Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

21 December 2021 *

(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 – Article 2(l) – Article 5(1)(c) – Flight booked through an online platform – Flight departure time brought forward by the operating air carrier – Classification – Receipt of notification of the flight being brought forward sent to an electronic address not belonging to the passengers concerned – Directive 2000/31/EC – Electronic commerce – Article 11 – Presumption of receipt – Scope of the operating air carrier's obligation to provide information)

In Case C-263/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria), made by decision of 26 May 2020, received at the Court on 15 June 2020, in the proceedings

Airhelp Limited

v

Laudamotion GmbH,

THE COURT (First Chamber),

composed of L. Bay Larsen, Vice-President of the Court, acting as President of the First Chamber, J-C. Bonichot and M. Safjan (Rapporteur), Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Airhelp Limited, by D. Stanonik and E. Stanonik-Palkovits, Rechtsanwälte,

– Laudamotion GmbH, by M. Klemm, Rechtsanwalt,

– the European Commission, by G. Braun and K. Simonsson, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 23 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling 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 (OJ 2004 L 46, p. 1), 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') (OJ 2000 L 178, p. 1).

2 The request has been made in proceedings between Airhelp Limited and Laudamotion GmbH concerning the latter's refusal to compensate air passengers, who had assigned their rights to Airhelp, for having brought forward their flight.

Legal context

Regulation No 261/2004

3 Under recitals 1, 7 and 12 of Regulation No 261/2004:

'(1) Action by the [European Union] 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.

…

(7) In order to ensure the effective application of this Regulation, the obligations that it creates should rest with the operating air carrier who performs or intends to perform a flight, whether with owned aircraft, under dry or wet lease, or on any other basis.

…

(12) The trouble and inconvenience to passengers caused by cancellation of flights should also be reduced. This should be achieved by inducing carriers to inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable re-routing, so that the passengers can make other arrangements. Air carriers should compensate passengers if they fail to do this, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.'

4 Article 2 of that regulation, entitled 'Definitions', 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 the regulation, entitled 'Cancellation', provides in its 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 [the] 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, entitled 'Right to compensation', provides in its paragraph 1:

'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;

…'

7 Article 13 of Regulation No 261/2004, entitled 'Right of redress', states:

'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.'

Directive 2000/31

8 Section 3, entitled 'Contracts concluded by electronic means', of Chapter II of Directive 2000/31 comprises Articles 9 to 11 of that directive. Article 11 of that directive, entitled 'Placing of the order', provides in its paragraph 1:

'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.'

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

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

10 The reserved flight, which was initially scheduled to depart on 14 June 2018 at 14.40, was brought forward by the operating air carrier to 8.25 on the same day, corresponding to the flight being brought forward by more than six hours.

11 Airhelp, to which the two passengers assigned any right to compensation arising out of Regulation No 261/2004, brought an action before the Bezirksgericht Schwechat (District Court, Schwechat, Austria). It claimed that the operating air carrier was liable to pay the two passengers a total sum of EUR 500 under Article 7(1)(a) of that regulation since the flight in question had been brought forward by more than six hours and the passengers had not been notified of that fact until four days before the scheduled departure, on 10 June 2018, via the booking platform.

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 specific 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 against the judgment of that court with the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria), which is the referring court. That court is unsure, in particular, whether the act of bringing forward a flight constitutes '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 points out that it shares the view of the Bundesgerichtshof (Federal Court of Justice, Germany) that, where a flight is brought forward by a significant amount of time, that constitutes abandonment of the original flight schedule and therefore 'cancellation' within the meaning of Article 2(l) of that regulation.

15 As to the question of whether the passengers in the main proceedings were correctly informed that their flight had been brought forward, the referring court states that, under the Austrian law transposing Directive 2000/31, a presumption of notification arises not only in the situations referred to in Article 11(1) of that directive, but also where there is a simple exchange of declarations by email. That means, in a case such as that in the main proceedings here, that a passenger is deemed to have been informed that his or her flight has been brought forward when that passenger is able to access the declaration made by the operating air carrier. The referring court is therefore unsure whether the national law, Directive 2000/31 or Regulation No 261/2004 should be applied in order to determine whether the passengers in the main proceedings were correctly informed that their flight had been brought forward.

16 In those circumstances, the Landesgericht Korneuburg (Regional Court, Korneuburg) decided to stay the proceedings and to refer 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?

(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?'

