

Provisional text

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 3 December 2020 (1)

Case C-826/19

WZ
v
Austrian Airlines AG

(Request for a preliminary ruling from the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria))

(Reference for a preliminary ruling – Air transport – Compensation of air passengers in the event of cancellation or delay of flights – Flight diverted to an airport which is not that for which the booking was made – Regulation (EC) No 261/2004 – Article 2(1) – Concept of ‘cancellation’ – Article 8(3) – Bearing the cost of transfer – Initiative – Breach of the obligations laid down in Articles 8 and 9 of the Regulation – Right to compensation)

1. Where a flight is diverted and lands at an airport which is not that for which the booking was made, but is nearby, is it to be regarded as having been cancelled for the purposes of Regulation (EC) No 261/2004, (2) so as to entitle the passengers to compensation under Article 7(1) of that regulation, or merely as having been delayed, in which case, under the judgment in *Sturgeon and Others*, (3) the passengers have no such entitlement unless there is a delay of three hours or more?
2. After the plane has landed, is the air carrier required to take the initiative and offer to bear the cost of transferring the passenger either to the airport for which the booking was made, or to another close-by destination agreed with the passenger, in accordance with Article 8(3)?
3. Does a breach of the obligation to provide assistance referred to in that article, and in Article 9(1)(c) of Regulation No 261/2004, give rise to a right to lump-sum compensation under Article 7(1) of that regulation?
4. These are some of the questions raised by the request for a preliminary ruling from the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria), and are those which, in accordance with the Court’s request, this Opinion will focus on.

5. In the judgment it will give in due course, the Court will, amongst other things, have the opportunity to rule for the first time on the interpretation of Article 8(3) of Regulation No 261/2004, and to clarify the place of that article in the logic and general scheme of the regulation.

I. Legal background

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

‘(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.

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

...

(4) [The European Union] 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.’

7. Article 5 of that regulation, headed ‘Cancellation’, provides:

‘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 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:

...

(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.

...’

8. Article 6 of the regulation, headed ‘Delay’, provides:

‘1. 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).

2. In any event, the assistance shall be offered within the time-limits set out above with respect to each distance bracket.'

9. Article 7 of the regulation, headed 'Right to compensation', provides:

'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;
- (b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;
- (c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.

...'

10. Article 8 of the regulation, headed 'Right to reimbursement or re-routing', provides:

'1. Where reference is made to this Article, passengers shall be offered the choice between:

- (a) – reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant,
 - a return flight to the first point of departure, at the earliest opportunity;
- (b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or
- (c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.

...

3. When, in the case where a town, city or region is served by several airports, an operating air carrier offers a passenger a flight to an airport alternative to that for which the booking was made, the operating air carrier shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger.'

11. Article 9 of the regulation, headed 'Right to care', is worded as follows:

'1. Where reference is made to this Article, passengers shall be offered free of charge:

- (a) meals and refreshments in a reasonable relation to the waiting time;
 - (b) hotel accommodation in cases
 - where a stay of one or more nights becomes necessary, or
 - where a stay additional to that intended by the passenger becomes necessary;
 - (c) transport between the airport and place of accommodation (hotel or other).
- ...'

II. Facts, procedure and the questions referred

12. WZ made a single booking with Austrian Airlines for a trip consisting of two flights on 21 May 2018, the first from Klagenfurt (Austria) to Vienna (Austria), respectively scheduled to depart at 18.35 and arrive at 19.20, and the second between Vienna and Berlin Tegel (Germany), respectively scheduled to depart at 21.00 and arrive at 22.20.

13. The weather conditions prevailing at aircraft turnaround three flights back in the rotation sequence had led to a delay which affected subsequent flights with the same aircraft on the Vienna–Berlin route, and the flight to Berlin Tegel that WZ had booked was delayed beyond the latest time permitted under the night flying restrictions in force at that airport.

14. Austrian Airlines therefore diverted the flight in question to Berlin Schönefeld airport, which is outside the city of Berlin, in the *Land* of Brandenburg. The diverted flight took off from Vienna at 22.07 and landed in Berlin Schönefeld at 23.18.

15. According to the referring court, the diversion of the flight caused WZ to be not only delayed (the flight landing at 23.18 instead of the scheduled arrival time of 22.20), but also inconvenienced, as the airport of arrival was further from his home (24 km instead of 8 km), which meant that the journey home took longer (41 minutes from Berlin Schönefeld instead of 15 minutes from Berlin Tegel). Austrian Airlines did not offer WZ alternative transport between Berlin Schönefeld and Berlin Tegel.

16. WZ claimed EUR 250 in compensation pursuant to Article 5 of Regulation No 261/2004, read in conjunction with Article 7 of that regulation. That claim was based on the delay on arrival of the flight as well as on the fact that Austrian Airlines had failed to offer him onward transport from Berlin Schönefeld to Berlin Tegel.

