

Case C-33/23

Request for a preliminary ruling

Date lodged:

24 January 2023

Referring court:

Landesgericht Korneuburg (Austria)

Date of the decision to refer:

24 January 2023

Appellant:

AA AG

Respondents:

VM

AG GmbH

...

REPUBLIC OF AUSTRIA

LANDESGERICHT KORNEUBURG

(REGIONAL COURT, KORNEUBURG)

ORDER

In the cases brought by

[A] the applicant V***** M***** ...¹ ... against the defendant A***** A***** AG ... in respect of **EUR 250** plus interest and costs (**22 R 224/22d**);

[B] the applicant A***** G***** GmbH ... against the defendant A***** A***** AG ... in respect of **EUR 800** plus interest and costs (**22 R 10/23k**);

¹ ...

in appeal proceedings brought by the defendant in each case against the judgments of the Bezirksgericht Schwechat (District Court, Schwechat)

[A] of 1 September 2022, 24 C 203/22s-7, and

[B] of 26 October 2022, 27 C 174/22y-9,

the Landesgericht Korneuburg, as the court of appeal ... meeting in closed session, has ordered as follows:

[I.] ... [Joinder of the national proceedings]

[II.] 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 3(1)(a) 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 (‘the Air Passenger Rights Regulation’) in conjunction with the Agreement between the European Community and the Swiss Confederation on Air Transport (ATA) of 21 June 1999, as amended by Decision No 2/2010 of the Community/Switzerland Air Transport Committee of 26 November 2010, to be interpreted as meaning that a flight connection consisting of two flights, departing from the territory of the Swiss Confederation with a stopover in the territory of a Member State and a final destination in the territory of a third country (the operating air carrier for which is, moreover, a Community carrier), falls within the scope of the Air Passenger Rights Regulation?’

[2] ‘Is Article 3(1)(b) and 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 (‘the Air Passenger Rights Regulation’) in conjunction with the Agreement between the European Community and the Swiss Confederation on Air Transport (ATA) of 21 June 1999, as amended by Decision No 2/2010 of the Community/Switzerland Air Transport Committee of 26 November 2010, to be interpreted as meaning that a flight connection consisting of two flights, departing from the territory of a third country with a stopover in the territory of a Member State and a final destination in the territory of the Swiss Confederation, the operating air carrier for which is a Community carrier, falls within the scope of the Air Passenger Rights Regulation?’

[III.] ... [Stay of proceedings]

GROUNDS:

[I.] ... [Reference to national law]

[II.] The request for a preliminary ruling:

[A] **22 R 224/22d**

Facts:

The applicant had a confirmed single booking for flight connection OS 774 from Belgrade (Serbia) to Vienna (Austria) and OS 575 from Vienna to Geneva (Switzerland), which was to be operated by the defendant on 30 July 2020.

Flight OS 774 from Belgrade to Vienna did operate. Flight OS 774 from Vienna to Geneva was cancelled and the applicant was informed of the cancellation less than seven days in advance. No alternative transportation was provided. The route from Belgrade to Geneva was a distance of not more than 1 500 kilometres.

By letter of 20 July 2020, the applicant claimed payment of compensation of EUR 250 from the defendant and specified 3 August 2020 as the final date for payment.

The main proceedings:

The **applicant** claimed compensation of EUR 250 plus interest under Article 5(1)(c) in conjunction with Article 7(1)(a) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 ('the Air Passenger Rights Regulation') and asserted that the Air Passenger Rights Regulation was applicable to the flight connection at issue.

The **defendant** disputed the applicant's claims, requested that the action be dismissed and contended that the passenger had not departed from an airport located in the territory of a Member State to which the Treaty applies. Nor had the final destination been located at a European Union airport. Because the Air Passenger Rights Regulation was not applicable, the passenger was not entitled to compensation.

By the **judgment under appeal**, the court at first instance ordered the defendant to pay EUR 250 plus interest and to reimburse legal costs. From a legal point of view, on the basis of its assessment of the facts described in the introduction, which are in part undisputed and in part incontestably established in accordance with domestic procedural laws (Paragraph 501(1) of the Zivilprozessordnung (Code of Civil Procedure)), it concluded, in summary, that on the basis of the Agreement between the European Community and the Swiss Confederation on Air Transport (ATA) of 21 June 1999, as amended by Decision No 1/2006 of the Community/Switzerland Air Transport Committee of 18 October 2006 (revised in form by Decision No 2/2020 of 26 November 2020), the Air Passenger Rights Regulation was also applicable to the flight connection at issue. The defendant had not made any submissions as to the existence of extraordinary circumstances

or the taking of reasonable measures. The applicant was therefore entitled to compensation in the amount claimed.

That judgment is being challenged, on grounds of an incorrect legal assessment, by the **appeal** lodged by the defendant, in which it claims that the judgment under appeal should be altered such that [the action] is dismissed in its entirety; in the alternative, an application for annulment is submitted.

The applicant contends that the appeal should not be granted.

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

[B] 22 R 10/23k

Facts:

The passengers L***** N***** and S***** C***** had a confirmed single booking for flight connection OS 568 from Zürich (Switzerland) to Vienna (Austria) and OS 899 from Vienna to Marrakesh (Morocco), which was to be operated by the defendant on 8 September 2019.