Consideration of the questions referred

The first question

17 By its first question, the referring court asks, in essence, whether Article 2(l) and Article 5(1)(c) of Regulation No 261/2004 must be interpreted as meaning that a flight is regarded as being cancelled where the operating air carrier brings that flight forward by several hours.

18 It should be noted in this regard that the concept of 'cancellation' is defined in Article 2(l) of Regulation No 261/2004 as meaning 'the non-operation of a flight which was previously planned and on which at least one place was reserved'.

19 The concept of 'flight' is not defined by Regulation No 261/2004. However, according to settled case-law, a flight consists, essentially, in 'an air transport operation, being as it were a "unit" of such transport, performed by an air carrier which fixes its itinerary' (judgment of 4 July 2018, *Wirth and Others*, C-532/17, EU:C:2018:527, paragraph 19 and the case-law cited).

20 Moreover, the Court has specified, first, that the itinerary is an essential element of the flight, as the flight is operated in accordance with the air carrier's pre-arranged planning (judgment of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 30).

21 Second, it in no way follows from the definition contained in Article 2(l) of Regulation No 261/2004 that, in addition to the fact that the initially scheduled flight was not operated, the 'cancellation' of that flight, within the meaning of that provision, requires the adoption of an express decision cancelling it (judgment of 13 October 2011, *Sousa Rodríguez and Others*, C-83/10, EU:C:2011:652, paragraph 29).

22 It is true that Article 2(l) and Article 5(1) of that regulation do not state explicitly how a flight which has been brought forward should be treated. However, according to settled case-law, it is necessary, in interpreting a provision of EU law, 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 (see, to that effect, judgment of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 41 and the case-law cited).

23 In that regard, concerning the context of Article 2(l) and Article 5(1) of Regulation No 261/2004, it should be noted that that regulation refers to situations where a flight is brought forward in the context of the re-routing provided for in Article 5(1)(c)(ii) and (iii) of that regulation. Under that latter provision the operating air carrier is required to compensate passengers whose flights have been cancelled unless that carrier informs them of the cancellation within the time limits laid down in that provision and offers re-routing, allowing passengers to depart no more than one to two hours, as appropriate, before the scheduled time of departure and to reach their final destination less than four or two hours, as the case may be, after the originally planned arrival time.

24 It follows that the EU legislature has recognised that, where a flight has been brought forward by a significant amount of time, that may result in serious inconvenience for passengers, in the same way as a flight delay, since, where a flight has been brought forward in that way, passengers are unable to use their time as they wish and to organise their trip according to their expectations.

25 That is the case, in particular, where a passenger, having taken all the necessary precautions, is unable to board the aircraft because the flight that he or she has reserved has been brought forward. That is also the case where the passenger is forced to adapt significantly to the new departure time in order to be able to take his or her flight.

26 Furthermore, it must be borne in mind that the main objective pursued by Regulation No 261/2004 is, as is apparent from, inter alia, recital 1 thereof, to ensure a high level of protection for passengers (judgment of 17 September 2015, *van der Lans*, C-257/14, EU:C:2015:618, paragraph 26 and the case-law cited).

27 The Court has thus held that, in accordance with that objective, provisions conferring rights on air passengers must be interpreted broadly (judgment of 22 April 2021, *Austrian Airlines*, C-826/19, EU:C:2021:318, paragraph 61 and the case-law cited).

28 Accordingly, since Regulation No 261/2004 is intended to make good, in a standardised and immediate manner, the various types of damage constituted by the serious inconvenience occasioned during the carriage of passengers by air (judgment of 3 September 2020, *Delfly*, C-356/19, EU:C:2020:633, paragraph 25 and the case-law cited) and in view of the serious inconvenience which may be caused to passengers in circumstances such as those referred to in paragraph 24 above, the concept of 'cancellation' must be interpreted as encompassing the situation in which a flight is brought forward by a significant amount of time.

29 In that regard, a distinction must be drawn between situations in which the bringing forward of a flight does not have any effect, or has a negligible effect, on the ability of air passengers to use their time as they wish, and situations which result in serious inconvenience because the flight has been brought forward by a significant amount of time, as described in paragraphs 24 and 25 above.

30 In order to distinguish a flight which has been brought forward by a significant amount of time from a flight which has been brought forward by a negligible amount of time, inspiration should be drawn from the thresholds laid down in Article 5(1)(c)(ii) and (iii) of Regulation No 261/2004.

