Anonymised version

Case C-172/21

Request for a preliminary ruling

Date lodged:

19 March 2021

Referring court:

Landgericht Köln (Germany)

Date of the decision to refer:

15 March 2021

Applicant and appellant:

EF

Defendant and respondent:

Deutsche Lufthansa AG

[…]

Landgericht Köln (Regional Court, Cologne)

Order

In the case of

EF, […] Berlin,

applicant and appellant,

[…]

v

Deutsche Lufthansa AG, […], Cologne,

defendant and respondent,

[…]

The proceedings are stayed.

The following questions on the interpretation of EU law are referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:

1. Is a corporate fare which is more favourable than the standard fare (*in casu*, EUR 152.00 instead of EUR 169.00), and which is based on a framework agreement between an air carrier and another **[Or. 2]** undertaking and which can be booked only for employees of the undertaking concerned for the purposes of business trips, a reduced fare not available directly or indirectly to the public within the meaning of the first sentence of Article 3(3) of Regulation (EC) No 261/2004?

2. If Question 1 is answered in the affirmative, is such a corporate fare not also part of a frequent flyer programme or other commercial programme of an air carrier or tour operator within the meaning of the second sentence of Article 3(3) of Regulation (EC) No 261/2004?

G r o u n d s:

I.

1.

The applicant is taking action against the defendant, which operates an air carrier, for payment of compensation of EUR 250.00 under 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 (‘Regulation (EC) No 261/2004’).

The underlying facts are as follows:

The applicant had a confirmed booking for flight LH 191 from Berlin-Tegel to Frankfurt, to be operated by the defendant, which included connecting flight EN.8858 from Frankfurt to Florence on 15 June 2019. The feeder flight LH 191 was scheduled to depart at 2.45 p.m. and land at 3.55 p.m. The connecting flight EN 8858 was scheduled to depart at 4.50 p.m. and land at 6.20 p.m. However, the feeder flight was delayed and did not reach its destination until 4.53 p.m. As a result, the applicant missed her connecting flight. She reached her destination at 11.43 p.m. by means of the alternative transport that had been offered to her.

The distance between Berlin-Tegel and Florence is less than 1 500 km.

The flights had been booked through the applicant's employer, the company Borderstep Institut GmbH, on the basis of a corporate fare agreed between the defendant and the company. This reduced the fare to EUR 152.00, compared to the normal fare of EUR 169.00. This type of reduced fare can be booked only for employees of Borderstep Institut GmbH for the purposes of business trips. **[Or. 3]**

The applicant first engaged the services of the company EUClaim Deutschland GmbH, which, acting on behalf of the applicant, requested the defendant to pay compensation in the amount of EUR 250.00 by letter of 8 August 2019. By letter of 9 September 2019, the applicant once again demanded payment from the defendant, this time through her legal representatives. The defendant did not make any payments.

2.

The Amtsgericht (Local Court) dismissed the action. It took the view that, in accordance with the first sentence of Article 3(3) of Regulation (EC) No 261/2004, the regulation is not applicable. It stated that the fare booked is a reduced fare not available directly or indirectly to the public. A fare is available to the public if, in principle, anyone can make a booking. This also applies if certain criteria attached to characteristics inherent in the person making the booking have to be met in order for that person to be eligible for an individual fare, as in the case of fares for senior citizens or children, for instance. However, the prerequisite for eligibility for a corporate fare is not the presence of characteristics inherent in the person concerned, but an agreement between the employer and the air carrier in question, with individual conditions of use, such as minimum turnover and specific fare criteria. This means that the group of persons who can make use of the fare is precisely defined in such a way that the fare is no longer available directly or indirectly to everyone.

3.

The applicant appealed against the judgment of the Local Court and continued to pursue the form of order sought.

The applicant takes the view that corporate fares are not covered by the first sentence of Article 3(3) of Regulation (EC) No 261/2004, and the regulation is therefore applicable. She submits that the provision covers only special fares for (active or former) employees of air carriers or tour operators ('industry discounts' or 'agent discounts'). In such cases, the interest of the operating air carrier in carrying the passenger concerned is not purely economic, which is why the legislature did not intend such cases to be covered by the regulation. However, reduced corporate fares are granted to large companies so that they book as many flights as possible with the air carrier. According to the applicant, the legislature did not intend for passengers who, in the case of such a fare, paid almost the full price and had no other close connection with the operating air carrier to be excluded from the regime for claiming compensation. This would contradict the

fundamental, consumer-friendly concept behind the regulation. The fare booked is also available to the public. In that connection, **[Or. 4]** the public is to be regarded as all persons outside the air carrier undertaking.

Moreover, the exception to the exclusion in the second sentence of Article 3(3) of Regulation (EC) No 261/2004 is – according to the applicant – also relevant, since corporate fares are to be regarded as frequent flyer programmes. Through such framework agreements, an undertaking is at least de facto bound to the air carrier as a customer for the duration of the agreement.

The defendant contends that the appeal should be dismissed.

II.

The decision on the appeal requires a preliminary ruling by the Court of Justice of the European Union on the questions referred.

1.

