



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

25 January 2024*

(Reference for a preliminary ruling – Air transport – Regulation (EC) No 261/2004 – Article 3(2)(a) – Article 5(1) – Article 7(1) – Compensation for air passengers in the event of long delay of flights – Requirement to present oneself for check-in in good time)

In Case C-474/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 3 May 2022, received at the Court on 15 July 2022, in the proceedings

Laudamotion GmbH

v

flightright GmbH,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Third Chamber, N. Piçarra, N. Jääskinen and M. Gavalec (Rapporteur), Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- flightright GmbH, by M. Michel and R. Weist, Rechtsanwälte,
- the German Government, by J. Möller, P. Busche, J. Heitz and M. Hellmann, acting as Agents,
- the European Commission, by G. Braun, K. Simonsson, G. Wilms and N. Yerrell, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: German.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 3(2)(a) and Articles 5 to 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 (OJ 2004 L 46, p. 1).
- 2 The request has been made in proceedings between Laudamotion GmbH, an air carrier, and flightright GmbH, a legal assistance company to which an air passenger has assigned his rights against Laudamotion, concerning compensation claimed as a result of the long delay of a flight on which that passenger had a confirmed reservation.

Legal context

- 3 According to recital 2 of Regulation No 261/2004:

‘Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.’
- 4 Article 2(l) of that regulation defines ‘cancellation’ as ‘the non-operation of a flight which was previously planned and on which at least one place was reserved’.
- 5 Article 3 of Regulation No 261/2004, entitled ‘Scope’, provides, in paragraphs 1 and 2 thereof:

‘1. This Regulation shall apply:

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

...

2. Paragraph 1 shall apply on the condition that passengers:

(a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in,

– as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,

or, if no time is indicated,

– not later than 45 minutes before the published departure time; ...

...’

6 Article 5 of Regulation No 261/2004, entitled ‘Cancellation’, provides, in paragraph 1 thereof:

‘In case of cancellation of a flight, the passengers concerned shall:

...

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

...

(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.’

7 Article 6(1) of that regulation, entitled ‘Delay’, is worded as follows:

‘When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:

(a) for two hours or more in the case of flights of 1 500 kilometres or less; or

(b) for three hours or more in the case of all intra-Community flights of more than 1 500 kilometres and of all other flights between 1 500 and 3 500 kilometres; or

(c) for four hours or more in the case of all flights not falling under (a) or (b),

passengers shall be offered by the operating air carrier:

(i) the assistance specified in Article 9(1)(a) and 9(2); and

(ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).’

8 Article 7 of Regulation No 261/2004, entitled ‘Right to compensation’, provides, in paragraph 1 thereof:

‘Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1 500 kilometres or less;

...’

