Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 23 September 2021 [1]

**Case C-263/20**

**Airhelp Limited**
**v**
**Laudamotion GmbH**

(Request for a preliminary ruling from the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria))

(Reference for a preliminary ruling – Air transport – Regulation (EC) No 261/2004 – Common rules on compensation and assistance to passengers in the event of cancellation or long delay of flights – Flight booked through an electronic platform – Flight departure time brought forward – Receipt of notification of the flight being brought forward sent to an electronic address – Scope of the obligation on the operating air carrier to provide information – Directive 2000/31/EC – Information society services – Article 11 – Placing of order – Presumption of receipt)

## I. Introduction

1. This request for a preliminary ruling made by the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria) concerns the interpretation of Article 5(1)(c) and Article 7 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, [2] and of Article 11 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). [3]

2. The request has been made in proceedings between Airhelp Limited and Laudamotion GmbH in the context of Laudamotion's refusal to compensate air passengers, the legal predecessors of Airhelp, as a result of their flight being brought forward. The legal question as to whether bringing forward a flight departure time may give rise to a right to compensation under Article 5(1)(c) and Article 7 of Regulation No 261/2004 was considered in depth in my Opinion in Joined Cases C-188/20, *Azurair*, C-196/20, *Eurowings*, and in Cases C-146/20, *Corendon Airlines* and C-270/20, *Austrian Airlines* (not yet published).

[1] Original language: French.
[2] OJ 2004 L 46, p. 1.
[3] OJ 2000 L 178, p. 1.

3. As requested by the Court, I will restrict this Opinion to an analysis of the second question referred for a preliminary ruling, by which the referring court asks, in essence, whether compliance with the requirement to inform the passenger of the cancellation in good time must be assessed solely in accordance with Article 5(1)(c)(i) to (iii) of Regulation No 261/2004, thus precluding the application of the national law on the receipt of electronic declarations, which was enacted in transposition of Directive 2000/31.

## II. Legal context

### *A. Regulation No 261/2004*

4. Article 2 of Regulation No 261/2004 provides:

'For the purposes of this Regulation:

…

(l) "cancellation" means the non-operation of a flight which was previously planned and on which at least one place was reserved.'

5. Article 5 of that regulation provides, in paragraphs 1 and 4:

'1. In case of cancellation of a flight, the passengers concerned shall:

(a) be offered assistance by the operating air carrier in accordance with Article 8; and

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

…

4. The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier.'

6. Article 7 of that regulation is worded as follows:

'1. Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1500 kilometres or less;

…'

7. Article 13 of the same regulation provides:

'In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.'

### *B. Directive 2000/31*

8. Article 11(1) of Directive 2000/31 is worded as follows:

'Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

– the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,

– the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.'

## III. The facts giving rise to the dispute, the procedure in the main proceedings and the questions referred

9. Two air passengers reserved a flight from Palma de Mallorca (Spain) to Vienna (Austria), operated by the air carrier Laudamotion, by means of an online booking platform. When making the reservation on that booking platform, the passengers entered their private email addresses and telephone numbers. That platform then reserved the flight with Laudamotion in the names of those passengers, generating in the booking process an email address specific to that reservation. That address was the only address known to the air carrier as a means of contacting the passengers.

10. The flight, which was initially scheduled to depart on 14 June 2018 at 14.40 and to arrive at 17.05 on the same day, was brought forward by the air carrier by more than six hours, therefore departing at 8.25.

11. Airhelp, to which the two passengers had assigned any rights they might have to compensation under Regulation No 261/2004, brought an action before the Bezirksgericht Schwechat (District Court, Schwechat, Austria). It claimed that the air carrier Laudamotion was liable to pay a total sum of EUR 500 for the two passengers under Article 7(1)(a) of that regulation since the flight had been brought forward by more than six hours and the passengers had not been notified of that until 10 June 2018, by means of the private email address they had provided.

12. Laudamotion disputed the substance of Airhelp's claim on the basis that notification of the flight time being brought forward had been sent, in good time, on 23 and 29 May 2018, to the email address provided by the booking platform.

