Reports of Cases

ORDER OF THE COURT (Ninth Chamber)

12 November 2020*

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court – Air transport – Regulation (EC) No 261/2004 – Common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights – Article 5(1)(c) – Article 7(1) – Right to compensation – Long delay in arrival – Flight reserved through a Community air carrier involving two flights, operated by different air carriers, departing from a third country for a Member State – Long delay which occurred during the first flight operated, under a code-share agreement, by an air carrier established in a third country – Action brought for compensation against the Community carrier)

In Case C-367/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Hamburg (Local Court, Hamburg, Germany), made by decision of 4 August 2020, received at the Court on 6 August 2020, in the proceedings

SP

v

KLM Royal Dutch Airlines, Direktion für Deutschland,

THE COURT (Ninth Chamber),

composed of D. Šváby (Rapporteur), acting as President of the Chamber, S. Rodin and K. Jürimäe, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision 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 3(5), Article 5(1)(b) and (c) and Article 7(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 a passenger, SP, and an air carrier, KLM Royal Dutch Airlines, Direktion für Deutschland ('KLM'), concerning the latter's refusal to compensate that passenger, the arrival of whose connecting flights suffered a long delay.

Legal context

3 Recital 1 of Regulation No 261/2004 provides:

'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.'

4 Article 2(b) and (c) of that regulation provides:

'For the purposes of this regulation:

…

(b) "operating air carrier" means an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger;

(c) "Community carrier" means an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers [(OJ 1992 L 240, p. 1)];'

5 Article 3 of that regulation, entitled 'Scope', provides in paragraphs 1 and 5:

'1. This regulation shall apply:

…

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.

…

5. This regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2. Where an operating air carrier which has no contract with the passenger performs obligations under this regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger.'

6 Article 5(1)(c) of that 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.’

7 Article 7(1) of Regulation No 261/2004 is worded as follows:

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

…

(c) EUR 600 for all flights not falling under (a) or (b).

…’

8 Article 13 of that 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.’

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

9 SP made a reservation, which was confirmed, for a flight scheduled for 8 June 2019 and connecting New York (United States) to Hamburg (Germany) via Amsterdam (Netherlands).

10 In the context of that flight, which involved connecting flights, the subject of a single reservation made through KLM, a ‘Community carrier’ within the meaning of Article 2(c) of Regulation No 261/2004, the flight connecting New York to Amsterdam, operated under a code-share agreement by Delta Airlines, a carrier established in a third country, experienced a delayed arrival, such that the scheduled connection for the flight from Amsterdam to Hamburg could not be guaranteed for the passengers concerned, which led SP to arrive at his final destination with a delay of more than three hours.

11 In response to KLM's refusal to pay him compensation in accordance with Article 7(1)(c) of Regulation No 261/2004, SP brought an action before the referring court, the Amtsgericht Hamburg (Local Court, Hamburg, Germany).

12 The Amtsgerich Hamburg (Local Court, Hamburg), being doubtful as to the applicability of Regulation No 261/2004 to the flight in question, in spite of the interpretation made by the Court in the judgment of 11 July 2019, *České aerolinie* (C-502/18, EU:C:2019:604), decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 5(1)(c) and Article 7(1) of Regulation No 261/2004, read together with Article 3(5) of that regulation, be interpreted as meaning that, in the case of connecting flights, where there are two flights which are the subject of a single reservation, departing from an airport located outside the territory of any Member State (in a third country) for an airport located within the territory of a Member State via an airport in another [Member State], a passenger who suffers a delay of three hours or more in reaching his or her final destination, the cause of that delay arising in the journey's first segment operated, under a code-share agreement, by an air carrier established in a third country, may bring his or her action for compensation under that regulation against the Community air carrier through which the flight was reserved in its entirety and which operated only the second segment of the journey?'

Consideration of the question referred

13 Under Article 99 of the Rules of Procedure of the Court, 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 where, inter alia, the answer to the question referred for a preliminary ruling admits of no reasonable doubt.