17. Austrian Airlines disputed the claim and argued, first, that the applicant had been delayed by only 58 minutes in reaching his final destination of Berlin. It argued, secondly, that WZ had been able to return home without difficulty using onward transportation. Thirdly, it contended that there had been 'extraordinary circumstances', within the meaning of Article 5(3) of Regulation No 261/2004, on the basis that significant meteorological difficulties had been encountered three flights back in the rotation sequence, leading Eurocontrol to assign the rotation in question, which was performed by the same aircraft, a later time-slot than had been anticipated.

18. The Bezirksgericht Schwechat (District Court, Schwechat, Austria) dismissed WZ's claims, holding that the diversion of the flight did not constitute a significant change to the flight itinerary, and accordingly that the flight could not be regarded as having been cancelled. That court also noted that the duration of the delay was not three hours or more.

19. WZ brought an appeal before the Landesgericht Korneuburg (Regional Court, Korneuburg). That court is uncertain as to (i) whether the case is to be regarded as one of cancellation or of delay, or as falling into a distinct category; (ii) whether the air carrier can rely on extraordinary circumstances, within the

meaning of Article 5(3) of Regulation No 261/2004, affecting a flight prior to that taken by the passenger, and (iii) whether the air carrier is required to pay compensation for breach of the obligations to provide assistance and care which are incumbent on it.

20. In those circumstances, the Landesgericht Korneuburg (Regional Court, Korneuburg) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) Is Article 8(3) of [Regulation No 261/2004] to be interpreted as meaning that it is applicable to two airports which are both located in the immediate vicinity of a city centre, but only one of them is located in the territory of the city and the other is located in a neighbouring federal *Land*?
- (2) Are Article 5(1)(c), Article 7(1) and Article 8(3) of [Regulation No 261/2004] to be interpreted as meaning that, in the event that a flight lands at an alternative airport of destination in the same town, city or region, there is a right to compensation owing to cancellation of the flight?
- (3) Are Article 6(1), Article 7(1) and Article 8(3) of [Regulation No 261/2004] to be interpreted as meaning that, in the event that a flight lands at an alternative airport in the same town, city or region, there is a right to compensation owing to a long delay?
- (4) Are Articles 5, 7 and Article 8(3) of [Regulation No 261/2004] to be interpreted as meaning that, in order to determine whether a passenger has suffered a loss of time equal to or in excess of three hours within the meaning of the judgment [of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716)], the delay must be calculated on the basis of the point in time at which the flight lands at the alternative airport of destination or the point in time at which the passenger is transferred to the airport of destination for which the booking was made or to another close-by destination agreed with the passenger?
- (5) Is Article 5(3) of [Regulation No 261/2004] to be interpreted as meaning that an air carrier which operates flights as part of a flight rotation system may rely on an incident – specifically on a reduction of the arrival rate brought about by stormy weather conditions – which occurred in relation to the flight three flights back in the rotation sequence of the flight concerned?
- (6) Is Article 8(3) of [Regulation No 261/2004] to be interpreted as meaning that, in the event that a flight lands at an alternative airport of destination, the air carrier must take the initiative to offer transport to a different location, or the passenger must request the transport?
- (7) Are Article 7(1), Article 8(3) and Article 9(1)(c) of [Regulation No 261/2004] to be interpreted as meaning that the passenger has a right to compensation owing to a breach of the obligations to provide assistance and care provided for in Articles 8 and 9?

21. Written observations were submitted by WZ, the Austrian Government and the European Commission.

III. Analysis

22. As indicated above, this Opinion will address only the second, third, sixth and seventh questions, in accordance with the Court's request.

23. I will thus examine those questions in turn.

A. *The second and third questions*

24. By its second and third questions, which should be examined together, the referring court essentially asks the Court whether Article 5(1)(c), Article 6(1), Article 7(1) and Article 8(3) of Regulation No 261/2004 are to be interpreted as meaning that, where a flight lands at an airport which is not that for

which the booking was made, but is in the same town, city or region, the passenger is entitled to compensation on the basis of cancellation of the flight or long delay on arrival. (4)

25. In other words, the Court is asked to determine whether the diversion of a flight to an alternative airport which is near that for which the booking was made can be characterised as a cancellation of the flight, or whether it is to be regarded (where applicable) as a case of delay on arrival. The answer to that question has significant consequences, in that a right to compensation is automatically recognised on the part of the passenger in the event of cancellation of the flight (unless the passenger was informed of the cancellation within the time limits laid down in Article 5(1)(c) of Regulation No 261/2004), whereas no such right arises in a case of delay, unless the duration of the delay is three hours or more.

26. With a view to proposing an answer to those questions, I will first examine the meaning of ‘cancellation’ in Regulation No 261/2004, concluding that that concept, as interpreted in the case-law of the Court, can, in principle, encompass a situation such as that under consideration in the present case, in which a flight lands at an alternative airport situated in the same region as the airport for which the booking was made (section 1). However, I will go on to suggest that that is not the correct reading with respect to a situation which the EU legislature intended, through the introduction of Article 8(3) of Regulation No 261/2004, to exclude from the system of legal rules relating to cancellations (section 2). Accordingly, I will conclude that where a flight is diverted to an airport situated in the same town, city or region, the passenger concerned is entitled to compensation only where he or she is delayed by three hours or more in reaching the airport for which the booking was made, or another close-by destination agreed with the air carrier (section 3).