13. The Bezirksgericht Schwechat (District Court, Schwechat) dismissed the action brought by Airhelp, which then lodged an appeal with the Landesgericht Korneuburg (Regional Court, Korneuburg), the referring court. That court wonders, in particular, whether bringing forward a flight constitutes a cancellation for the purposes of Regulation No 261/2004 and also queries the extent of the obligation on the operating air carrier to provide information.

14. In that regard, the referring court states that it shares the view of the Bundesgerichtshof (Federal Court of Justice, Germany),[4] that, where a scheduled flight is brought forward by more than a negligible amount of time, that may substantiate a right to compensation under Article 7(1) of the regulation, as the original flight plan is abandoned where a flight is brought forward by several hours.

15. As to the question of whether the passengers in the main proceedings received due notification of their flight being brought forward, the referring court states that, under the Austrian law transposing Directive 2000/31, a declaration is deemed to be received not only in the situations referred to in Article 11(1) of that directive, but also where there is a simple exchange of electronic mail. That means, in the present case, that a passenger is regarded as having been notified of his or her flight being brought forward when he or she is able to retrieve the declaration made by the operating air carrier. The referring court therefore wonders whether the national law, Directive 2000/31 or Regulation No 261/2004 should be applied when considering whether the passengers received due notification of their flight being brought forward.

16. In those circumstances, the Landesgericht Korneuburg (Regional Court, Korneuburg) decided to stay the proceedings and to submit the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Article 5(1)(c) and Article 7 of [Regulation No 261/2004] to be interpreted as meaning that the passenger has a right to compensation where the original time of departure of 14.40 is brought forward to 8.25 on the same day?

[4] According to the information contained in the request for a preliminary ruling, that view was expressed in a press release of the Bundesgerichtshof (Federal Court of Justice), reference No 89/2015, X ZR 59/14, issued following a decision in which the claim was found to be admitted.

(2) Is Article 5(1)(c)(i) to (iii) of Regulation No 261/2004 to be interpreted as meaning that examination as to whether the passenger is informed of the cancellation is to be conducted solely in accordance with that provision and precludes the application of national law on the receipt of declarations which was enacted in transposition of [Directive 2000/31] and includes a provision whereby declarations are deemed to be received?

(3) Are Article 5(1)(c)(i) to (iii) of Regulation No 261/2004 and Article 11 of [Directive 2000/31] to be interpreted as meaning that, where a passenger reserved a flight via a booking platform and provided his or her telephone number and email address, but the booking platform forwarded to the air carrier the telephone number and an email address that was generated automatically by the booking platform, delivery to the automatically generated email address of the notification that the flight has been brought forward is to be regarded as information or delivery of notification that the flight has been brought forward, even where the booking platform does not forward, or delays forwarding, the air carrier's notification to the passenger?'

## IV. Proceedings before the Court

17. The order for reference, dated 26 May 2020, was received at the Court Registry on 15 June 2020.

18. The parties to the main proceedings and the European Commission submitted written observations within the period prescribed by Article 23 of the Statute of the Court of Justice of the European Union.

19. At the general meeting of 27 April 2021, the Court decided to proceed without a hearing.

## V. Legal analysis

### *A. The second question referred*

20. By its second question, the referring court asks, in essence, whether the requirement to inform the passenger of the cancellation in time must be assessed solely in accordance with Article 5(1)(c)(i) to (iii) of Regulation No 261/2004. If so, that regulation effectively precludes the application of national law on the receipt of declarations which was enacted in transposition of Directive 2000/31.

21. As I shall explain in detail below, I take the view that the requirement to inform the passenger of the cancellation in time must be assessed *solely* in accordance with Article 5(1)(c)(i) to (iii) of Regulation No 261/2004. That interpretation stems from both the wording and the objective of the relevant provisions.

22. First, Section 3 of Chapter II of that directive contains provisions relating to contracts concluded by electronic means. Article 11(1) of that directive, entitled 'Placing of the order', provides that Member States are to ensure that, in cases where the recipient of the service places his or her order through electronic means, the service provider must 'acknowledge the receipt of

the recipient's order without undue delay and by electronic means' (first indent) and that 'the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them' (second indent).

