***** assigned her claims against the defendant arising from this incident to the first applicant, who accepted the assignment.

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 2 hours and 15 minutes, and its arrival was delayed by 2 hours and 40 minutes.

Furthermore, the aircraft should have been used for the following subsequent flights:

[3] OE 100 from Vienna (VIE) 11.30, to Palma de Mallorca (PMI) 13.55, the flight in question. The flight ran – with a replacement aircraft – but its departure was delayed by 7 hours and 40 minutes, and its arrival was delayed by 7 hours and 41 minutes.

[4] OE 105, the flight which is the subject of the proceedings 22 R 258/20a before this court as well as Case C-672/20 before the Court of Justice. The [Or. 4] flight ran – with the same replacement aircraft – but its departure was delayed by 8 hours and 26 minutes, and its arrival was delayed by 8 hours and 19 minutes.

In actions brought separately, the **applicants** each claimed payment of EUR 250 from the defendant – [...] and claimed that there were no extraordinary circumstances. They disputed the argument that a lightning strike was the reason for the delay. A circumstance that occurred prior to the immediately preceding flight could not be taken into account. Nor did the defendant take all reasonable measures to prevent the flight from being delayed. It should have arranged for a replacement aircraft and a standby crew to be made available to passengers as quickly as possible. The defendant should explain the reasons why it was not possible to book the passengers onto another flight.

The **defendant** did not dispute the start of the interest period, but contested the merits and amount of the relief sought. It contended that the action should be dismissed, submitting that the aircraft had been damaged by a lightning strike during a previous rotation. During the pre-flight check for the flight in question, it became apparent that the damage and provisional repairs made on the preceding flight had obviously deteriorated, so the pilot ordered repair and a new inspection. The verification began at 15.05. It was not possible to predict how long the inspection would take. At 15.07, a replacement aircraft was called for, which landed in Vienna at 18.15. The flight was able to run using this aircraft but with a delay. [Or. 5]

With the **contested judgment**, the court of first instance granted the relief sought. The District Court, Schwechat, did not make any findings regarding the cause of the delay. It evidently assumed that a lightning strike constitutes an extraordinary circumstance within the meaning of Article 5(3) of the Air Passenger Rights Regulation, and disputed a number of the measures considered reasonable by the defendant. It concluded from the facts presented (summarised to reflect the key elements) that the defendant did not make adequate submissions concerning the reasonable measures taken to prevent the delay. One possible reasonable measure would have been to rebook the passengers onto another flight from Vienna to

Palma de Mallorca, or to use a replacement aircraft from its own fleet or to subcharter an aircraft in order to allow the flight to depart on time or, at least, with a delay of less than three hours. It pointed out that the defendant must have been aware as soon as the lightning strike occurred at around 9.00 that this could cause a considerable delay to subsequent rotations, even if ultimately no relevant damage was found during the inspection.

[...][submissions] [**Or. 6**]

The Regional Court, Korneuburg, sitting as an **appeal court**, is called on to rule on the applicants' claims at second and final instance.

The defendant's rotation on 21 October 2019 is the subject of several proceedings pending before the appeal court, brought by numerous passengers against the same defendant, including the proceedings 22 R 258/20a. In this case, the appeal court had decided to stay the proceedings and request a preliminary ruling from the Court of Justice on the questions that can be seen in the decision (in addition to a question concerning the scope of the EU Air Passenger Rights Regulation which is not relevant here). In the meantime, those proceedings have been closed, as the appeal was withdrawn. The request for a preliminary ruling pending before the Court of Justice in Case C-672/20 was withdrawn on 28 April 2021. The questions are therefore (almost) identical to Questions 2 and 3 of the withdrawn request for a preliminary ruling.

On the **questions referred**:

Question 1:

The defendant based its argument on the existence of an extraordinary circumstance within the meaning of Article 5(3) of the Air Passenger Rights Regulation as the cause of the (significant) delay, submitting that the first of the two preceding flights 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 applicants in the proceedings before the court of first instance, but that court did not make any findings 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 appeal court to resolve this specific case, [**Or. 7**] despite the circumstances not being established on this point, 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 having to order further findings from the court of first instance.

The referring court has assumed from the outset that a lightning strike constitutes an extraordinary circumstance within the meaning of Article 5(3) of the Air Passenger Rights Regulation (judgments of the Regional Court, Korneuburg, of

24 October 2019, 21 R 222/19y; most recently, of 21 July 2020, 22 R 209/20i). However, other Austrian courts have come to the opposite conclusion (for example judgment of the Bezirksgericht für Handelssachen Wien (District Court for Commercial Matters, Vienna, Austria) of 31 March 2017, 11 C 227/16m = RRa 2018, 289).

The appeal court is (still) 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 4 May 2017, *Pešková and Peška*, C-315/15, paragraph 24).

In view of the fact that scientific evidence may be required, and that the appeal court 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 [Or. 8] can, in principle, give rise to an extraordinary circumstance within the meaning of Article 5(3) of the Air Passenger Rights Regulation.

Question 2:

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 of 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 100, 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 the passengers that should have been carried on this flight had been rebooked beforehand.

The applicants oppose 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 of 11 June 2020, *Transportes [Or. 9] Aéreos Portugueses*, C-74/19, paragraph 59). [...] [explanations relating to national proceedings]

The appellant does not discuss the *Transportes Aéreos Portugueses* case 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 was able to transport the applicants on the booked flight – albeit with a significant delay; rebooking was not necessary. The question whether there was a different option available for this specific flight connection that would have allowed the passengers to reach their final destination far earlier than on the defendant’s delayed flight, albeit still with a significant delay (unlike in the proceedings [...] before this court or Court of Justice Case C-672/20[...]) remains open and **[Or. 10]** must be examined by the court of first instance if rebooking is deemed relevant.

The appeal court (still) 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. 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 appeal court has not been conclusively clarified by the Court of Justice, especially not in its remarks in the judgment in *Transportes Aéreos Portugueses*.

The consideration of both questions is necessary for the appeal court to be able to reach a final decision on the appeal. If a lightning strike is not considered to constitute an extraordinary circumstance, the contested judgment must be confirmed in any case. If a lightning strike is considered an extraordinary circumstance, the court of first instance must ascertain whether a lightning strike was the cause of the long delay (Question 1). 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 upheld or set aside (Question 2). **[Or. 11]**

[II] [...] [stay of proceedings]

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Regional Court, Korneuburg, Dept. 22

Korneuburg, 4 May 2020

[...]

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