1. Does the diversion of a flight to an airport serving the same town, city or region as the airport for which the booking was made amount to cancellation of the flight?

(a) The concept of ‘cancellation’ in the case-law of the Court

27. ‘Cancellation’ is defined in Article 2(1) 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’. Since that definition is based on the non-operation of a *flight*, some clarification of the meaning of ‘flight’ is necessary before the meaning of ‘cancellation’ can be precisely determined.

28. ‘Flight’ is not defined by Regulation No 261/2004. Nonetheless, that concept has been characterised in settled case-law of the Court as consisting, essentially, in an air transport operation performed by an air carrier which fixes its itinerary. (5) The Court subsequently held 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. (6) It seems to me to follow that, if the flight itinerary which forms part of that planning is not followed, that constitutes ‘non-operation’ of the flight within the meaning of Regulation No 261/2004, and the flight must therefore be regarded as having been ‘cancelled’.

29. The question then arising is ‘in what circumstances can the flight itinerary be regarded as not having been followed?’

30. It seems to me that that question has been answered by the Court in the judgment in *Sousa Rodríguez and Others*. (7) In the matter which gave rise to that judgment, the Court was asked whether the fact that, shortly after take-off, an aircraft had circled back to the airport of departure, and the passengers had been returned to their original point of departure, constituted cancellation of the flight. In its judgment, the Court held that, for a flight to be considered to have been operated, ‘it is not enough that the aeroplane left in accordance with the scheduled itinerary, but it must also have reached its destination as appearing in the said itinerary’. It reached that conclusion on the basis that ‘the term “itinerary” means the journey to be made by aeroplane from *the airport of departure to the airport of arrival* according to a fixed schedule’. (8) (9)

31. To my mind it follows that changes to the airport of departure and/or the airport of arrival involve, in principle, abandonment of the original planning, and consequently serve to classify the flight as ‘a cancelled flight’ for the purposes of Regulation No 261/2004.

32. This reading seems to me to be supported by the order of the Court in the *Wunderlich* matter. (10) In that case, the question before the Court was whether a flight was to be regarded as having been cancelled where the places of departure and arrival accorded with the planned schedule, but there had been an unscheduled stopover. Considering that the answer was clear from the judgment in *Sousa Rodríguez and Others*, (11) the Court held that the flight was not to be regarded as having been cancelled given that the places of departure and arrival accorded with the planned schedule. (12) In other words, the reason why the flight could not be regarded as having been cancelled lay, the Court held, in the fact that the change to the itinerary did not relate *either to the airport of departure or to the airport of arrival*. In my view it follows, conversely, that any change to the airport of departure or the airport of arrival dictates, in principle, that the flight has been cancelled for the purposes of Regulation No 261/2004.

(b) Application to the present case

33. I will not deny that the factual background to the present case tests the limits of this case-law of the Court. Although the flight taken by the applicant in the main proceedings did not land at the airport of final destination shown in the flight plan, it did land at a nearby airport, and this might be an argument in favour of a more flexible interpretation of the requirement – imposed, it seems to me, by the case-law of the Court discussed above – for the scheduled itinerary to be scrupulously followed.

34. It could be argued that, since it is in the nature of air transport services that difficulties may arise which occasion changes to the flight itinerary, a *slight* change to that itinerary, such as the fact that the aircraft lands at an airport near the airport of final destination, should not lead to the flight being regarded as having been cancelled. That is precisely what the Commission seems to me to be arguing in its written observations when it states that, since the flight taken by the applicant in the main proceedings was only diverted from Berlin Tegel to Berlin Schönefeld, and the journey destination thus remained the same despite the fact that the aircraft landed at an alternative airport, the flight planning was not abandoned, but simply adapted to external circumstances.

35. I do not consider that the case-law of the Court can be understood in the way envisaged by the Commission, for reasons falling into two categories.

36. First, I would point out that the fact that paragraph 18 of the order of the Court in *Wunderlich* (13) uses the term ‘*places of departure and arrival*’, rather than ‘*airports of departure and arrival*’, does not support the Commission’s argument, given that that paragraph is intended to paraphrase paragraph 28 of the judgment of 13 October 2011, *Sousa Rodríguez and Others* (C-83/10, EU:C:2011:652), to which it refers, and paragraph 28 of that judgment refers to the ‘*airports*’ of departure and arrival.

37. Secondly, and more importantly, it must not be forgotten that the Court, in its judgment in *Sturgeon and Others*, originally elevated the itinerary to the status of a decisive factor in distinguishing cases of ‘cancellation’ from cases of ‘delay’ of flights, which have markedly different legal consequences under Regulation No 261/2004. (14) A flexible interpretation of the case-law of the Court examined above, under which slight changes to the airport of departure or the airport of arrival would not constitute cancellation of the flight, would blur that distinction, compromising legal certainty as to the application of Regulation No 261/2004.

38. Accordingly, I take the view that a flight which is diverted so as to land at an airport serving the same town, city or region as that for which the booking was made could, at first sight, be regarded as having been cancelled, on the basis of the Court’s case-law on the interpretation of the concept of ‘cancellation’ as defined in Article 2(1) of Regulation No 261/2004. Accordingly, the diversion of the flight would give rise to a right to compensation by the combined effect of Article 5(1)(c) and Article 7(1) of Regulation No 261/2004.