23. Although notification of a cancellation constitutes neither an 'order' nor an 'acknowledgement of receipt' for the purposes of Article 11 of Directive 2000/31, it is apparent from the order for reference that the national law at issue in the main proceedings goes beyond that directive in providing that the rule on receipt is to apply not only to 'orders' and 'acknowledgements of receipt' but to all other legally significant electronic declarations, including documents relating to flight reservations. According to the information supplied by the referring court, both the second indent of Article 11(1) of Directive 2000/31 and the national provisions transposing that provision provide for declarations to be deemed to be received, essentially from the time at which the declaration can be retrieved.[5]

24. Secondly, it must be noted that the information referred to in Article 5(1)(c) of Regulation No 261/2004 is the information to be provided 'in case of cancellation of a flight', through which the passengers concerned are 'informed of the cancellation'. It is clear that the information relating to a cancellation constitutes neither an 'order' nor an 'acknowledgement of receipt' for the purposes of Article 11 of Directive 2000/31. Therefore, for the purposes of analysis, the legal acts in question must be regarded, in principle, as communications with a different purpose.

25. I would add that it cannot be inferred from the wording of Article 5(1)(c) of Regulation No 261/2004 that the method by which that information must reach the passenger is limited to electronic means. On the contrary, the sole requirement is for 'the passengers concerned … [to be] informed of the cancellation', which, in principle, allows for other means of communication. Of course, given that this type of information carries particular significance for the effective exercise of the rights conferred by Regulation No 261/2004, the means of communication chosen must be adequate and suitable for the needs of passenger air transport.[6]

26. More fundamentally, I would point out that, under Article 5(4) of Regulation No 261/2004, the burden of proof concerning whether and when the passenger has been informed of the cancellation of the flight rests with the operating air carrier. Placing the burden of proof on the operating air carrier[7] helps to ensure the high level of protection for passengers referred to in recital 1 of Regulation No 261/2004.

27. The importance of that legislative objective must be borne in mind in the present context since, according to settled case-law, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.[8] In *Krijgsman*, the Court underlined the

5 See p. 10 of the order for reference.

6 Steinrötter, B., *Beck'scher Online-Großkommentar (Gsell/Krüger/Lorenz/Mayer)*, Art. 1-19 VO (EG) Nr. 261/2004, Article 5, paragraphs 23 and 25, mentions that there are no formal requirements as to the method by which notification of a cancellation must reach the passenger. Nonetheless, the author recommends that a means of communication is chosen which ensures that the passenger has been effectively informed of the flight cancellation. If the passenger claims he or she has not received the message, it will be for the air carrier to prove that he or she was notified of the cancellation, and when.

7 See Commission Notice on Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council (OJ 2016 C 214, p. 5), paragraph 3.2.5., entitled 'Burden of proof in the event of cancellation'.

8 See judgments of 16 November 2016, *Hemming and Others* (C-316/15, EU:C:2016:879, paragraph 27), and of 11 May 2017, *Krijgsman* (C-302/16, EU:C:2017:359, paragraph 24).

importance of the obligation, under Article 5(4) of Regulation No 261/2004, to prove that the passenger was notified of information in guaranteeing the passenger's rights.[9] Receipt of the information must allow the passenger sufficient time to react to the cancellation of his or her flight, with the minimum of inconvenience, and to assert his or her rights against the air carrier.

28. In that regard, it must be pointed out that the effect of the second indent of Article 11(1) of Directive 2000/31 is to reverse the burden of proof in that the order and the acknowledgement of receipt are 'deemed to be received' when the parties to whom they are addressed are able to access them. Such a presumption that the required information has been 'duly received' by the passenger appears to me to be incompatible with the burden of proof imposed on air carriers under Regulation No 261/2004, since, in the absence of any other proviso, it puts the onus on the passenger to prove that he or she did not receive the information in good time.