Flight OS 568 from Zürich to Vienna was delayed, as a result of which the passengers missed connecting flight OS 899 and reached their final destination in Marrakesh with a delay of more than three hours. The route from Zürich to Marrakesh was a distance of more than 1 500 kilometres (and not more than 3 500 kilometres).

The passengers assigned their rights to compensation under Article 7 of the Air Passenger Rights Regulation (ultimately through A***** Ltd) to the applicant, which accepted the assignment.

The applicant unsuccessfully claimed payment of compensation totalling EUR 800 from the defendant.

The main proceedings:

The **applicant** claimed compensation totalling EUR 800 plus interest under Article 5(1)(c) in conjunction with Article 7(1)(b) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 ('the Air Passenger Rights Regulation') and asserted that the Air Passenger Rights Regulation was applicable to the flight connection at issue.

The **defendant** disputed the applicant's claims, requested that the action be dismissed and contended that the passengers had not departed from an airport located in the territory of a Member State to which the Treaty applies. Nor had the final destination been located at a European Union airport. Because the Air

Passenger Rights Regulation was not applicable, the passengers were not entitled to compensation.

By the **judgment under appeal**, the court at first instance ordered the defendant to pay EUR 800 plus interest and to reimburse legal costs. From a legal point of view, on the basis of its assessment of the facts described in the introduction, which are in part undisputed and in part incontestably established in accordance with domestic procedural laws (Paragraph 501(1) of the Zivilprozessordnung (Code of Civil Procedure)), it concluded, in summary, that on the basis of the Agreement between the European Community and the Swiss Confederation on Air Transport (ATA) of 21 June 1999, as amended by Decision No 1/2006 of the Community/Switzerland Air Transport Committee of 18 October 2006 (revised in form by Decision No 2/2020 of 26 November 2020), the Air Passenger Rights Regulation was also applicable to the flight connection at issue. The defendant had not made any submissions as to the existence of extraordinary circumstances or the taking of reasonable measures. The applicant was therefore entitled to compensation in the amount claimed.

That judgment is being challenged, on grounds of an incorrect legal assessment, by the **appeal** lodged by the defendant, in which it claims that the judgment under appeal should be altered such that [the action] is dismissed in its entirety; in the alternative, an application for annulment is submitted.

The applicant contends that the appeal should not be granted.

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

The questions referred for a preliminary ruling:

[1] The primary condition for the applicants' right to compensation under Article 7(1)(a) of the Air Passenger Rights Regulation is that the flight connections at issue fall within the scope of the Air Passenger Rights Regulation.

[2] Under Article 3(1) of the Air Passenger Rights Regulation, the regulation applies

(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies; or

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.

[3] In the present cases, neither the point of departure nor the final destination of the flight connection is located in a Member State of the European Union; in case

[A] the point of departure is located in the territory of a third country and the point of arrival in the territory of the Swiss Confederation; in case [B] the point of departure is located in the territory of the Swiss Confederation and the point of arrival in the territory of a third country.

This understanding is founded on the existing case-law of the Court of Justice of the European Union, according to which a flight with one or more connections which was the subject of a single reservation constitutes a whole for the purposes of the right of passengers to compensation under the Air Passenger Rights Regulation, implying that the applicability of that regulation is to be assessed with regard to the place of the flight's initial departure and the place of its final destination (CJEU, 11 July 2019, *Ceske aerolinie*, paragraph 16; CJEU, 12 November 2020, *KLM Royal Dutch Airlines*, C-367/20, paragraph 19; CJEU, 24 February 2022, *Airhelp*, C-451/20, paragraph 26; CJEU, 6 October 2022, *flightright GmbH*, C-436/21, paragraph 23). The fact that the airport where the stopover takes place is located in the territory of a Member State does not mean that the Air Passenger Rights Regulation is applicable (CJEU, 24 February 2022, C-451/20 *Austrian Airlines*, paragraph 41).

[4] The Agreement between the European Community and the Swiss Confederation on Air Transport (ATA), which was concluded on 21 June 1999, sets out rules for the Contracting Parties in the field of civil aviation (Article 1 of the ATA). It is stated in its preamble that on account of the integrated character of international civil aviation the Parties to the Agreement desire that regulations for intra-European air transport be harmonised.

Article 1(1) in Chapter 1 of the ATA states that the objective of the Agreement is to set out rules for the Contracting Parties in the field of civil aviation.

Under Article 2 of the ATA, the provisions of the Agreement and its Annex apply to the extent that they concern air transport or matters directly related to air transport as mentioned in the Annex to the Agreement.

Article 23(1) of the ATA states that the Agreement is without prejudice to the right of each Contracting Party, subject to compliance with the principle of non-discrimination and the provisions of the Agreement, to amend unilaterally its legislation on a point regulated by the Agreement.

Article 32 of the ATA provides that the Annex to the Agreement forms an integral part thereof.

According to the Annex, wherever acts specified in the Annex contain references to Member States of the European Community, or a requirement for a link with the latter, the references are, for the purpose of the Agreement, to be understood to apply equally to Switzerland or to the requirement of a link with Switzerland.

