Reports of Cases

ORDER OF THE COURT (Eighth Chamber)

5 October 2016*

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court — Absence of reasonable doubt — Air transport — Regulation (EC) No 261/2004 — Article 2(l) — Definition of 'cancellation' — Flight making an unscheduled stopover)

In Case C-32/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Dresden (Dresden District Court, Germany), made by decision of 10 December 2015, received at the Court on 19 January 2016, in the proceedings

**Ute Wunderlich**

v

**Bulgarian Air Charter Limited**

THE COURT (Eighth Chamber),

composed of D. Šváby (Rapporteur), President of the Chamber, M. Safjan and M. Vilaras, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure

after considering the observations submitted on behalf of:

— Bulgarian Air Charter Limited, by P. Kauffmann, Rechtsanwalt,

— the French Government, by D. Colas and M.-L. Kitamura, acting as Agents,

— the European Commission, by W. Mölls and K. Simonsson, acting as Agents,

having regard to the decision taken, after hearing the Advocate General, to give a decision on the action by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

* Language of the case: German.

## Order

1 This request for a preliminary ruling concerns the interpretation of Article 2(1) 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 Ms Ute Wunderlich and Bulgarian Air Charter Limited, an air carrier, concerning the refusal by that carrier to compensate her when her flight had been subject to an unscheduled stopover before reaching her final destination.

### Legal context

3 Recitals 1, 2 and 4 of Regulation No 261/2004 state:

‘(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

…

(4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.’

4 Article 2(l) of Regulation No 261/2004 defines ‘cancellation’ as ‘the non-operation of a flight which was previously planned and on which at least one place was reserved’.

5 Article 5(1) of the regulation provides:

‘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:
   (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.’

6 Article 7(1) of the regulation provides, in particular, that in the case of the cancellation of a flight, passengers receive compensation in the fixed sum of EUR 250 for all flights of 1500 kilometres or less.

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

7 Ms Wunderlich made a reservation with Bulgarian Air Charter for a flight departing from Burgas (Bulgaria) and arriving in Dresden (Germany), which was scheduled to take off on 13 September 2014 at 11.40 and scheduled to land on the same day at 13.00.

8 The aircraft making the flight at issue took off on the day and at the time scheduled. However, it made an unscheduled stopover in Prague (Czech Republic) before finally landing in Dresden at 15.20, that is to say with an arrival time that was late by 2 hours and 20 minutes.

9 Ms Wunderlich brought a claim before the Amtsgericht Dresden (Dresden District Court, Germany) seeking the payment of EUR 250 compensation pursuant to Articles 5 and 7 of Regulation No 261/2004, in the case of the cancellation of a flight.

10 In that context, the referring court considers that, in order to interpret the concept of 'cancellation' within the meaning of Article 2(1) of Regulation No 261/2004, it is necessary, in accordance with the judgment of 13 October 2011, *Sousa Rodríguez and Others* (C-83/10, EU:C:2011:652), to have recourse to the term 'itinerary', which is defined by the Court as the journey to be made by the aircraft from the airport of departure to the airport of arrival according to a fixed schedule, that is to say, the aircraft must depart in accordance with the scheduled itinerary and must also reach its intended destination as it appears in that itinerary. In that regard, it considers that it is clear from the judgment of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716), that the itinerary is an essential element of the flight, as the flight must be operated in accordance with the carrier's pre-arranged planning. That court also observes that, having regard to the distinction that must be made between delay and cancellation, a flight may be regarded as cancelled only if the carrier transported the passengers on another flight, the original planning of which differs from that of the flight initially scheduled. On that basis, the referring court concluded that the itinerary is an essential element of the flight.

11 Moreover, it found, based on the judgment of 13 October 2011, *Sousa Rodríguez and Others* (C-83/10, EU:C:2011:652), that several German courts have held that the deviation by the aircraft from the original itinerary and the inclusion of an unscheduled stopover represent such a significant modification to the original itinerary that the scheduled flight must be regarded as not having been operated.

12 In those circumstances, the Amtsgericht Dresden (Dresden District Court) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'Is there a flight cancellation within the meaning of Article 2(l) of Regulation No 261/2004 in the case where a scheduled flight departed on time and arrived at its scheduled destination with a delay of not more 3 hours but with an unscheduled stopover?'

