

**Case C-517/21**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

20 August 2021

**Referring court:**

Landesgericht Korneuburg (Austria)

**Date of the decision to refer:**

13 July 2021

**Defendant:**

Laudamotion GmbH

**Applicants:**

TG

QN

AirHelp Germany GmbH

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**Subject matter of the main proceedings**

Air passenger rights – Right to compensation – Concept of ‘presenting oneself for check-in’ – Inconvenience – Actual taking of the flight as a possible condition for the right to compensation

**Subject matter and legal basis of the request for a preliminary ruling**

Interpretation of EU law, Article 267 TFEU

**Questions referred for a preliminary ruling**

(1) Is Article 3(2)(a) of Regulation (EC) No 261/2004 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'), to be interpreted as meaning that the regulation applies to a passenger who checks in online but does not present himself or herself at the check-in counter at the times specified in that provision?

(2) Taking into account the judgment of the Court of Justice of the European Union of 19 November 2009 in Joined Cases C-402/07 and C-432/07, is Article 5 of the Air Passenger Rights Regulation, in conjunction with Article 7 thereof, to be interpreted as meaning that – where the operating air carrier cannot avoid liability, as provided for in Article 5(3) of the Air Passenger Rights Regulation – the passenger has the right to compensation if:

- the flight is delayed in arriving at the final destination by at least three hours,
- it was already apparent prior to boarding that the flight would reach its final destination with a delay of at least three hours, and
- the passenger did not appear for the boarding of that flight?

*If Question 2 is answered in the affirmative:*

(3) Is this also the case where the passenger, without the involvement of the operating air carrier, books an alternative flight with which he or she reaches another airport serving the same city or region (Article 8(3) of the Air Passenger Rights Regulation) as his or her originally booked flight only slightly later than he or she would have reached the final destination of that flight as scheduled?

*If Question 2 is answered in the affirmative:*

(4) Is this also the case where the passenger, at his or her request, is rebooked by the operating air carrier onto an alternative flight with which he or she reaches his or her final destination earlier than he or she would have with the delayed originally booked flight, but nevertheless later than he or she would have with the flight originally booked had it been on schedule (and the flight onto which the passenger was rebooked does not itself have a 'long delay')?

### **Provisions of Community law relied on**

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

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The request for a preliminary ruling comprises three similar sets of facts on the basis of which it is necessary to answer the question as to whether a passenger must also have taken a flight on which he or she would have reached his or her final destination with a delay of at least three hours. All the applicants seek compensation pursuant to Article 5(1)(c) of Regulation (EC) No 261/2004, in conjunction with Article 7(1)(a) or (b) thereof.

#### *Case 22 R 203/20p:*

- 2 The applicant had a confirmed booking for flight OE 190, to be operated by the defendant, departing from Düsseldorf (DUS) at 2.45 p.m. and arriving in Kos (KGS) at 7.10 p.m. on 23 October 2019. As it happened, the flight did not leave DUS until 7.27 p.m. (delay in departure of 4 hours and 42 minutes) and did not reach KGS until 11.38 p.m. (delay in arrival of 4 hours and 28 minutes). The applicant had checked in for that flight online.
- 3 The court of first instance ruled that, in the case of online check-in, physical appearance at the counter in the check-in hall is not necessary, and the requirement for application laid down in Article 3(2)(a) of Regulation (EC) No 261/2004 is met if check-in has been carried out online. It stated that, moreover, the regulation does not contain any indication that the passenger must also take the delayed flight in order to have a right to compensation. The defendant appealed against that ruling.