14 Since that is the case here, it is appropriate to apply that provision.

15 By its question, the referring court asks, in essence, whether Article 5(1)(c) and Article 7(1) of Regulation No 261/2004, read together with Article 3(1)(b) and (5) of that regulation, must be interpreted as meaning that, in the case of connecting flights, involving two flights which are the subject of a single reservation, departing from an airport located within the territory of a third country for an airport located in the territory of a Member State via the airport of another Member State, a passenger who suffers a delay of three hours or more in reaching his or her destination, the cause of that delay arising in the first flight operated, under a code-share agreement, by a carrier established in a third country, may bring his or her action for compensation under that regulation against the Community carrier that operated the second flight.

16 The answer to that question necessitates, first of all, a determination of whether Regulation No 261/2004 is applicable to such a flight.

17 In that regard, in accordance with Article 3(1)(b), Regulation No 261/2004 applies, inter alia, to passengers departing from an airport located in a third country and travelling to an airport located in the territory of a Member State which is subject to the FEU Treaty, unless they received benefits or compensation and were given assistance in that third country if the operating air carrier of the flight concerned is a Community carrier.

18 It follows that the application of Regulation No 261/2004 to a situation such as that referred to in that provision requires that three conditions are met, namely, first, that the flight concerned is one departing from an airport located in a third country for an airport located in the territory of a Member State, second, that that flight is operated by an 'operating Community air carrier', that is to say, in accordance with Article 2(c) of that regulation, a carrier with a valid operating licence granted by a

Member State, and third, that the passenger concerned did not receive benefits or compensation and assistance in the third country of departure (see, to that effect, judgment of 11 June 2020, *Transportes Aéreos Portugueses*, C-74/19, EU:C:2020:460, paragraph 33).

19 With regard to the first of those conditions, the Court has previously made it clear that a flight with one or more connections which was the subject of a single reservation constitutes a whole for the purposes of the right of passengers to compensation under Regulation No 261/2004, implying that the applicability of that regulation is to be assessed with regard to the place of the flight's initial departure and the place of its final destination (judgment of 11 July 2019, *České aerolinie*, C-502/18, EU:C:2019:604, paragraph 16 and the case-law cited).

20 Thus, connecting flights such as those at issue in the present case, which the referring court has established were the subject of a single reservation and were undertaken with a departure from New York and a final destination of Hamburg, must be regarded as having departed from an airport in a third country and arrived at an airport in a Member State.

21 With respect to the second of the conditions set out in paragraph 18 of the present order, the Court has held that the classification of 'operating air carrier' within the meaning of Article 2(b) of Regulation No 261/2004 requires, first, the performance of the flight in question, and second, the existence of a contract with a passenger (judgment of 11 July 2019, *České aerolinie*, C-502/18, EU:C:2019:604, paragraph 23 and the case-law cited).

22 From that point of view, the Court has found, in particular, that that classification includes an air carrier which, like KLM in the present case, performs one flight of connecting flights within the context of a contract of carriage which that carrier made with the passenger concerned (see, in that regard, judgment of 11 July 2019, *České aerolinie*, C-502/18, EU:C:2019:604, paragraphs 24 and 25).

23 Thus, connecting flights of which one flight is operated by an operator such as KLM, which has been shown to possess a valid operating licence granted by a Member State, must be considered as a flight operated by an operating Community air carrier within the meaning of Article 3(1)(b) of Regulation No 261/2004, regardless of the fact that those connecting flights were also partly operated by a non-Community carrier.

24 With regard to the third of the conditions set out in paragraph 18 of the present order, it is in no way apparent from the request for a preliminary ruling that the passenger received benefits or compensation and assistance in the United States.

25 Accordingly, and unless the passenger concerned did receive benefits or compensation and assistance in the United States, which it is for the referring court to determine, connecting flights departing from an airport located in the territory of a third country for an airport located in the territory of a Member State and operated in part by an operating Community air carrier, within the meaning of Article 3(1)(b) of Regulation No 261/2004, in the present case KLM, fall within the scope of that regulation.

26 Therefore, second, it is important to determine whether the passenger of such connecting flights which are the subject of a single reservation, the final flight of which arrived at its final destination with a delay of three hours or more, may bring proceedings for compensation under Article 5(1)(c) and Article 7(1) of Regulation No 261/2004 against any of the air carriers that performed those flights, including against the operating air carrier with which the passenger made the contract of carriage, but whose flight was not the cause of that delay.

27 In that regard, it should be recalled that passengers of flights that have been delayed must be considered as having a right to compensation under Article 5(1)(c) of Regulation No 261/2004, read together with Article 7(1) of that regulation, where they suffer, upon arrival at their final destination,

a loss of time equal to or in excess of three hours (judgment of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 61; see also, to that effect, judgment of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraph 37).