29. It seems to me that, in practice, that would be extremely difficult to prove and that the aforementioned objective, referred to in point 28 above, of protecting air passengers would thus be undermined. In the event of communication problems caused by human error or technical failure, an obligation on the passenger to show that he or she did not receive any communication containing the information set out in Article 5(1)(c) of Regulation No 261/2004 would amount to a requirement on him or her to prove the unprovable or, to put it another way, to do the impossible. Clearly, the principle that no one can be obliged to do the impossible (*impossibilium nulla obligatio est*), recognised by the EU legal order,[10] would preclude such an approach.

30. Article 5(4) of Regulation No 261/2004 constitutes a *lex specialis* in relation to the provisions of Directive 2000/31 in so far as it imposes particular requirements as to the manner in which the information has to be communicated to the passengers. Bearing in mind the interest that passengers have in being kept abreast of any unexpected changes significantly affecting their flight times and given the inconvenience that generally results from the cancellation of a flight, it seems to me that a simple presumption of 'due receipt' does not satisfy the enhanced requirements in the field of passenger air transport.

31. In the light of the foregoing considerations, I regard the information requirement in Article 5(1)(c)(i) to (iii) of Regulation No 261/2004, read in the light of Article 5(4) of that regulation, as precluding the application of the provisions of the national law transposing Directive 2000/31, under which electronic messages are deemed to be received, meaning that, in order to ensure a high standard of protection for passengers, it is solely in the light of that regulation that compliance with the requirement to inform the passenger of the cancellation should be assessed.

32. The conclusion that the standard of consumer protection laid down in Regulation No 261/2004 has not been met must also be drawn in relation to the non-harmonised provisions of the national law, referred to in the order for reference, which, in transposing Article 11 of Directive 2000/31, extended the substantive scope from orders and acknowledgements of receipt to other electronic declarations, including electronic declarations relating to the cancellation of a flight.

9 Judgment of 11 May 2017, *Krijgsman* (C-302/16, EU:C:2017:359, paragraphs 23 to 28).

10 See judgments of 3 March 2016, *Daimler* (C-179/15, EU:C:2016:134, paragraph 42); of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, EU:C:2017:987, paragraph 96); and of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 79).

33. In that regard, it must be recalled that, as the Court has noted in its case-law, for the majority of the aspects of electronic commerce, Directive 2000/31 is 'not intended to achieve harmonisation of substantive rules, but defines a "coordinated field" in the context of which the mechanism in Article 3 must allow, according to [recital 22] in the preamble to the Directive, information society services to be, in principle, subject to the law of the Member State in which the service provider is established'.[11] That interpretation is confirmed by recitals 6, 7, 10 and 22 of that directive.

34. Given that the national legislature has chosen – voluntarily and without any express requirement under EU law – to extend the scope of the harmonised rules on electronic commerce to other aspects not provided for by Directive 2000/31, those provisions cannot be considered as forming part of the harmonised legislation on electronic commerce. In that situation, the question that arises is in fact the compatibility of the provisions of national law with those of Regulation No 261/2004.

35. Regardless of whether the national provisions at issue were, rightly or wrongly, adopted in the transposition of Directive 2000/31, it may legitimately be concluded that they hamper the objective pursued by Regulation No 261/2004. Accordingly, Article 5(1)(c)(i) to (iii) of Regulation No 261/2004, read in the light of Article 5(4) of that regulation, must be interpreted as precluding the provisions of national law that are based on Article 11 of Directive 2000/31.

### *B. Answer to the second question referred*

36. For the reasons set out above, I propose that the answer to the second question referred should be that Article 5(1)(c)(i) to (iii) of Regulation No 261/2004 is to be interpreted as meaning that the requirement to inform the passenger of the cancellation must be satisfied solely in accordance with that regulation, which precludes the application of national provisions creating a presumption of access to electronic declarations.

## VI. Conclusion

37. In the light of the foregoing considerations, I propose that the Court should answer the second question referred for a preliminary ruling by the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria) as follows:

Article 5(1)(c)(i) to (iii) 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 is to be interpreted as meaning that the requirement to inform the passenger of the cancellation must be satisfied solely in accordance with that regulation, which precludes the application of national provisions creating a presumption of access to electronic declarations.

[11] See judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraph 57).