39. To test that proposition it is necessary, nonetheless, to examine it in the light of the wording of Article 8(3) of Regulation No 261/2004, which applies to the present case inasmuch as it specifically governs the situation where a flight is diverted to an airport serving the same town, city or region as that for which the booking was made.

2. *Whether it would be compatible with Article 8(3) of Regulation No 261/2004 for the diversion in the present case to be regarded as a case of ‘cancellation’*

(a) *Preliminary observations*

40. I would observe that, with a view to guaranteeing a high level of protection for passengers, Regulation No 261/2004 lays down a system of rules under which the rights it provides for – rights to compensation, assistance and care (Articles 7, 8 and 9) – are made conditional on the occurrence of certain events, namely denied boarding, cancellation or significantly delayed departure (Articles 4, 5 and 6), to which the Court has added long delay on arrival in its case-law (judgment in *Sturgeon and Others*). (15) Thus, the cancellation of a flight entitles the passenger to compensation (EUR 250, 400 or 600, depending on the distance the flight would have covered), to assistance in the form of reimbursement or re-routing to the final destination, and to care in the form of free refreshments, free communications (by telephone, fax or email) and, where necessary, free accommodation.

41. In that context, it would be possible to take the view, as indicated in point 38 of this Opinion, that where the flight is diverted as envisaged by Article 8(3) of Regulation No 261/2004, that constitutes cancellation for the purposes of that regulation, and gives rise to all the passenger rights that this entails – which, as regards assistance, will necessarily take the form of the air carrier bearing the cost of transferring the passenger from the airport of arrival to the airport for which the booking was made, or to another close-by destination agreed with the passenger. If that were the case, the proposition advanced at the end of the last section would obviously be correct.

42. However, it is also possible to take the view that where the flight is diverted as envisaged by Article 8(3) of Regulation No 261/2004, that does not constitute cancellation but is a *distinct category of defective performance*, separate from denied boarding, cancellation or delay, and simply gives rise to the one passenger right provided for in the event of defective performance of that kind. If that were the case, the proposition advanced at the end of the last section would obviously have to be modified.

43. As to which of those two readings of Article 8(3) of Regulation No 261/2004 is correct, this must be determined in accordance with the Court’s well-established methods of interpretation.

(b) *Literal, systematic, historical and purposive interpretation*

44. As regards the literal interpretation, I take the view that this could support *both* the first *and* the second possibility envisaged in points 41 and 42 of this Opinion. Article 8(3) goes no further than to provide for a right on the part of the passenger to the cost of a transfer from the airport of arrival to that for which the booking was made, where the flight has been diverted to an airport in the same town, city or region, and there is nothing in its wording to indicate whether or not such a diversion is to be regarded as a ‘cancellation’ within the meaning of Article 2(1) of Regulation No 261/2004.

45. Fortunately, the systematic and historical approaches offer a clearer interpretation of Article 8(3) of Regulation No 261/2004.

46. The systematic approach requires, first of all, that Article 8 of Regulation No 261/2004 is considered in its entirety. As I have said, Article 8(1) sets out the content of a right to assistance, providing that where reference is made to that article, passengers are to be offered the choice between reimbursement (and a return flight to their point of departure) (Article 8(1)(a)), or re-routing, under comparable transport conditions, to their final destination either at the earliest opportunity (Article 8(1)(b)) or at a later date (Article 8(1)(c)). Since Article 5 of Regulation No 261/2004 (‘Cancellation’) does make reference to that

article, the cancellation of a flight entitles the passengers concerned to the benefit of both those alternative forms of assistance. To my mind it is reasonable to suppose that, if the right set out in Article 8(3) of Regulation No 261/2004 had been intended, like the rights to reimbursement or re-routing, to be dependent on cancellation of the flight, it would realistically have been included in paragraph 1 of that article, possibly in a new subparagraph (d).

47. If regard is had to the fact that the right to the cost of transferring the passenger from the airport of arrival to the airport for which the booking was made, where those airports serve the same town, city or region, is set out in an *independent* paragraph, separate from that defining the rights to assistance enjoyed by passengers in cases of cancellation, it necessarily follows that the conditions which must be satisfied in order for the latter rights to arise do not apply to the former.

48. It must be borne in mind, in particular, that the beginning of Article 8(1) ('Where reference is made to this Article ...') presupposes that the rights to assistance for which that paragraph provides are, in principle, subject to the occurrence of the events exhaustively identified in Regulation No 261/2004 and the case-law interpreting that regulation, namely denied boarding (Article 4), cancellation (Article 5), delayed departure (Article 6) and delay on arrival of three hours or more (judgment in *Sturgeon and Others*). (16) Now, if Article 8(3) of Regulation No 261/2004 is to be interpreted *independently* of Article 8(1), as I have just suggested, the right for which it provides cannot be considered to be subject to the occurrence of one of those events. Thus, it follows that Article 8(3) of Regulation No 261/2004 entitles passengers to the cost of a transfer from the airport of arrival to that for which the booking was made, where those airports are in the same town, city or region, *regardless of whether any of those events has in fact occurred*.