28 As regards the party liable to pay the compensation due in the case of a long delay in the arrival of connecting flights, such as those at issue in the present case, the Court has made clear that any operating air carrier which participated in the performance of at least one of those connecting flights is liable to pay that compensation, regardless of whether or not the flight which that carrier operated was the cause of the long delay to the passenger's arrival at his or her final destination (see, to that effect, judgment of 11 July 2019, *České aerolinie*, C-502/18, EU:C:2019:604, paragraphs 20 to 26).

29 In that respect, the Court has, first of all, established that flights with one or more connecting flights which are the subject of a single reservation must be regarded as constituting a whole, as has been recalled in paragraph 19 of the present order, which means that, in the context of those flights, an operating air carrier which performed the second flight cannot take refuge behind the poor performance of a previous flight operated by a different air carrier (see, to that effect, judgment of 11 July 2019, *České aerolinie*, C-502/18, EU:C:2019:604, paragraph 27).

30 The Court has further recalled that the second sentence of Article 3(5) of Regulation No 261/2004 provides that, where an operating air carrier which has no contract with the passenger in question performs obligations under that regulation, it is to be regarded as doing so on behalf of the person having a contract with that passenger. Thus, in a situation where, in the context of connecting flights where there are two flights which were the subject of a single reservation, the first flight is performed under a code-share agreement by an operating air carrier other than the operating air carrier that entered into the contract of carriage with that passenger and which performed the second flight, the latter carrier remains subject to contractual obligations to that passenger, even in relation to the performance of the first flight (see, to that effect, judgment of 11 July 2019, *České aerolinie*, C-502/18, EU:C:2019:604, paragraphs 28 and 29).

31 Furthermore, the Court has indicated that that solution is justified by the aim of ensuring a high level of protection for passengers, set out in recital 1 of Regulation No 261/2004, with a view to guaranteeing that the passengers transported are compensated by the operating air carrier which had made the contract of carriage with them, without needing to take into account the arrangements made by that carrier regarding the performance of other flights making up the connecting flights which that carrier offered (see, to that effect, judgment of 11 July 2019, *České aerolinie*, C-502/18, EU:C:2019:604, paragraph 30).

32 Finally, the Court has recalled that, in accordance with Article 13 of Regulation No 261/2004, the discharge of obligations by the operating air carrier pursuant to that regulation is without prejudice to its right to seek compensation, under the applicable national law, from any person who caused that air carrier to fail to fulfil its obligations, including third parties, which allows an operating air carrier, with regard to connecting flights which were the subject of a single reservation and were performed under a code-share agreement, that has had to make payment of the compensation provided for by Regulation No 261/2004 because of a long delay affecting a flight that it did not itself perform, to bring an action against the operating air carrier responsible for that delay in order to obtain redress for that financial cost (judgment of 11 July 2019, *České aerolinie*, C-502/18, EU:C:2019:604, paragraphs 31 and 32).

33 Having regard to the foregoing, the answer to the question referred is that Article 5(1)(c) and Article 7(1) of Regulation No 261/2004, read together with Article 3(1)(b) and (5) of that regulation, must be interpreted as meaning that, in the case of connecting flights, where there are two flights which are the subject of a single reservation, departing from an airport located within the territory of a third country for an airport located in a Member State via the airport of another Member State, a passenger who suffers a delay of three hours or more in reaching his or her final destination, the

cause of that delay arising in the first flight operated, under a code-share agreement, by a carrier established in a third country, may bring his or her action for compensation under that regulation against the Community air carrier that performed the second flight.

Costs

34 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.

On those grounds, the Court (Ninth Chamber) hereby orders:

Article 5(1)(c) and Article 7(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, read together with Article 3(1)(b) and (5) of that regulation, must be interpreted as meaning that, in the case of connecting flights, where there are two flights which are the subject of a single reservation, departing from an airport located within the territory of a third country for an airport located in a Member State via the airport of another Member State, a passenger who suffers a delay of three hours or more in reaching his or her final destination, the cause of that delay arising in the first flight operated, under a code-share agreement, by a carrier established in a third country, may bring his or her action for compensation under that regulation against the Community air carrier that performed the second flight.

[Signatures]