

Anonymised version

Translation

C-663/23 – 1

Case C-663/23

Request for a preliminary ruling

Date lodged:

9 November 2023

Referring court:

Landgericht Düsseldorf (Germany)

Date of the decision to refer:

24 October 2023

Applicant:

UW

Defendant:

Etihad Airways P.J.S.C.

Landgericht Düsseldorf (Regional Court, Düsseldorf)

Order

In the case of

Mr UW, [...] Berlin,

applicant,

[...]

v

Etihad Airways P.J.S.C., [...] Frankfurt,

defendant,

[...]

on 24 October 2023,

[...] the 22nd Civil Chamber of the Landgericht Düsseldorf made the following

order:

The proceedings are stayed.

The following questions concerning the interpretation of EU law are referred to the Court of Justice of the European Union pursuant to point (b) of the first paragraph and the third subparagraph of Article 267 TFEU:

1.

Must Article 5(1)(a) in conjunction with Article 8(1)(a) and Article 7(3) of the Air Passenger Rights Regulation be interpreted as meaning that a passenger who bought a ticket for a flight by an operating air carrier not with money but using bonus miles under a frequent flyer programme established by another air carrier may claim reimbursement of the ticket price in money if that flight is cancelled by the operating air carrier?

2.

If the first question is answered in the affirmative, is the ticket price for the purposes of Article 8(1)(a) of the Air Passenger Rights Regulation, reimbursement of which the passenger may claim in money, to be determined in such cases on the basis of the publicly available fare at which the cancelled flight in question is offered for sale by the operating air carrier or on the basis of the (average) value of the bonus miles used?

Grounds:

I.

The request for a preliminary ruling is based on the following facts:

The applicant had a confirmed reservation for the flight to be operated by the defendant on 6/7 April 2021 from Düsseldorf via Abu Dhabi, United Arab Emirates, to Cairo, Egypt (flight numbers: EY 24 and EY 653).

The corresponding ticket was bought from American Airlines by his fellow passenger. For the applicant's ticket, the fellow passenger paid 42 500 frequent flyer miles from the American Airlines bonus programme, and the applicant paid USD 81.60 in taxes and charges.

The publicly available fare for that flight is EUR 8 009.91 including taxes and charges.

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The flight was cancelled by the defendant.

The applicant declined a re-routed flight offered to him and, on 6 February 2021, claimed reimbursement of the miles used and the supplementary payment, setting a deadline of 15 February 2021. The defendant made no reimbursement and referred the applicant to American Airlines.

On 22 February 2021, the applicant instructed his legal representative to undertake the non-judicial assessment and pursuit of his claims against the defendant. For that service, the legal representative charged the applicant EUR 850.00.

The defendant had the air carrier American Airlines credit the 85 000 miles used by the fellow passenger to his bonus miles account.

In the present proceedings, the applicant claims that the court should:

order the defendant to pay him EUR 8 009.91 plus interest [...] and an additional EUR 850.00.

The defendant contends that the court should:

dismiss the action.

The defendant takes the view that the applicant can at most claim the crediting of bonus miles because the flight was bought using American Airlines bonus miles and not by paying money. Since the defendant is unable to credit the American Airlines bonus miles to him, the applicant must seek reimbursement from American Airlines.

II.

The outcome of the action depends crucially on the questions set out in the operative part.

Specifically:

The applicant has a right to reimbursement of the ticket price of EUR 8 009.91 from the defendant under Article 5(1)(a) and the first indent of Article 8(1)(a) of the Air Passenger Rights Regulation if he is able to claim reimbursement of the ticket price in money, even though the flight was bought not with money but with bonus miles.

Under Article 5(1)(a) and the first indent of Article 8(1)(a) of the Air Passenger Rights Regulation, because the defendant cancelled the booked flight, for which the applicant had a confirmed reservation, it must reimburse to the applicant, if he so chooses, within seven days, by the means provided for in Article 7(3) of the Air Passenger Rights Regulation, the cost of the ticket at the price at which it was bought.

(a)

The applicant bought the ticket only in part by paying money, in an amount of USD 81.60 for taxes and charges, but otherwise used 42 500 of his fellow passenger's frequent flyer miles under the American Airlines bonus programme.

The nature and amount of the right to reimbursement are determined in accordance with Article 7(3) of the Air Passenger Rights Regulation, to which express reference is made in the first indent of Article 8(1)(a) of the Air Passenger Rights Regulation. Under Article 7(3) of the Air Passenger Rights Regulation, reimbursement of the cost of the ticket is to be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services. It is uncertain from that provision whether the applicant may claim reimbursement in euros of the equivalent value of the bonus miles used. In the view of the Chamber, that is the case.

This would not appear to be precluded by the fact that the ticket was originally bought not with money but with bonus miles. According to the clear wording of Article 7(3) of the Air Passenger Rights Regulation, reimbursement in travel vouchers and/or other services, which includes recrediting of bonus miles, can be paid only with the signed agreement of the passenger. Because no such agreement has been given by the applicant in this case, the equivalent value of the bonus miles must be reimbursed in money.