49. The justification for interpreting Article 8(3) of Regulation No 261/2004 independently is all the stronger, it seems to me, for the fact that the right in question *is substantively different* from the rights to assistance contained in paragraph 1 of that article, in that it does not relate to 're-routing' of air passengers to their final destination, but relates to a 'transfer' between two nearby airports. While the former is an air transport service generally provided by the carrier in question, (17) the latter is a transport service of a different kind, generally provided by an economic operator which is independent of the air carrier, with the latter simply being responsible for the costs incurred by the passenger in obtaining the benefit of the service. To summarise, I consider that the *distinct* nature of the right provided for by Article 8(3) of Regulation No 261/2004, as compared to the rights to assistance, can be explained by the fact that it is conferred on the passenger by reason of a *distinct* kind of defective performance of the air carrier, as compared to those which give rise to a right to assistance, pursuant to Regulation No 261/2004 and to the case-law of the Court interpreting that regulation.

50. A careful consideration of the preparatory works relating to the regulation at issue, and its predecessor, Regulation (EEC) No 295/91, (18) confirms, in my view, that the right enshrined in Article 8(3) of Regulation No 261/2004 is to be interpreted independently in relation to the other rights of assistance provided for by that article.

51. As regards Regulation No 295/91, I would observe that Article 6(2) of that regulation laid down a rule which was practically identical in content to that found in Article 8(3) of Regulation No 261/2004, (19) and that that rule was contained in a provision relating exclusively to passenger rights to care, (20) rather than appearing among the rights to assistance provided for in Article 4(1) of Regulation No 295/91. (21) As to the preparatory works relating to Regulation No 261/2004, I note that while the Commission proposal which led to that regulation (22) resulted in the rule being moved into an article headed 'Right to reimbursement or re-routing', that rule was not inserted into Article 8(1) of the regulation, but set out separately in Article 8(3), where it remains.

52. On a systematic and historical interpretation, therefore, it can be seen that Article 8(3) of Regulation No 261/2004 was conceived as an independent provision laying down both its own conditions of applicability (the air carrier having offered the passenger a diverted flight to an airport in the same town, city or region as that for which the booking was made) and the legal consequences arising where those

conditions are met (the passenger's right to the costs incurred in connection with the transfer from the airport of arrival to the airport for which the booking was made, or to another close-by destination agreed with the air carrier), and it is not necessary, for the purposes of identifying either the conditions or the consequences, to read it in conjunction with other provisions of Regulation No 261/2004, as interpreted in the case-law of the Court.

53. Finally, the provision at issue should be considered from a purposive angle, noting that the purposive approach is clearly the Court's preferred method of interpretation of Regulation No 261/2004. (23) I should say immediately that this approach dispels any residual doubt as to whether the situation of diversion envisaged by Article 8(3) of that regulation is to be regarded as a cancellation of the flight within the meaning of Article 2(1) of that regulation.

54. As to the main objective pursued by Regulation No 261/2004, it should be observed first of all that, as is clear from recitals 1, 2 and 4 of that regulation, it aims 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, such as denied boarding, cancellation and long delay, and also redressing those situations in a standardised and immediate manner. (24)

55. Thus, the fact that a flight is classified as having been 'cancelled' implies that the inconvenience occasioned to the passengers, by reason of breach of the transport obligation, was *serious*. In my view, the fact that a flight lands at an airport which is not that for which the booking is made, but which serves the same town, city or region, does not amount in itself to a situation causing passengers inconvenience as serious as that caused by cancellation (or denied boarding or delay on arrival of three hours or more).

56. Furthermore, it is not obvious to me that a reading of Article 8(3) of Regulation No 261/2004 on which diversion to an airport serving the same town, city or region as that for which the booking was made is treated as a cancellation would ensure a higher level of protection for passengers than the reading on which it is a distinct category of defective performance, separate from cancellation, denied boarding or long delay on arrival. I note that one of the means employed by that regulation, to achieve its primary objective of ensuring a high level of protection for passengers, is to dissuade air carriers from cancelling flights. (25) Against that background, it is easy to imagine that, if the diversions envisaged by Article 8(3) of Regulation No 261/2004 were not understood as falling outside the concept of 'cancellation', and thus gave rise to the same passenger rights as a cancellation, air carriers might react, in many cases, as astute economic operators, and decide to cancel flights which could simply have been diverted to an airport near that for which the booking was made, and offer passengers on those flights re-routing to that airport, probably at a later date. After all, would it be economically rational to make the organisational effort required for passengers to be able to reach their final destination at the earliest opportunity, which is often non-negligible, if the obligations incumbent on air carriers in the event of such a diversion were comparable to those incumbent on them in the event of cancellation (compensation, assistance and care)?

