

Provisional text

## JUDGMENT OF THE COURT (Ninth Chamber)

11 July 2019 (\*)

Reference for a preliminary ruling — Transport — Common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights — Regulation (EC) No 261/2004 — Article 5(1)(c) — Article 7(1) — Right to compensation — Connecting flights — Flights consisting of two flights operated by different air carriers — Long delay in relation to the second flight with points of departure and arrival outside the European Union and operated by a carrier established in a non-Member State)

In Case C-502/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Městský soud v Praze (Prague City Court, Czech Republic), made by decision of 17 May 2018, received at the Court on 30 July 2018, in the proceedings

**CS and Others**

v

**České aerolinie a.s.,**

THE COURT (Ninth Chamber),

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

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- CS and Others, by R. Jehne, advokát,
- České aerolinie a.s., by J. Horník, advokát,
- the Italian Government, by G. Palmieri, acting as Agent, and by P. Garofoli, avvocato dello Stato,
- the European Commission, by P. Němečková and N. Yerrell, acting as Agents,

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

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 3(5) 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 CS and Others ('the passengers concerned') and České aerolinie a.s., an air carrier, concerning the latter's refusal to pay compensation to those passengers, when the arrival time of their connecting flights was subject to a long delay.

## Legal context

### *European Union law*

- 3 Article 2(b) and (c) of Regulation No 261/2004 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)];'

- 4 Article 3(1) and (5) of that regulation, that article being headed 'Scope', provides:

'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;

...

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.'

- 5 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.'

6 Article 7(1) of that regulation 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).

...'

7 Article 13 of Regulation No 261/2004 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.'

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

8 The passengers concerned, 11 in number, each made a reservation with České aerolinie for flights from Prague (Czech Republic) to Bangkok (Thailand) via Abu Dhabi (United Arab Emirates).

9 The first of those connecting flights, operated by České aerolinie and connecting Prague and Abu Dhabi, was carried out according to the flight plan and the plane arrived on time at its destination. However, the second flight, operated, under a code-share agreement, by Etihad Airways, which is not a 'Community carrier', within the meaning of Article 2(c) of Regulation No 261/2004, and connecting Abu Dhabi and Bangkok, arrived 488 minutes late.

10 Since České aerolinie refused to pay the passengers concerned the compensation provided for in Article 7(1)(c) of Regulation No 261/2004, they brought an action before the Czech first instance court with jurisdiction to hear an action against that carrier. That court upheld their request for compensation, holding, in particular, that, even though it had not performed the flight which was subject to the long delay, České aerolinie could be obliged to pay that compensation pursuant to the last sentence of Article 3(5) of Regulation No 261/2004.

11 That decision was upheld on appeal by the referring court, the Městský soud v Praze (Prague City Court, Czech Republic). In its judgment of 26 April 2016, that court held, inter alia, that there was no need to refer to the Court a request for a preliminary ruling under Article 267 TFEU, since the interpretation of Article 3(5) of Regulation No 261/2004 could be clearly inferred from the wording of that regulation and from the judgment of the Court of 28 February 2013, *Folkerts* (C-11/11, EU:C:2013:106). In that regard, the referring court considered that it follows from that provision that České aerolinie was directly liable to the passengers concerned for the harm they suffered on account of the delay in the part of the connecting flights operated by the company Etihad Airways, since a constituent element of the legal concept of

‘agency’ is that the acts of the agent can be directly attributed to the principal. Further, according to the referring court, that interpretation of the regulation was entirely pertinent to the facts of the case before it and was fair, in that the liability of the contractual carrier stems from the contract and the carrier cannot be relieved of liability on the ground that the delayed part of the flight was operated by another party, and in that the situation was comparable to any other form of subcontracting.