The question is material to the decision. If a corporate fare is not covered by the first sentence of Article 3(3) of Regulation (EC) No 261/2004 and also does not fall within the scope of the exception to the exclusion in the second sentence of Article 3(3) of Regulation (EC) No 261/2004, the appeal would be unsuccessful. If this is deemed not to be the case, however, the appeal would be successful, as the applicant would then be entitled to the compensation claimed. The applicant reached her final destination with a delay of 5 hours and 23 minutes. The defendant did not allege extraordinary circumstances within the meaning of Article 5(3) of Regulation (EC) No 261/2004.

2.

The question of whether a corporate fare of the type at issue constitutes a reduced fare not available directly or indirectly to the public within the meaning of the first sentence of Article 3(3) of Regulation (EC) No 261/2004 and whether such a fare does not also constitute a frequent flyer programme or other commercial programme of an air carrier or tour operator within the meaning of the second sentence of Article 3(3) of Regulation (EC) No 261/2004 is a question of interpretation of Article 3(3) of Regulation (EC) No 261/2004, which, in cases of doubt, is a matter reserved for the Court of Justice of the European Union.

3.

According to the view previously held by the present Chamber, a reduced corporate fare which is based on a framework agreement between an air carrier and another undertaking, and which can be booked only for employees of the undertaking concerned specifically for the purposes of business trips, is a reduced fare not available directly or indirectly to the public **[Or. 5]** within the meaning of the first sentence of Article 3(3) of Regulation (EC) No 261/2004 (Landgericht

Köln (Regional Court, Cologne), judgment of 17 March 2020, 11 S 33/19, juris; Regional Court, Cologne, judgment of 17 November 2020, 11 S 373/19, the latter not published).

a)

The question of whether corporate fares that apply only to undertakings that have concluded an agreement with the air carrier constitute a fare not available directly or indirectly to the public is highly contentious in the case-law and legal literature.

In line with the applicant's legal appraisal, the prevailing view in the legal literature is that only trade discounts that cannot be found on the free market and are granted to employees of air carriers or cooperating tour operators or travel agencies, such as the industry discount (ID), the agent discount (AD) and the Personal Education Program fare (PEP), are covered by the second variant of the first sentence of Article 3(3) of Regulation (EC) No 261/2004 […]. According to that view, the public can be regarded only as the entirety of persons outside the air carrier undertaking, but not employees of the air carrier or cooperating tourism companies […], whereby it is sufficient if the fare is also accessible only to sections of the public that are linked to individual characteristics of the customers – children, pupils, students, senior citizens […]. Corporate fares are also at least indirectly available to a segment of the public thus defined […]. According to proponents of that view, this follows in any case from the spirit and purpose of the provision […], which is apparent from the exception to the exclusion in the second sentence of Article 3(3) of Regulation (EC) No 261/2004. **[Or. 6]**

The case-law is divided and is not settled – as far as can be seen and to the extent that it has been published. According to the Amtsgericht Hamburg (Local Court, Hamburg), for example, the applicability of the regulation is not excluded in the case of reduced corporate fares (Local Court, Hamburg, order of 1 November 2019, 23a C 83/19), whereas individual sections of the Amtsgericht Köln (Local Court, Cologne, judgment of 4 November 2016, 136 C 155/15), the Amtsgericht Bremen (Local Court, Bremen, judgment of 16 January 2020, 16 C 313/19) and the Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main, judgment of 4 April 2019 – 32 C 1964/18) consider that the regulation is not applicable in the case of reduced corporate fares. The LG Frankfurt am Main (Regional Court, Frankfurt am Main) has ruled that even a discount granted to an entire professional group – journalists – cannot be regarded as being available directly or indirectly to the public (Regional Court, Frankfurt am Main, judgment of 6 June 2014 – 24 S207/134s, citation taken from *Schmid*, NJW 2015, 513, footnote 5).

b)

The present Chamber takes the view that a corporate fare of the type at issue is not to be regarded as being 'available to the public'. Contrary to the view taken in the legal literature, the Chamber is unable to see any evidence demonstrating that the

second alternative of the first sentence of Article 3(3) of Regulation (EC) No 261/2004 is supposed to apply only to trade discounts for employees of air carriers and tourism companies. It is true that the Commission's interpretative guidelines on the regulation also refer to fares offered to those in the trade. They read as follows, in relation to the first sentence of Article 3(3): '*Special fares offered by air carriers to their staff fall under this provision*'. However, it cannot be inferred from this – irrespective of the lack of binding force of those guidelines – that only such fares fall under the provision. Such an inference is already undermined by the exception to the exclusion in the second sentence of Article 3(3) of Regulation (EC) No 261/2004, pursuant to which frequent flyer programmes are excluded from the provision of the first sentence. If the first sentence were to cover only fares for air carriers' own employees or associated employees from the outset, that exception to the exclusion would be completely unnecessary, because such fares do not constitute frequent flyer programmes in any event. Therefore, if the legislature had intended for the provision to be understood in that way, it could have omitted the second sentence altogether. The Chamber takes the view that it follows from the fact that it did not do so that the first sentence does not cover only trade discounts for air carriers' own employees and those of tourism companies. Nor does the opposing view taken by some authors in the legal literature explain how such an understanding can be reconciled with the second sentence. It is stated in this regard, in just one such publication, that the second sentence has only declaratory effect, as the first sentence does not cover frequent flyer programmes in any event – it is merely a 'clarifying provision' (*Servicenorm*) of the EU legislature […] **[Or. 7]** […]. The Chamber is unable to share that view and considers that it is based on circular reasoning.