9 Article 12 of that regulation, entitled ‘Further compensation’, provides, in paragraph 1 thereof:

‘This Regulation shall apply without prejudice to a passenger’s rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 10 An air passenger had a confirmed reservation with Laudamotion for a flight from Düsseldorf (Germany) to Palma de Mallorca (Spain), scheduled for 26 June 2018. Since he believed that the announced delay of that flight would cause him to miss a business appointment, that passenger decided not to board that flight, which arrived at the destination with a delay of 3 hours and 32 minutes.
- 11 That passenger assigned his rights to flightright, which brought proceedings before the German court having jurisdiction, seeking to obtain compensation in the amount of EUR 250 on the basis of Article 7(1)(a) of Regulation No 261/2004. Following dismissal at first instance, flightright was successful on appeal.
- 12 In the light of the case-law of the Court of Justice, which treats the situation of passengers whose flights are the subject of long delays – that is to say, a delay of three hours or more in arrival at their final destination – as being equivalent to that of passengers whose flights are cancelled, the appeal court interpreted Article 3(2)(a) of that regulation as meaning that a passenger who was informed, prior to his or her departure, of a delay of three hours or more may obtain the compensation provided for in Articles 5 and 7 of that regulation, even if that passenger did not present himself or herself at the airport.
- 13 Laudamotion brought an appeal on a point of law (*Revision*) against the decision of the appeal court before the referring court, the Bundesgerichtshof (Federal Court of Justice, Germany).
- 14 The referring court notes that the passenger concerned did not present himself for check-in no later than 45 minutes before the published departure time, in breach of Article 3(2)(a) of Regulation No 261/2004, whereas, pursuant to Article 2(l) and Article 5 of that regulation, that formality is excluded only in the event of cancellation of a flight. Nevertheless, the referring court considers that, since the Court of Justice treated a long delay in arrival of a flight as being equivalent to the cancellation of a flight in the judgment of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716), that passenger could be exempted from such a formality.
- 15 The referring court observes, however, that there are considerable differences between the cancellation of a flight and a long delay of a flight. It takes the view that, in the event of cancellation, the non-operation of the planned flight is certain, and that it is therefore logical not to require passengers to present themselves for check-in in order to assert their right to compensation provided for in Articles 5 and 7 of Regulation No 261/2004. By contrast, it considers that, even if a delay of a flight appears likely before the flight is performed, it may be that, not later than 45 minutes before the departure time, there is not yet sufficient information to conclude that the flight will be operated with a delay of three hours or more.
- 16 In its view, the order of 24 October 2019, *easyJet Airline* (C-756/18, EU:C:2019:902), also suggests that, in order to be entitled to compensation for the long delay of a flight, a passenger who was not transported on the delayed flight must, in any event, have presented himself or herself for check-in, a fact which he or she can prove by means of a boarding card or other proof.
- 17 The referring court takes the view that, for the purposes of the application of Article 3(2)(a) of Regulation No 261/2004, a long delay of a flight in arrival cannot, in principle, be treated as equivalent to the cancellation of a flight. It considers that, accordingly, a passenger is exempt

from the requirement to present himself or herself for check-in only if, first, the flight has been delayed by three hours or more in arrival and, second, there is a situation comparable to a cancellation. In its view, that could be the case where passengers have sufficient indications, no later than 45 minutes before the published departure time, that the flight can be operated only with a delay of three hours or more in arrival at the destination.

- 18 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Does the right to compensation for a delay in a flight of more than three hours after the scheduled time of arrival under Articles 5, 6 and 7 of [Regulation No 261/2004] require that, in accordance with Article 3(2)(a) thereof, the passenger must present himself or herself for check-in at the time indicated by the air carrier, the tour operator or an authorised travel agent, but not later than 45 minutes before the published departure time, or is the case of a long delay in the above sense exempt from that requirement – as in the case where a flight is cancelled?
- (2) In the event that the right to compensation is not exempt, on the sole basis of the occurrence of a long delay in the above sense, from the requirement for passengers to present themselves for check-in, does such an exemption apply where the passenger had sufficiently reliable information indicating that the flight would arrive only with a long delay in the above sense?’

Consideration of the questions referred

The first question

- 19 As a preliminary point, it should be noted that the origin of the dispute in the main proceedings is the delayed departure of an aircraft. Nevertheless, the crux of that dispute lies in the repercussions of that delay. The applicant in the main proceedings claims compensation owing to the likely delay of the relevant flight in arrival at the final destination, which, he argues, would have prevented him from arriving on time for a business appointment, which was to take place in Palma de Mallorca. Since Article 6 of Regulation No 261/2004 is concerned solely with the delay of a flight beyond its originally scheduled time of departure and the fixed compensation to which a passenger is entitled, under Article 7 of Regulation No 261/2004, when his or her flight reaches the final destination three hours or more after the scheduled arrival time is therefore not dependent on the conditions laid down in Article 6 of that regulation being met (judgment of 26 February 2013, *Folkerts*, C-11/11, EU:C:2013:106, paragraphs 36 and 37), the dispute in the main proceedings must be examined solely in the light of Articles 3, 5 and 7 of Regulation No 261/2004.
- 20 Accordingly, it must be held that, by its first question, the referring court asks, in essence, whether Article 3(2)(a) of Regulation No 261/2004 is to be interpreted as meaning that, in order to be entitled to the compensation provided for in Article 5(1) and Article 7(1) of that regulation in the event of a flight delay of three hours or more after the arrival time originally scheduled by the air carrier, an air passenger must have presented himself or herself for check-in in good time.
- 21 It follows from Article 3(1)(a) and (2)(a) of Regulation No 261/2004 that that regulation is to apply to passengers departing from an airport located in the territory of a Member State to which the Treaty applies on the condition, first, that those passengers have a confirmed reservation on the flight concerned and, second, that they present themselves for check-in in good time, except in