- 12 That judgment was however set aside by the Ústavní soud (Constitutional Court, Czech Republic), by a judgment of 31 October 2017. In its judgment, the Ústavní soud (Constitutional Court) instructed the referring court to examine the arguments of České aerolinie in which it relied on a judgment of the Bundesgerichtshof (Federal Court of Justice, Germany) where that court held that the liability of the contractual carrier could not be established where it was not itself the operating air carrier.
- 13 The case having been sent back to it by the Ústavní soud (Constitutional Court), the referring court finds that the passengers concerned can successfully claim the remedy of compensation only if the contractual carrier, in this case České aerolinie, can be held to be responsible for the long delay in the arrival of the flight operated outside the European Union by an air carrier that is itself established outside the European Union, namely Etihad Airways. The requirement of a high level of protection of passengers is conducive to such an interpretation, particularly when, as in this case, the connecting flights at issue are such that one flight is operated outside the European Union by a non-Community carrier, implying that Regulation No 261/2004 is not applicable. On the other hand, the fact that that regulation provides that the party liable to pay the compensation provided for in Article 7(1)(c) is the operating air carrier militates against such an interpretation, that position being supported by the case-law of the Bundesgerichtshof (Federal Court of Justice).
- 14 In those circumstances, the Městský soud v Praze (Prague City Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is there an obligation on a Community carrier to pay compensation to passengers under the second sentence of Article 3(5) of [Regulation No 261/2004] where the Community carrier, as the contractual carrier, operated the first leg of a flight with a stopover at an airport in a non-Member State, from which, under a code-share agreement, a carrier which is not a Community carrier operated the second leg of the flight and there was a delay, of more than 3 hours in the arrival at the final destination airport, which arose exclusively in the second leg of the flight?’

### **Consideration of the question referred**

- 15 By its question, the referring court seeks, in essence, to ascertain whether Article 5(1)(c) and Article 7(1) of Regulation No 261/2004, read together with Article 3(5) of that regulation, must be interpreted as meaning that, in the case of connecting flights, where there are two flights that are the subject of a single reservation, departing from an airport located within the territory of a Member State and travelling to an airport located in a non-Member State via the airport of another non-Member State, a passenger who suffers a delay in reaching his or her destination of 3 hours or more, the cause of that delay arising in the second flight, operated, under a code-share agreement, by a carrier established in a non-Member State, may bring his or her action for compensation under that regulation against the Community carrier that operated the first flight.
- 16 As a preliminary point, it must be recalled, in the first place, that a flight with one or more connections which is the subject of a single reservation constitutes a whole for the purposes of the right of passengers to compensation provided for in Regulation No 261/2004 (see, to that effect, judgment of 31 May 2018, *Wegener*, C-537/17, EU:C:2018:361, paragraphs 18 and 19 and the case-law cited), implying that the applicability of Regulation No 261/2004 is to be assessed with regard to the place of a flight’s initial departure and the place of its final destination (see, to that effect, judgment of 31 May 2018, *Wegener*, C-537/17, EU:C:2018:361, paragraph 25).