3. Conclusion

57. In the light of the considerations set out above, I take the view that the interpretation envisaged in point 41 of this Opinion, on which a flight which is diverted so as to land at an airport serving the same town, city or region as that for which the booking was made can be classified as having been cancelled, cannot be accepted, inasmuch as Article 8(3) of Regulation No 261/2004 conceives of such a diversion as a category of defective performance distinct from cancellation of the flight. It follows that, in principle, such a diversion merely entitles the passenger to the cost of a transfer from the airport of arrival to the airport for which the booking was made (or another close-by destination agreed between the air carrier and the passenger), and not to the compensation available in the event of cancellation of the flight.

58. I would add, in so far as it may be useful (and although I am conscious of the fact that this is not the position in the main proceedings), that the possibility can by no means be ruled out that, by reason of such a diversion, the passenger might be delayed by three hours or more in reaching the airport for which the booking was made, or the other close-by destination agreed with the air carrier. It is self-evident that the

long delayed on arrival would then entitle the passenger to compensation pursuant to Articles 5, 6 and 7 of Regulation No 261/2004, read together, as is apparent from the judgment in *Sturgeon and Others*, (26) referred to above.

59. Before concluding, I would observe that an interpretation on which a diversion falling within Article 8(3) of Regulation No 261/2004 was treated as a cancellation of the flight would also, to my mind, conflict with the principle of equal treatment, to which the Court has referred on many occasions in connection with the interpretation of other provisions of that regulation. (27)

60. As is well known, that principle 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. As regards Regulation No 261/2004, the Court has stated that the issue of whether situations covered by that regulation are comparable must be determined ‘by reference to the *type* and *extent* of the various types of inconvenience and damage suffered by the passengers concerned’. (28) (29) Having regard to those criteria, it can hardly be doubted, in my view, that a passenger who has taken a flight which is operated in accordance with the original planning, and who reaches the airport for which the booking was made with a delay of less than three hours, has suffered inconvenience of the same type and extent as a passenger, such as the applicant in the main proceedings, whose flight is diverted to an alternative airport serving the same town, city or region, and who reaches the airport for which the booking was made with a delay of less than three hours. However, if such a diversion were to be regarded as a cancellation, only the second passenger would be entitled to compensation under Article 7 of Regulation No 261/2004.

61. In the light of the foregoing, I suggest that the Court’s answer to the second and third questions should be that Article 5(1)(c), Article 6, Article 7(1) and Article 8(3) of Regulation No 261/2004 are to be interpreted as meaning that, where a flight lands at an airport which is not that for which the booking was made, but is in the same town, city or region, the passenger is not entitled to compensation on the basis that the flight has been cancelled. A right to compensation would arise only if, as a result of the diversion, the passenger was delayed by three hours or more in reaching the airport for which the booking was made, or the other close-by destination agreed with the air carrier.

B. The sixth question

62. By its sixth question, the referring court essentially asks whether Article 8(3) of Regulation No 261/2004 is to be interpreted as meaning that where the flight lands at an airport which is not that for which the booking was made, the air carrier must take the initiative and offer the passenger to bear the cost of transferring the passenger to that airport or another close-by destination agreed with the passenger.

63. First of all, I should indicate my disagreement with the position expressed by the Commission in its written observations, which is that it follows necessarily, from the fact that that article provides that the air carrier must ‘*bear the cost* of transferring the passenger from [the] alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger’, (30) that the carrier is not required to take the initiative with regard to the performance of this obligation. While it is true that the term ‘bear the cost’ may give the impression that the obligation only involves reimbursement of the transfer costs *on request by the passenger*, that interpretation would overlook the fact that the preceding phrase (‘an operating air carrier *offers* a passenger a flight to an airport alternative to that for which the booking was made’) (31) refers to an offer made by the carrier which could be accompanied by an offer to bear the cost incurred by the passenger by reason of the transfer in question. Accordingly, I do not consider that an unequivocal answer to the question can be discerned from the wording of Article 8(3) of Regulation No 261/2004.

64. In those circumstances, the purpose of Article 8(3) of Regulation No 261/2004 is once again of decisive importance to its interpretation. I observe that, while the primary objective of that regulation is to ‘[ensure] a high level of protection for passengers’, as recital 1 of the regulation states, that recital continues ‘moreover, full account should be taken of the requirements of *consumer* protection in general’. (32)

65. In other words, the underlying rationale of the system of rules established by Regulation No 261/2004 is also based on the observation that the passenger/consumer is at a disadvantage in relation to the air carrier/service provider. In order to counterbalance that situation, and thus provide the passenger/consumer effective enjoyment of the rights conferred on him or her, it seems to me that the regulation requires the passenger/consumer to be *actively* assisted by the air carrier/service provider.

66. This is apparent, *inter alia*, from the provisions of Regulation No 261/2004 governing passenger rights to assistance. In that regard, it can be seen that although the various language versions of Article 8(1) of that regulation are not unanimous with regard to the question of whether the initiative lies with the air carrier or the passenger, (33) Article 4(3) (denied boarding), Article 5(1)(a) (cancellation) and Article 6(1) (c)(iii) (delay of at least five hours) of the regulation provide, respectively, that the air carrier ‘shall ... assist [the passengers concerned]’, that the passengers concerned ‘shall be offered assistance by the ... air carrier’, and that those passengers ‘shall be offered by the ... air carrier ... the assistance specified in Article 8(1)(a)’.