31 It should be pointed out that bringing forward a flight is different to delaying a flight, for which the Court has held that passengers acquire a right to compensation when they suffer a loss of time equal to or in excess of three hours in relation to the duration originally planned by the air carrier (see, to that effect, judgment of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 57), since passengers must take steps in order to be able to board the aircraft because the flight which they have reserved has been brought forward. That difference is also apparent from the fact that the EU legislature, in Article 5(1)(c)(iii) of Regulation No 261/2004, accepts delays of less than two hours, whereas flights may not be brought forward by more than one hour.

32 It is apparent from Article 5(1)(c)(iii) of that regulation that any instance in which a flight has been brought forward by one hour or less may exempt the operating air carrier from its obligation to compensate passengers under Article 7 of that regulation. Accordingly, it must be held that the reference point for determining whether a flight has been brought forward by a significant amount of time or a negligible amount of time for the purposes of applying Article 5 of that regulation is whether the flight has been brought forward by more than one hour, by one hour or by less than one hour.

33 That interpretation respects the balancing of the interests of air passengers and of those of the operating air carriers that the EU legislature sought by adopting Regulation No 261/2004 (see, by analogy, judgment of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraph 39 and the case-law cited).

34 Although that interpretation allows passengers to be compensated for serious inconvenience when a flight is brought forward by a significant amount of time, it relieves operating air carriers of the obligation to pay compensation in the case where they inform air passengers that the flight has been brought forward under the conditions laid down in Article 5(1)(c)(i) to (iii) of that regulation.

35 In the light of the foregoing, the answer to the first question is that Article 2(l) and Article 5(1)(c) of Regulation No 261/2004 must be interpreted as meaning that a flight is regarded as being 'cancelled' in the case where the operating air carrier brings that flight forward by more than one hour.

The second question

36 By its second question, the referring court asks, in essence, whether compliance with the requirement to inform the air passenger of the cancellation of his or her flight in good time must be assessed solely in accordance with Article 5(1)(c) of Regulation No 261/2004 and not in accordance with the national law transposing Article 11 of Directive 2000/31 on receipt in the context of contracts concluded by electronic means.

37 First of all, Article 11(1) of Directive 2000/31 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' 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'.

38 The application of that Article 11 presupposes that the service provider has the means to contact directly by electronic means the recipient who has ordered the service.

39 As the Advocate General observed in point 23 of his Opinion, notification of a flight cancellation within the meaning of Article 5 of Regulation No 261/2004 constitutes neither an 'order' nor an 'acknowledgement of receipt' for the purposes of Article 11 of Directive 2000/31, with the result that a situation such as that in the main proceedings falls outside the material scope of that Article 11.

40 Next, as regards the national provision at issue in the main proceedings, the referring court points out that it goes beyond Directive 2000/31 in that the presumption of receipt provided for in Article 11(1) of that directive applies not only to 'orders' and 'acknowledgements of receipt', but also to all other legally significant electronic declarations, including documents relating to flight reservations and to changes to those reservations. However, that national provision cannot affect the conditions governing application of the provisions of Regulation No 261/2004.

41 In that regard, it should be noted that Article 5(1)(c) of Regulation No 261/2004 provides that passengers whose flights have been cancelled have a right to compensation unless they are informed of that cancellation under the conditions set out in Article 5(1)(c)(i) to (iii) of that regulation.

42 In that connection, it is important to point out that Article 5 of that regulation imposes an additional condition on the operating air carrier. It is apparent from paragraph 4 of that article that the burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight rests with the operating air carrier. Placing that obligation on the operating air carrier helps to ensure the high level of protection for passengers referred to in recital 1 of Regulation No 261/2004.

43 In the present case, it is apparent from the facts in the main proceedings that the reservation was made through an intermediary. Where there is an intermediary, Article 5(1)(c) of that regulation in principle precludes the application of a presumption, such as the one arising from the national provisions at issue in the main proceedings, that a communication has been made between the service provider and the recipient of the service in question in order to show that the communication was made to the passenger. If the operating air carrier communicates solely with the intermediary, that is not in itself sufficient for a finding that communication to the passenger has been made.

44 However, if the passenger expressly authorises the intermediary to receive the information transmitted by the operating air carrier and that carrier is aware of that authorisation, it must be held that Article 5(1)(c) of Regulation No 261/2004 does not preclude a presumption such as the one arising from the national legislation at issue in the main proceedings.

45 It is for the referring court to verify that evidence in the light of the circumstances of the main proceedings.

46 In the light of the foregoing, the answer to the second question is that compliance with the requirement to inform the passenger in good time of the cancellation of his or her flight must be assessed solely in accordance with Article 5(1)(c) of Regulation No 261/2004, read in conjunction with Article 5(4) of that regulation.