By Decision No 1/2006 of the Community/Switzerland Air Transport Committee of 18 October 2006 (revised in form by Decision No 2/2020 of 26 November

2010), the ATA was amended (inter alia) such that the Passenger Rights Regulation was incorporated into point 6 of the Annex (in place of Regulation No 295/91, which had been repealed).

The referring court therefore tends to the view that the wording and the identifiable objective of the ATA indicate that the Air Passenger Rights Regulation is also fully applicable to the territory of Switzerland.

[5] However, the Zivilgericht des Kantons Basel-Stadt (Civil Court of the Canton of Basel-Stadt) takes the view, relying on Article 15 of the ATA, under which Swiss and Community air carriers are granted traffic rights only for routes between Switzerland and the European Union and within the European Union, that the Air Passenger Rights Regulation is applicable only to that extent (decisions of 11 March 2011, V.2010.1734; 15 May 2012, V.2012.213).

It must nevertheless be stated, in the view of the referring court, that Article 15 of the ATA concerning the reciprocal grant of traffic rights represents only one aspect of the Agreement as a whole, which has no discernible connection with the granting of passenger rights.

[6] By contrast, the Swiss Federal Office of Civil Aviation (FOCA) evidently takes the view that the Air Passenger Rights Regulation applies to all departures from Switzerland at least, regardless of the airline (<www.bazl.admin.ch/bazl/de/home/gutzuwissen/fluggastrechte.html>). This would then also hold – in case [A] here – for all flights with a final destination in Switzerland if the other conditions laid down in Article 3(1)(b) of the Air Passenger Rights Regulation are satisfied.

Nevertheless, the referring court understands that:

- The operating air carrier for both legs – the defendant – is a Community carrier.
- The receipt of compensation in the third country constitutes a fact by virtue of which any claim is forfeited which would, according to general principles, have to be asserted and demonstrated by the defendant operating air carrier. The defendant has not, however, made any submissions in this regard in these proceedings.

[6] In its requests for a preliminary ruling of 9 April 2013 (X ZR 105/12) and 22 June 2021 (X ZR 15/20) – which concerned applicability under Article 3(1)(a) of the regulation – the (German) Bundesgerichtshof (Federal Court of Justice) also took the view that by virtue of the extension of the Air Passenger Rights Regulation to the territory of Switzerland by the ATA, flights departing from the territory of Switzerland with their destination in a third country also fall within the scope of the regulation.

The German Bundesgerichtshof has held in this regard that the Annex to the Air Transport Agreement, as revised by Decision No 2/2010 of the Air Transport Committee, provides in the second indent that, in respect of acts specified in the Annex, references contained therein to the Member States of the European Community or the European Union are, for the purpose of the Agreement, to be understood to apply equally to Switzerland. Article 3(1) of the Air Passenger Rights Regulation might therefore have to be applied such that it is sufficient for the existence of rights under that regulation that the point of departure of a flight or, where the registered office of the air carrier is in the European Union or in Switzerland, the point of arrival is in Switzerland. Such an interpretation of the Air Transport Agreement and its Annex is consistent not only with its wording, but also with the objective set out in the preamble to that Agreement, according to which regulations for intra-European air transport, including the territory of Switzerland, should be harmonised. Accordingly, air carriers in Switzerland should be able and required to operate under the same conditions as those in the Member States of the European Union. Consumers and customers of air carriers should encounter the same quality standards in Switzerland, and also therefore be able to assert the same rights vis-à-vis those carriers in Switzerland, as in the Member States of the European Union, while air carriers are intended to be subject to the same conditions of competition. It would be quite incongruous if the Air Passenger Rights Regulation were applicable only to passengers departing from the territory of Switzerland for an airport located in the territory of a Member State of the European Union.

[a] The proceedings on the request for a preliminary ruling under X ZR 105/12 (C-259/13) were removed from the register of the Court of Justice of the European Union.

[b] There was no need for the Court of Justice of the European Union to address the second question, which is relevant here, referred in the request for a preliminary ruling made under X ZR 15/20 (C-436/21) on account of the answer given to the first question referred.

[7] A request for a preliminary ruling from the Amtsgericht Hannover (Local Court, Hanover) (C-3/15) concerning the application of Article 3(1)(b) of the Air Passenger Rights Regulation to a flight connection from a third country to Switzerland was also removed from the register of the Court of Justice of the European Union.

[8] The question[s] 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 appeals. The court of appeal does not consider there to be an *acte clair*.

If the Court answers the questions referred in the affirmative, each of the applicants is rightly entitled to compensation; the appeals brought by each of the defendants could not be granted. If the Court answers the questions referred in the negative, each of the applicants is not rightly entitled to compensation; the appeal

brought by each of the defendants would have to be granted and the judgments delivered at first instance would have to be altered such that the actions are dismissed. The answer to the questions referred is therefore necessary to enable the referring court to give judgment.

[III.] ... [Reference to national law]

Landesgericht Korneuburg, ...

Korneuburg, 24 January 2023

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WORKING DOCUMENT