the case of cancellation of the flight as referred to in Article 5 of that regulation. Since those two conditions are cumulative, a passenger's presence for check-in cannot be presumed by virtue of the fact that that passenger has a confirmed reservation on the flight concerned (order of 24 October 2019, *easyJet Airline*, C-756/18, EU:C:2019:902, paragraph 25). It must be stated that the effectiveness of Article 3(2)(a) of Regulation No 261/2004 requires passengers to present themselves at the airport in good time, more specifically to a representative of the operating air carrier, in order to be transported to the intended destination, even if they have already checked in online before going to the airport.

- 22 In the present case, the questions submitted by the referring court are based on the premiss that the passenger concerned did not present himself for check-in in good time. In those circumstances, the question whether Regulation No 261/2004 is applicable depends on whether, in the context of Article 3(2)(a) of that regulation, a long delay of a flight in arrival at the final destination, that is to say, a delay of three hours or more, can be treated as being equivalent to a cancellation of a flight, within the meaning of Article 5 of Regulation No 261/2004.
- 23 In that respect, it should be noted, in the first place, that the Court has already ruled that Articles 5 and 7 of Regulation No 261/2004, read in the light of the principle of equal treatment, must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation laid down in Article 7(1) of that regulation, as passengers whose flights are cancelled and, moreover, may rely on that right to compensation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier (see, to that effect, judgments of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraphs 60, 61 and 69, and of 7 July 2022, *SATA International – Azores Airlines (Failure of the refuelling system)*, C-308/21, EU:C:2022:533, paragraph 19 and the case-law cited).
- 24 In the judgment of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716, paragraphs 49, 52 and 60), the Court compared the type and extent of the inconvenience and damage suffered by a passenger whose flight was cancelled and who had to wait for a re-routing flight to be offered to him or her, with the inconvenience and damage suffered by a passenger whose flight was delayed. The latter therefore had to wait for the aircraft to be ready for take-off and had necessarily presented himself or herself for check-in since he or she boarded the aircraft. Both types of passenger thus had to wait longer in order to reach their final destination and therefore undeniably suffered damage consisting in a loss of time which, given that it is irreversible, can be redressed only by compensation. Given that they suffered similar damage, those passengers could not, in accordance with the principle of equal treatment, be treated differently.
- 25 The crucial factor which has led the Court to treat a long delay of a flight in arrival as being equivalent to the cancellation of a flight is that passengers whose flight is affected by a long delay, like passengers whose flight is cancelled, suffer damage which occurs in the form of an irreversible loss of time equal to or in excess of three hours, which can be redressed only by compensation (see, to that effect, judgments of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraphs 52, 53 and 61; of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraph 54; and of 12 March 2020, *Finnair*, C-832/18, EU:C:2020:204, paragraph 23). Accordingly, in the event of cancellation of a flight or long delay of

a flight in arrival at its final destination, the right to compensation provided for in Article 7(1) of Regulation No 261/2004 is intrinsically linked to the occurrence of that loss of time equal to or in excess of three hours.