#### *Case 22 R 83/21t:*

- 4 The applicant had a confirmed booking for flight OE 314, to be operated by the defendant, departing from Vienna (VIE) at 6.50 a.m. and arriving at London Stansted (STN) at 8.10 a.m. on 19 December 2019. As it happened, the flight did not leave VIE until 1.20 p.m. (delay in departure of 6 hours and 30 minutes) and did not reach STN until 2.30 p.m. (delay in arrival of 6 hours and 20 minutes).
- 5 The applicant had checked in online and went to the defendant's check-in counter one hour before the scheduled time of departure, but the counter was unmanned. The flight booked was displayed on the departure board with a departure time that was not until the afternoon.
- 6 The applicant had booked the flight to attend a conference in London from 10 a.m. onwards. He subsequently booked a flight with another air carrier and arrived at London Heathrow at 8.15 a.m.
- 7 It was not until 9 a.m. that the applicant received a text message from the defendant informing him that flight OE314 would not be operated until the afternoon.

- 8 The court of first instance ruled that a right to compensation also exists where the passenger forgoes carriage in the event of an unavoidable delay in arrival of at least three hours. It stated that a requirement to take the flight in this case is not compatible with the high level of protection afforded by Regulation (EC) No 261/2004, especially given that the delay may frustrate the purpose of the journey. The inconvenience caused to the applicant in this case consisted in having to organise another flight at short notice and under great pressure. The defendant brought an appeal against that judgment.

*Case 22 R 228/21s:*

- 9 A number of passengers who assigned their claims to the applicant had a confirmed booking for flight OE 300, to be operated by the defendant, departing from Düsseldorf (DUS) at 10.40 a.m. and arriving in Palma de Mallorca (PMI) at 1.05 p.m. on 25 June 2019. As it happened, the flight did not leave DUS until 9.45 p.m. (delay in departure of 11 hours and 5 minutes) and did not reach PMI until 11.57 p.m. (delay in arrival of 10 hours and 52 minutes).
- 10 On the morning of the day of departure, the passengers were informed that the booked flight OE300 would not depart until 6.10 p.m. After a further notification informing them that the departure would be delayed by another hour, the passengers contacted the defendant to inquire about being rebooked onto an earlier flight. They were rebooked onto flight OE150 from DUS to PMI, departing at 5.05 p.m. and arriving at 7.10 p.m. on 25 June 2019, which landed on time in Palma de Mallorca. As a result of the rebooking, the passengers did not present themselves for the check-in of flight OE300, but for the check-in of flight OE150.
- 11 The court of first instance ruled that the passengers for whom alternative transport had been organised, and who had already been informed of this before the departure of the originally booked flight, did not have to present themselves for check-in for the originally booked flight in order to preserve their rights under Regulation (EC) No 261/2004. It stated that, as the passengers suffered a loss of time of more than three hours, they have a right to compensation. The defendant brought an appeal against that judgment.

**The essential arguments of the parties in the main proceedings**

- 12 In the first case, the applicant submits that he participated in the delayed flight, and responsibility for the delay lay solely with the defendant. In addition, ‘presenting oneself for check-in’ is equivalent to check-in; this is apparent from, for instance, the English language version of the regulation. Inconvenience was caused because the flight had been booked for a specific reason.
- 13 In the second case, the applicant argues that he could not reasonably be expected to take such a delayed flight in order to have a right to compensation for the inconvenience caused. He stated that he would have been happy to give the defendant the opportunity to organise alternative transport, but this was not

possible due to the unstaffed counter at the airport of departure. Spontaneously booking an alternative flight was the only way in which he could still attend the conference.

- 14 In the third case, it is submitted that, in the event of a rebooking, it is not a requirement that passengers present themselves for check-in for the flight originally booked. The passengers did not refuse to take the originally booked flight, but made use of the alternative transport organised. Nevertheless, they reached their final destination only after a delay of more than three hours, which justifies the right to compensation.
- 15 The defendant contends, in essence, that the applicants did not present themselves for check-in for the respective flights. Nor were they informed that carriage would be refused, for which reason even the basic requirements for the application of Regulation (EC) No 261/2004 as laid down in Article 3 thereof are not met. It submits that check-in is only one aspect of 'presenting oneself for check-in'. The term 'presenting oneself' can be interpreted only as meaning the physical presence of the passenger. According to the defendant, the time limits for alternative transport exempting the air carrier from its liability to pay compensation are extremely tight, which is why the passenger's physical presence is also necessary for organisational reasons.
- 16 Furthermore, the defendant argues that a right to compensation cannot exist on account of the long delay if the flight was voluntarily not taken. In this case, no inconvenience has been caused by the delay either. Moreover, the decisive factor is the delayed arrival of the passenger, not the flight, at the final destination.
- 17 With regard to the second case, the defendant also submits that the applicant did not give it the opportunity to arrange alternative transport.