Nor would this appear to be precluded by the fact that Article 8(1)(a) of the Air Passenger Rights Regulation, which makes express reference to Article 7(3) of the Air Passenger Rights Regulation, was based on the normal case where the ticket is paid for with money and overlooked the case of reimbursement of the ticket price where bonus miles have been used. According to the second sentence of Article 3(3) of the Air Passenger Rights Regulation, the Air Passenger Rights Regulation is explicitly declared to be applicable also in cases where tickets were bought under a frequent flyer programme or other commercial programme by an air carrier. Such programmes include frequent flyer programmes with bonus miles, like that operated by American Airlines. It can therefore be concluded that the legislature clearly envisaged the case at issue here and nevertheless decided, in connection with the right to reimbursement under the first indent of Article 8(1)(a) of the Air Passenger Rights Regulation, to refer without limitation to the means of reimbursement under Article 7(3) of the Air Passenger Rights Regulation in order to avoid inconvenience for the passenger in such cases.

It must be borne in mind in particular in this regard that it is not uncommon – including in the case at issue, where bonus miles from the American Airlines frequent flyer programme can also be used for the defendant's flights – for bonus miles under frequent flyer programmes to be able to be used also to buy flights of other airlines which are members of the same airline alliance. In such cases, the operating air carrier against which a claim is made cannot recredit the bonus miles

issued by another airline to the passenger's miles account or can do so only with considerable difficulty. In order to prevent the operating air carrier being able, in such cases, to refer the passenger seeking reimbursement to the airline which established the frequent flyer programme, the legislature therefore evidently decided always to grant the passenger a right to reimbursement in money in these cases too.

This is also consistent with the intended objective of the Air Passenger Rights Regulation of establishing a high level of protection for passengers in air travel. In addition, the Court of Justice of the European Union has ruled, with regard to the right to compensation under Article 7(1) of the Air Passenger Rights Regulation, that Article 7(3) of the Air Passenger Rights Regulation, which establishes a high level of protection for passengers, must be interpreted broadly (see Court of Justice of the European Union, judgment of 3 September 2020 – C-356/19 *Delfly v Smartwings Poland*, [...]: passenger may demand payment of compensation in the national currency rather than in euros).

Even if the contractual provisions of the American Airlines bonus miles programme ruled out reimbursing the equivalent value of the bonus miles in money and only the recrediting of bonus miles to the passenger's account was provided for, that provision would be void under Article 15 of the Air Passenger Rights Regulation, because it would unduly restrict the applicant's rights arising from Article 5(1)(a), the first indent of Article 8(1)(a) and Article 7(3) of the Air Passenger Rights Regulation. Furthermore, under Article 13 of the Air Passenger Rights Regulation, the operating air carrier may seek compensation from another air carrier which issued the bonus miles.

(b)

The applicant is claiming a sum of EUR 8 009.91. As submitted by the applicant and not contested, that is the price which the applicant would have had to pay in the event of booking the flight on the open market. Despite not being sellable, bonus miles do have a value because passengers can use them within the framework of the bonus programme in exchange for goods or services offered (see Bundesgerichtshof (Federal Court of Justice, Germany), judgment of 1 March 2023 – IV ZR 112/22, r + s 2023, pp. 448, 449, paragraph 14). The Chamber considers it appropriate to have regard to that hypothetical purchase price in determining the value of the bonus miles, in line with the applicant's submission.

Reference cannot be made to any kind of objective value of the bonus miles. The value of the bonus miles used varies depending on the flights for which the miles are used. Depending on which flight is booked using miles, it can sometimes be more favourable for the passenger to use miles and sometimes less favourable, the value of the miles generally being higher for expensive long-distance flights than for simple short- and medium-haul flights. However, it would be unfeasible in practice and also unreasonable for the passenger if some kind of 'average value' of bonus miles were determined here, possibly based on the passenger's past flight

behaviour or on the behaviour of an average frequent flyer customer. The value of bonus miles when they are redeemed seems entirely opaque to the passenger. The passenger generally has no insight into the relevant calculation by the airline or the airline's arrangements with other airlines from the same airline alliance relating to acceptance of bonus miles when flights are booked. The applicant has submitted, and it is uncontested, that he regularly uses miles for very expensive flights. Booking the flight at issue from Düsseldorf via Abu Dhabi to Cairo on 6/7 April 2021 using 42 500 bonus miles 'defined' the value of the bonus miles used as the hypothetical ticket price at which the flight in question is offered on the open market. The applicant can no longer be deprived of this advantage as a result of the subsequent cancellation of the flight. Where the airline establishes such frequent flyer programmes for reasons relating to customer loyalty and marketing and the passenger uses those miles to book a flight, the airline must – if it cancels the flight in question – adhere to the value of the bonus miles defined for that specific booking, especially since the calculation underlying the bonus programme is completely opaque and non-transparent to the passenger.

In respect of the defendant's submission that it has now recredited the miles used for the flight to the miles account of the fellow passenger who made the booking, this is irrelevant. First, recrediting the miles to the fellow passenger's account does not increase the applicant's assets. Second, reimbursement of the ticket price in any form other than money – as set out above – can only take place with the written consent of the passenger under Article 7(3) of the Air Passenger Rights Regulation. That consent has not been given, with the result that the recrediting of miles, rather than fulfilling the passenger's rights, is ineffective. The defendant cannot create a *fait accompli* by recrediting the miles used to the applicant or his fellow passenger against his will.

(c)

The interpretation of the Air Passenger Rights Regulation in respect of the questions raised above is not so obvious that the correct interpretation can be inferred beyond doubt from the text of the Air Passenger Rights Regulation and the previous case-law of the Court of Justice of the European Union. [...]