## The question referred for a preliminary ruling

13 Under Article 99 of the Rules of Procedure of the Court, where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

14 That provision should be applied in the present case.

15 By its question, the referring court asks, in essence, whether Article 2(1) of Regulation No 261/2004 must be interpreted as meaning that a flight in respect of which the places of departure and arrival accorded with the planned schedule but during which there was an unscheduled stopover must be regarded as cancelled.

16 At the outset, it must be noted that Article 2(1) of Regulation No 261/2004 defines 'cancellation' as 'the non-operation of a flight which was previously planned and on which at least one place was reserved'.

17 In that regard, the Court has stated that it was possible, as a rule, to conclude that there is a cancellation where the planning for the original flight is abandoned and the passengers from that flight join passengers on a flight which was also planned, but independently of the flight for which the passengers so transferred had made their bookings (see the judgment of 13 October 2011, *Sousa Rodríguez and Others*, C-83/10, EU:C:2011:652, paragraph 30 and the case-law cited).

18 However, a flight, such as that at issue in the main proceedings, in which the places of departure and arrival accorded with the planned schedule and which did not give rise to the transfer of passengers onto another flight due to the flight on which they had booked being removed from the schedule, may not be regarded as non-operation within the meaning of Article 2(1) of Regulation No 261/2004 (see, to that effect, the judgment of 13 October 2011, *Sousa Rodríguez and Others*, C-83/10, EU:C:2011:652, paragraph 28 and the case-law cited).

19 The fact that that flight gave rise to an unscheduled stopover cannot call that finding into question and, thus, allow that flight to be regarded as having been cancelled.

20 In that regard, it is true that it follows from the Court's case-law that the flight's itinerary is an essential element thereof, as the flight is operated in accordance with the carrier's pre-arranged planning (judgment of 13 October 2011, *Sousa Rodríguez and Others*, C-83/10, EU:C:2011:652, paragraph 27).

21 However, if a flight that reached its final destination after an unscheduled stopover were equated to a cancelled flight and, hence, the air carrier was required to pay to the passengers of that flight compensation pursuant to Article 5(1)(c) and Article 7 of Regulation No 261/2004, that would not be consistent with the purpose of that regulation or the principle of equal treatment.

22 First, it is common ground that the objective of Regulation No 261/2004, as is clear from recitals 1, 2 and 4 thereof, is to ensure a high level of protection for passengers and consumers, by strengthening their rights in a number of situations involving serious trouble and inconvenience, and also redressing those situations in a standardised and immediate manner (judgment of 22 June 2016, *Mennens*, C-255/15, EU:C:2016:472, paragraph 26 and the case-law cited).

23 The fact that a flight gave rise to an unscheduled stopover is not at all a situation involving in itself, for the passengers, serious trouble or inconvenience such as that arising from a denied boarding, a cancellation or a lengthy delay, compensation for which is provided for by Regulation No 261/2004, as interpreted by the Court.

24 Such serious trouble and inconvenience would only arise if the stopover means that the aircraft making the flight at issue reaches its final destination with a delay equal to or in excess of three hours compared with the scheduled time of arrival, a situation which, in principle, gives rise to the passenger's right to compensation laid down in Article 5(1)(c) and Article 7 of Regulation No 261/2004, as interpreted by the Court (see, to that effect, the judgment of 26 February 2013, *Folkerts*, C-11/11, EU:C:2013:106, paragraph 32 and the case-law cited).

25 Second, if a flight that arrives at its planned final destination after an unscheduled stopover were equated to a cancellation that would recognise the right of compensation to a passenger who, owing to the unscheduled stopover, suffered a delay in arriving of less than three hours, whilst a passenger who suffered the identical delay for a different reason would not have a right to the compensation provided for by Article 5(1)(c) and Article 7 of Regulation No 261/2004, as interpreted by the Court and, therefore, would be contrary to the principal of equal treatment.

26 In that regard, it is settled case-law that all European Union acts must be interpreted in accordance with primary law as a whole, including that principle, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, the judgment of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 48, and the case-law cited).

27 Having regard to the foregoing considerations, the answer to the question asked by the referring court is that Article 2(1) of Regulation No 261/2004 must be interpreted as meaning that a flight in respect of which the places of departure and arrival accorded with the planned schedule but during which there was an unscheduled stopover cannot be regarded as cancelled.

## Costs

28 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Eighth Chamber) hereby rules:

**Article 2(l) 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 a flight in respect of which the places of departure and arrival accorded with the planned schedule but during which an unscheduled stopover took place cannot be regarded as cancelled.**

[Signatures]