The third question

47 By its third question, the referring court asks, in essence, whether Article 5(1)(c)(i) of Regulation No 261/2004 must be interpreted as meaning that an air passenger who reserved a flight through an intermediary is regarded as having been informed of the cancellation of that flight in the case where the operating air carrier transmitted the information relating to that cancellation to that intermediary, through which the contract of carriage by air was concluded with that passenger, at least two weeks before the scheduled time of departure, but that intermediary did not inform the passenger of that cancellation within the period referred to in that provision.

48 That question is based on the premiss that the passenger has not authorised the intermediary to receive the information transmitted by the operating air carrier in accordance with the detailed rules set out in paragraph 44 above.

49 Article 5(1)(c) of Regulation No 261/2004 provides that, in the case of cancellation of a flight, the passengers concerned have a right to receive compensation from the operating air carrier in accordance with Article 7 of that regulation, unless they are informed of the cancellation of the flight under the conditions set out in Article 5(1)(c) of that regulation.

50 As has been recalled in paragraph 42 above, Article 5(4) of that regulation provides that it is for the operating air carrier to prove that it informed the passengers, within the prescribed period, of the cancellation of the flight concerned.

51 It follows from the clear wording of those provisions that, where the operating air carrier is unable to prove that the passenger concerned was informed of the cancellation of his or her flight at least two weeks before the scheduled time of departure, it is required to pay compensation in accordance with Article 7 of Regulation No 261/2004.

52 In that regard, the Court has already held that that interpretation applies not only when the contract for carriage has been entered into directly between the passenger concerned and the air carrier, but also when that contract has been entered into via a third party such as, as is the case in the main proceedings, an online travel agency (see, to that effect, judgment of 11 May 2017, *Krijgsman*, C-302/16, EU:C:2017:359, paragraph 26).

53 As it follows both from Article 3(5) of Regulation No 261/2004 and from recitals 7 and 12 thereof, the operating air carrier which performs or intends to perform a flight is alone liable to compensate passengers for failure to fulfil the obligations under that regulation including, in particular, the obligation to inform set out in Article 5(1)(c) thereof (judgment of 11 May 2017, *Krijgsman*, C-302/16, EU:C:2017:359, paragraph 27).

54 Nonetheless, it should be noted that the discharge of obligations by the operating air carrier pursuant to Regulation No 261/2004 is without prejudice to its rights to seek compensation, under the applicable national law, from any person who caused the air carrier to fail to fulfil its obligations, including third parties, as Article 13 of that regulation provides (see, to that effect, judgment of 11 May 2017, *Krijgsman*, C-302/16, EU:C:2017:359, paragraph 29 and the case-law cited).

55 Since that article refers expressly to third parties, it follows that Regulation No 261/2004 does not make the right of the operating air carrier to seek compensation conditional on the existence of a contract binding that carrier and the intermediary to which the air passenger had recourse in order to reserve his or her flight.

56 Having regard to the foregoing, the answer to the third question is that Article 5(1)(c)(i) of Regulation No 261/2004 must be interpreted as meaning that an air passenger who reserved a flight through an intermediary is to be regarded as not having been informed of the cancellation of that flight in the case where, although the operating air carrier transmitted the information relating to that cancellation to that intermediary, through which the contract of carriage by air was concluded with that passenger, at least two weeks before the scheduled time of departure, that intermediary did not inform the passenger of that cancellation within the period referred to in that provision and that passenger did not expressly authorise that intermediary to receive the information transmitted by that operating air carrier.

Costs

57 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 (First Chamber) hereby rules:

1. **Article 2(l) and Article 5(1)(c) 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 is regarded as being 'cancelled' in the case where the operating air carrier brings that flight forward by more than one hour.**

2. **Compliance with the requirement to inform the passenger in good time of the cancellation of his or her flight must be assessed solely in accordance with Article 5(1)(c) of Regulation No 261/2004, read in conjunction with Article 5(4) of that regulation.**

3. **Article 5(1)(c)(i) of Regulation No 261/2004 must be interpreted as meaning that an air passenger who reserved a flight through an intermediary is to be regarded as not having been informed of the cancellation of that flight in the case where, although the operating air carrier transmitted the information relating to that cancellation to that intermediary, through which the contract of carriage by air was concluded with that passenger, at least two weeks before the scheduled time of departure, that intermediary did not inform the passenger of that cancellation within the period referred to in that provision and that passenger did not expressly authorise that intermediary to receive the information transmitted by that operating air carrier.**

[Signatures]