67. The need for an offer of assistance from the air carrier reflects the requirement for protection of the passenger/consumer inasmuch as, having been ‘stranded’, by reason of the occurrence of one of the events referred to above, in an airport which is not that of final destination, that passenger/consumer is in a weak position by comparison with the air carrier established in that airport. That is why the air carrier is required to discharge its obligation to provide assistance regardless of whether the passenger has made a prior request.

68. It seems to me that, as the Austrian Government observed in its written observations, that interpretation is fully in line with the judgment of the Court in the *Rusu* case, in which it held that it was for the air carrier which denied boarding to passengers to offer those passengers the assistance specified in Article 8(1) of Regulation No 261/2004. More specifically, the Court held in that judgment that, when putting forward that offer, the air carrier was required to provide the passengers with the information needed to enable them to make an effective choice between reimbursement and re-routing, and that there was no obligation on the part of the passenger to contribute actively to seeking that information. (34) In summary, it seems to me to follow from that judgment that effective enjoyment of the passenger right to assistance is not possible if the need for the air carrier’s prior intervention is overlooked.

69. While the right to the cost of a transfer between the airport of arrival and that for which the booking was made (or another close-by destination agreed with the passenger) is, as I have maintained above, to be interpreted independently of the rights to assistance set out in Article 8(1) of Regulation No 261/2004, I consider that the corresponding obligation of the air carrier must also take account of the requirement of protection for the passenger/consumer as expressed in recital 1 of that regulation.

70. In the light of the foregoing, I suggest that the Court’s answer to the sixth question should be that Article 8(3) of Regulation No 261/2004 is to be interpreted as meaning that where the flight lands at an airport which is not that for which the booking was made, the air carrier must take the initiative and offer the passenger to bear the cost of transferring the passenger to that airport or another close-by destination agreed with the passenger.

C. The seventh question

71. By its seventh question, the referring court essentially asks whether a breach of the obligations to bear the cost of transferring passengers from the airport of arrival to that for which the booking was made (or a close-by destination agreed with the passenger), and of transport between the airport and the place of accommodation, which are incumbent on the air carrier pursuant to Article 8(3) and Article 9(1)(c) of Regulation No 261/2004, can give rise to a right to lump-sum compensation pursuant to Article 7(1) of that regulation.

72. First of all, I suggest that the Court should reformulate that question so as to refer to Article 8(3) of Regulation No 261/2004 alone. As regards Article 9(1)(c) of the regulation, I consider that the relevance of

the interpretation of that provision for the resolution the dispute in the main proceedings is less than clear from the factual background to the present matter and that, in any event, an independent reading of Article 8(3) of the regulation, which I have advocated in this Opinion, is such as to rule out such relevance in so far as, on that reading, it is only Article 8(3) of Regulation No 261/2004 that is applicable to a case of diversion such as that under consideration in the present case.

73. It does not seem to me that the reformulated question gives rise to any particular difficulties, as it can be answered on the basis of the Court's existing case-law.

74. First of all, I observe that the Court has already explicitly indicated, albeit *obiter dictum*, in its judgment in *Sousa Rodríguez and Others*, (35) that the question of the *existence* of a right to compensation on the part of the passenger, arising from a breach by the air carrier of the obligations of assistance and care incumbent on it under Articles 8 and 9 of Regulation No 261/2004, is to be answered in the affirmative.

75. It could be asked whether a passenger also enjoys that right where the air carrier has breached the obligation to bear the cost of transferring the passenger from the airport of arrival to that for which the booking was made (or another close-by destination as agreed), contained in Article 8(3) of Regulation No 261/2004. I would state once again that the approach taken in this Opinion is that the obligations of assistance properly so called, breach of which gives rise to a right to compensation under the judgment in *Sousa Rodríguez and Others*, (36) are contained in Article 8(1) of that regulation alone, and whereas Article 8(3) of the regulation is to be regarded as an independent provision. Nonetheless, I consider that the question must be answered in the affirmative, given that the obligation at issue, just like the obligations of assistance (and care), 'would be nugatory if it could not be enforced', to borrow the words of Advocate General Sharpston in her Opinion in *Sousa Rodríguez and Others*. (37)

76. As to whether the compensation in question can be *lump-sum* compensation under Article 7(1) of Regulation No 261/2004, as claimed by the applicant in the main proceedings, it is apparent on close examination of the Court's reasoning in the judgment in *McDonagh*, (38) where the validity of Article 9 of Regulation No 261/2004 was considered in the light of the principle of proportionality, that it cannot.

77. The Court held that the lack of a temporal or monetary limit on the obligation to provide care contained in Article 9 of that regulation did not infringe the principle of proportionality, given that the financial consequences for air carriers, even if substantial, were not disproportionate to the aim of ensuring a high level of protection for passengers, and that in any event, air carriers, as experienced operators, were entitled to pass on the costs incurred as a result of that obligation to airline ticket prices. At that point, the Court made a further observation so as to clarify that, nonetheless, an air passenger could only obtain, by way of compensation for the failure of the air carrier to comply with its obligation to provide care, reimbursement of the amounts which, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger, a matter it left to be assessed by the national court. (39) The Court thus intended to convey, it seems to me, that an interpretation that is consistent with the principle of proportionality presupposes a *correlation* between the compensation payable by the air carrier and the costs incurred by the passenger in question, and by definition, this rules out lump-sum compensation of the kind provided for by Article 7(1) of Regulation No 261/2004.