#### **Succinct presentation of the reasons for the request for a preliminary ruling**

- 18 In order to be able to assess whether the applicants have a right to compensation, it is necessary to ascertain whether Regulation (EC) No 261/2004 is applicable. If that is the case, it must be ascertained whether it is also necessary that the passenger was carried on the flight that reached the final destination with a delay of at least three hours.

#### *Question 1:*

- 19 This question asks whether online check-in is sufficient for the application of the regulation, or whether the passenger must also be present at the airport of departure at the times specified in Article 3(2) of the regulation. The absence of a clear answer to that question in the regulation may be explained by the fact that online check-in was not yet very widespread when the regulation was adopted.

- 20 It is necessary to clarify whether the German term ‘*Abfertigung*’ (check-in) is to be equated with (online) check-in or goes beyond it. The English-language version, for example, uses the term ‘check-in’, which suggests that online check-in may be sufficient.
- 21 If that is the case, ‘presenting oneself’ for check-in would be superfluous and successful online check-in would lead to the applicability of Regulation (EC) No 261/2004. That view is also taken by the appellate court, but the issue has not yet been clarified by the case-law of the Court of Justice.

*Question 2:*

- 22 The question arises as to whether the passenger also has a right to the payment of compensation if he or she becomes aware of the long delay before the flight and thus does not participate in the flight.
- 23 According to the national legal literature, the right to compensation also exists where the passenger, having knowledge of the long delay, decides not to participate in the flight, for example because the flight can then no longer serve the purpose of the journey; the nuisance caused to the passenger is, in such a case, comparable to that caused by a cancellation of the flight. This does not seem erroneous to the appellate court. It is true that it cannot be the case that participation of the passenger in the flight is never a condition for the recognition of a right to compensation (for example where the delay is not apparent in advance). On the other hand, however, it also cannot be the case that, just to have a right to compensation, the passenger must participate in a flight when it is already apparent that doing so will mean that he or she will arrive at the final destination with a delay of at least three hours. In such a case, the inconvenience caused does not consist solely in a delay in arrival at the final destination.
- 24 However, the intention of reaching a particular event at the final destination in time cannot be a decisive factor. If the event is missed even with a delay of less than three hours, this does not establish a right to compensation. Therefore, the existence of a right to compensation does not depend on the individual damage actually suffered by the passenger as a result of the cancellation or the long delay.

*Question 3:*

- 25 If the delay of more than three hours is already apparent to the passenger before departure and he or she does not take the flight, it might be concluded that there is no right to compensation if the passenger reaches the final destination by other means with a delay of less than three hours – provided that the delayed arrival at the final destination is deemed to be the sole inconvenience to the passenger.
- 26 However, it should be borne in mind that, in the event of a cancellation, there is no change in the right to compensation if the passenger reaches his or her final destination by other means organised by himself or herself.

*Question 4:*

- 27 It might be argued that a rebooking establishes the applicability of Regulation (EC) No 261/2004 to the alternative flight, and thus none of the alternative conditions of Article 3(2) of the regulation apply to the originally booked flight, with the result that the regulation is no longer applicable to that flight. There would then no longer be a right to compensation for the delay of the flight originally booked. This seems incorrect, however, since, even in the case of a cancelled flight, for which the passenger is unable to present himself or herself for check-in, the passenger has a right to compensation in the case of alternative transport outside the time limits of Article 5(1)(c)(ii) and (iii) of the regulation.
- 28 This shows that the fact that the passenger no longer has a confirmed booking for the originally booked flight after the rebooking is not decisive for the right to compensation in respect of the originally booked flight.

WORKING DOCUMENT