- 26 However, a passenger who did not go to the airport, as appears to be the case with respect to the applicant in the main proceedings, on the ground that he or she had sufficient information to conclude that the flight would arrive at its final destination only after a long delay, has not, in all likelihood, suffered such a loss of time.
- 27 It should be borne in mind that a loss of time is not damage arising as a result of a delay, but is an inconvenience, like other inconveniences inherent in cases of denied boarding, flight cancellation and long delay and encountered in them, such as lack of comfort, the fact of being temporarily denied means of communication normally available (judgment of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraph 51) or the fact of being unable to carry on, without interruption, one's personal, domestic, social or business activities (see, to that effect, judgment of 4 September 2014, *Germanwings*, C-452/13, EU:C:2014:2141, paragraphs 20 and 21).
- 28 In that regard, since the loss of time giving rise to compensation under Article 7(1) of Regulation No 261/2004 is suffered identically by all passengers whose flights are delayed, it is possible to redress that loss by means of a standardised measure, without having to carry out any assessment of the individual situation of each passenger concerned. Consequently, such a measure may be applied immediately (judgment of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraph 52).
- 29 In the second place, it should be noted that, in paragraphs 33 to 36 and 39 of the judgment of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716), confirmed by, inter alia, the judgment of 21 December 2021, *Corendon Airlines* (C-395/20, EU:C:2021:1041, paragraph 18), the Court held that cancelled flights and delayed flights are two quite distinct categories of flights, since, in accordance with Article 2(l) of Regulation No 261/2004, flight cancellation, unlike delay, is the result of non-operation of a flight which was previously planned.
- 30 However, where a flight is affected by a long delay, the intention is that it will be performed and, accordingly, check-in must be carried out. It follows that passengers whose flight is delayed cannot be exempted from the obligation to present themselves for check-in, which is expressly laid down in Article 3(2)(a) of Regulation No 261/2004.
- 31 It thus follows from the foregoing considerations that, in the context of Article 3(2)(a) of that regulation, the long delay of a flight in arrival at the final destination should not be treated as being equivalent to the cancellation of a flight.
- 32 In the last place, it must be stated that damage caused by the fact of having missed a business appointment must be regarded as individual damage, inherent in the specific situation of the passenger concerned, and therefore cannot be compensated by the award of the compensation provided for in Article 7(1) of that regulation, which is intended to provide compensation, in a standardised and immediate manner, only for damage that is almost identical for every passenger concerned (see, to that effect, judgment of 29 July 2019, *Rusu*, C-354/18, EU:C:2019:637, paragraphs 28, 30, 31 and 33).

- 33 However, such individual damage may be the subject of ‘further compensation’, within the meaning of Article 12 of Regulation No 261/2004, which presupposes that the claim is based on national or international law (see, to that effect, judgments of 29 July 2019, *Rusu*, C-354/18, EU:C:2019:637, paragraphs 35 and 36, and of 8 June 2023, *Austrian Airlines (Repatriation flight)*, C-49/22, EU:C:2023:454, paragraph 36).
- 34 In the light of the foregoing, the answer to the first question is that Article 3(2)(a) of Regulation No 261/2004 must be interpreted as meaning that, in order to be entitled to the compensation provided for in Article 5(1) and Article 7(1) of that regulation in the event of a long delay of a flight, namely a delay of three hours or more after the arrival time originally scheduled by the air carrier, an air passenger must have presented himself or herself for check-in in good time or, if he or she has already checked in online, must have presented himself or herself at the airport in good time to a representative of the operating air carrier.

The second question

- 35 In view of the answer given to the first question, there is no need to answer the second question, since it is irrelevant whether the passenger had sufficiently reliable information indicating that the flight would arrive at its final destination only after a long delay.

Costs

- 36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 3(2)(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

must be interpreted as meaning that, in order to be entitled to the compensation provided for in Article 5(1) and Article 7(1) of that regulation in the event of a long delay of a flight, namely a delay of three hours or more after the arrival time originally scheduled by the air carrier, an air passenger must have presented himself or herself for check-in in good time or, if he or she has already checked in online, must have presented himself or herself at the airport in good time to a representative of the operating air carrier.

[Signatures]