- 17 Under Article 3(1)(a) of Regulation No 261/2004, that regulation is applicable to, in particular, passengers departing from an airport located in the territory of a Member State to which the Treaty applies.
- 18 Connecting flights such as those at issue in the main proceedings, connecting Prague to Bangkok via Abu Dhabi, departing from an airport located in the territory of a Member State, therefore fall within the scope of Regulation No 261/2004.
- 19 In the second place, the Court has held that passengers whose flights are delayed must be regarded as being entitled to the compensation provided for in Article 5(1)(c) of Regulation No 261/2004, read together with Article 7(1) of that regulation, where they suffer, on arrival at their final destination, a loss of time equal to or in excess of 3 hours (see, to that effect, judgments of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 61, and of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraph 38).
- 20 As regards who is liable to pay the compensation due in a case of long delay in the arrival of connecting flights, such as that at issue in the main proceedings, it is apparent from the wording of Article 5(1)(c) and Article 5(3) of Regulation No 261/2004 that the party liable can only be the ‘operating air carrier’, within the meaning of Article 2(b) of that regulation.
- 21 It must therefore be determined whether, in a situation such as that at issue in the main proceedings, a carrier such as České aerolinie can be categorised as such.
- 22 Under Article 2(b) of Regulation No 261/2004, an ‘operating air carrier’ is ‘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’.
- 23 Accordingly, that definition sets out two cumulative conditions which must be satisfied if an air carrier is to be regarded as an ‘operating air carrier’, relating, first, to the performance of the flight in question and, second, to the existence of a contract with a passenger (judgment of 4 July 2018, *Wirth and Others*, C-532/17, EU:C:2018:527, paragraph 18).
- 24 In this case, and as is stated in the order for reference, it is undisputed that České aerolinie did perform a flight under the contract of carriage with the passengers concerned.
- 25 Consequently, České aerolinie must be categorised as the ‘operating air carrier’ and therefore is liable, subject to Article 5(3) of Regulation No 261/2004, to pay the compensation provided for in Article 5(1)(c) and Article 7(1) of that regulation.
- 26 Such a finding cannot be called into question by the fact, referred to by České aerolinie in its written observations, that the cause of the delay which the passengers concerned had to suffer was not in the first of the connecting flights, performed by that carrier, but in the second of the connecting flights, performed by another air carrier.
- 27 In that regard, it must be observed, first, that, as is apparent from the case-law cited in paragraph 16 of the present judgment, flights with one or more connections that are the subject of a single reservation must be regarded as a single unit, which implies that, in the context of such flights, an operating air carrier that has operated the first flight cannot take refuge behind a claim that the performance of a subsequent flight operated by another air carrier was imperfect.
- 28 Further, the second sentence of Article 3(5) of Regulation No 261/2004 states that, where an operating air carrier which has no contract with the passenger performs obligations under this regulation, it is to be regarded as doing so on behalf of the person having a contract with that passenger.
- 29 Accordingly, in a situation such as that at issue in the main proceedings, where, in the context of connecting flights consisting of two flights that were the subject of a single reservation, the second 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 the passengers concerned and that performed the first flight, the latter carrier remains subject to contractual obligations to the passengers, even in relation to the performance of the second flight.

- 30 Further, the objective of ensuring a high level of protection of passengers, stated in recital 1 of Regulation No 261/2004, is also capable of supporting the conclusion that, in the case of connecting flights that are the subject of a single reservation and that are operated under a code-share agreement, the operating air carrier that performed the first flight is liable to pay compensation even in the event of delay suffered during the second flight operated by another air carrier. Such an approach makes it possible to ensure that the passengers carried obtain compensation from the operating air carrier that entered into the contract of carriage with them, and they do not have to take account of arrangements made by that carrier for the performance of the second of the connecting flights.
- 31 Last, it must be recalled that, under 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 the air carrier to fail to fulfil its obligations, including third parties (judgment of 11 May 2017, *Krijgsman*, C-302/16, EU:C:2017:359, paragraph 29 and the case-law cited).
- 32 Consequently, and more specifically in the case of connecting flights that are the subject of a single reservation and that are operated under a code-share agreement, it would, where appropriate, fall to the operating air carrier 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.
- 33 In the light of 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(5) of that regulation, must be interpreted as meaning that, in the case of connecting flights, where there are two flights that are the subject of a single reservation, departing from an airport located within the territory of a Member State and travelling to an airport located in a non-Member State via the airport of another non-Member State, a passenger who suffers a delay in reaching his or her destination of 3 hours or more, the cause of that delay arising in the second flight, operated, under a code-share agreement, by a carrier established in a non-Member State, may bring his or her action for compensation under that regulation against the Community air carrier that performed the first 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

**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(5) of Regulation No 261/2004, must be interpreted as meaning that, in the case of connecting flights, where there are two flights that are the subject of a single reservation, departing from an airport located within the territory of a Member State and travelling to an airport located in a non-Member State via the airport of another non-Member State, a passenger who suffers a delay in reaching his or her destination of 3 hours or more, the cause of that delay arising in the second flight, operated, under a code-share agreement, by a**

**carrier established in a non-Member State, may bring his or her action for compensation under that regulation against the Community air carrier that performed the first flight.**

[Signatures]

---

\* Language of the case: Czech.