Contrariwise, however – without the Chamber having to rule on this point – it appears as though a fare does not necessarily have to be accessible to the entire public without restriction. Thus, it may also be sufficient for the purposes of the public element if a fare is accessible only to a specific segment of the public defined according to objective personal criteria, as is the case with fares for children and senior citizens (see also, for example, Local Court, Bremen, judgment of 16 January 2020, 16 C 313/19). However, the question then arises as to what kind of criteria must be used to determine the group so that a fare can be regarded as being accessible to a segment of the public within the meaning of the provision. The Chamber takes the view that such a segment of the public can be assumed only if the group is determined on the basis of objective personal characteristics inherent in the members, such as age or possibly also the status of pupil or student. In the case of a corporate fare, however, group membership is not triggered by a personal characteristic of the passenger, but by a contractual relationship between the passenger's employer and the air carrier. Accordingly, it is not sufficient for a traveller to be merely an employee of a company of a certain size in order to be eligible for the reduced fare. Rather, that company must have concluded a corresponding framework agreement beforehand. The granting of the fare is therefore attached to a criterion *inter partes* that was determined by the parties to the framework agreement (Local Court, Bremen, judgment of 16 January 2020, 16 C 313/19).

Even if it were assumed that group membership within the meaning of the first sentence of Article 3(3) of Regulation (EC) No 261/2004 can be established by virtue of the fact that a customer is an employee of a company that has concluded an agreement with the air carrier, the fare at issue would in any case lack the characteristic of being freely accessible for that 'segment of the public' – even if only indirectly. This is because even the employees of the company that concluded the framework agreement on the more favourable rate in the present case cannot freely access it. Rather, it is common ground that the fare at issue applies only to the specific purpose of business trips within the scope of the employment relationship, and not however to private trips of the employees. In any event, due to this clearly defined attachment to a specific purpose, the accessibility of the reduced fare is no longer solely dependent on personal characteristics of the passenger and there is no longer a fare accessible to the public (see also Local Court, Cologne, judgment of 4 November 2016, 136 C 155/15 […] **[Or. 8]** […]. This also constitutes a significant difference from other possible fares that apply to a segment of the public. Reduced fares for children or senior citizens, for instance, apply to such persons irrespective of the purpose of the journey. Even in the case of fares for pupils and students, it is generally not a prerequisite for access to such fares that the reason for the flight is school or studies.

4.

The Chamber takes the view that a fare of the type at issue also does not fall under the exception to the exclusion in the second sentence of Article 3(3) of Regulation (EC) No 261/2004, according to which the regulation applies, irrespective of the first sentence, to passengers having tickets issued under a frequent flyer programme or other commercial programme by an air carrier or tour operator (Regional Court, Cologne, judgment of 17 March 2020, 11 S 33/19, juris; Regional Court, Cologne, judgment of 17 November 2020, 11 S 373/19, not published).

In any event, so-called frequent flyer or mileage programmes are deemed to be covered by that provision in the case-law and legal literature, largely without contention. However, it is occasionally also assumed that corporate fares ultimately also serve the purpose of customer ['frequent flyer' in the English language version of the regulation] loyalty and commercial advertising and therefore the exception to the exclusion in the second sentence also applies to such fares […]. The Chamber takes the view, however, that the concepts of customer loyalty and commercial advertising within the meaning of the second sentence of Article 3(3) of Regulation (EC) No 261/2004 are not to be understood so broadly. This is because every reduced fare ultimately serves the purpose of customer loyalty. If, however, a mere reduction were sufficient to allow the exception to the exclusion in the second sentence, this would once again lead to the outcome already described above: not a single reduced fare granted to persons outside a company (the latter not being customers in the strict sense of the word) would ultimately fall under the second alternative of the first sentence of Article 3(3) of

Regulation (EC) No 261/2004 and the provision of the second sentence would be completely superfluous. The provision of the first sentence would then apply only to trade discounts. Had this been the intention of the legislature, however, it could have easily made express provision to that effect in the first sentence and omitted the second sentence, which would have then been unnecessary. It specifically did not do this. It also cannot be assumed that the legislature intended to prescribe, solely via the cumbersome and circuitous route of the exception to the exclusion in the second sentence, that only fares offered to those in the trade are excluded from the applicability of the regulation. For the above reasons, the Chamber proceeds on the assumption that the second sentence does not cover corporate fares, but applies only to passengers travelling with tickets issued to them as awards under frequent flyer programmes or **[Or. 9]** commercial programmes, in particular mileage programmes (see also Local Court, Cologne, judgment of 4 November 2016, 136 C 155/15).

[…]

[closing formalities, signatures]