78. I readily acknowledge that, when the Court added that observation to its judgment, it was not for the specific purpose of rejecting an entitlement to lump-sum compensation, but simply because it was necessary to place a limit on the amounts claimed by passengers on the basis of breach of the air carrier's obligation to provide care, in cases where the flight was cancelled in extraordinary circumstances which continued for some time. Nonetheless, in my view the general character of the formulation chosen by the Court, combined with the fact that the observation in question also appears in the operative part of that judgment, indicates that the Court considered that to recognise an entitlement, on the part of the passenger, to lump-sum compensation such as that provided for in Article 7(1) of Regulation No 261/2004, arising from any breach of the obligation to provide care contained in Article 9 of that regulation, would have

negative financial consequences for the air carrier of such significance that such an interpretation of that article would infringe the principle of proportionality.

79. It can accordingly be concluded that, in the present case, breach by the air carrier of the obligation of care contained in Article 9(1)(b) of Regulation No 261/2004 entitles the passenger to reimbursement of the amounts which, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for that breach.

80. Given that any provision of Regulation No 261/2004 must be interpreted in such a way as to be consistent with the principle of proportionality, it is clear, to my mind, that the same applies where it is the obligation in Article 8(3) of that regulation that is breached by the air carrier.

81. In the light of the considerations set out above, I suggest that the Court's answer to the seventh question referred should be that a breach of the obligation, incumbent on the air carrier pursuant to Article 8(3) of Regulation No 261/2004, to bear the cost of transferring passengers from the airport of arrival to the airport for which the booking was made (or a close-by destination agreed with the passenger) does not entitle the passenger to the lump-sum compensation referred to in Article 7(1) of that regulation. However, it does entitle the passenger to reimbursement of the amounts which, in the light of the specific circumstances of each case, prove necessary, appropriate and reasonable to make up for the air carrier's breach.

IV. Conclusion

82. Having regard to the foregoing considerations, I suggest that the Court should answer the second, third, sixth and seventh questions referred by the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria) as follows:

1. Article 5(1)(c), Article 6, Article 7(1) and Article 8(3) 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 are to be interpreted as meaning that, where a flight lands at an airport which is not that for which the booking was made, but is in the same town, city or region, the passenger is not entitled to compensation on the basis that the flight has been cancelled. A right to compensation would arise only if, as a result of the diversion, the passenger was delayed by three hours or more in reaching the airport for which the booking was made, or the other close-by destination agreed with the air carrier.
2. Article 8(3) of Regulation No 261/2004 is to be interpreted as meaning that where the flight lands at an airport which is not that for which the booking was made, the air carrier must take the initiative and offer the passenger to bear the cost of transferring the passenger to that airport or another close-by destination agreed with the passenger.
3. A breach of the obligation, incumbent on the air carrier pursuant to Article 8(3) of Regulation No 261/2004, to bear the cost of transferring passengers from the airport of arrival to the airport for which the booking was made (or a close-by destination agreed with the passenger), does not entitle the passenger to the lump-sum compensation referred to in Article 7(1) of that regulation. However, it does entitle the passenger to reimbursement of the amounts which, in the light of the specific circumstances of each case, prove necessary, appropriate and reasonable to make up for the air carrier's breach.

[1](#) Original language: French.

[2](#) Regulation 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).

[3](#) Judgment of 19 November 2009 (C-402/07 and C-432/07, EU:C:2009:716).

[4](#) Despite the reference to Article 6(1) of Regulation No 261/2004, it seems clear to me that the ‘long delay’ envisaged by the third question relates to cases of long delay on arrival, or in other words the situation where arrival is delayed by three hours or more, as considered in the judgment of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716), and not cases of long-delayed departure. It is apparent from the order for reference that the claim for compensation brought by the applicant in the main proceedings before the national courts was based, inter alia, on delay on arrival of the flight. In any event, delayed departure does not give rise, in itself, to any right to compensation, given that Article 6 of Regulation No 261/2004 does not make reference to Article 7 of that regulation.

[5](#) See judgment of 10 July 2008, *Emirates Airlines* (C-173/07, EU:C:2008:400, paragraph 40).

[6](#) Judgment of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716, paragraph 30).

[7](#) Judgment of 13 October 2011 (C-83/10, EU:C:2011:652).

[8](#) Judgment of 13 October 2011, *Sousa Rodríguez and Others* (C-83/10, EU:C:2011:652, paragraph 28).

[9](#) My italics.

[10](#) Order of 5 October 2016 (C-32/16, EU:C:2016:753).

[11](#) Judgment of 13 October 2011 (C-83/10, EU:C:2011:652).

[12](#) Order of 5 October 2016, *Wunderlich* (C-32/16, EU:C:2016:753, paragraph 18).

[13](#) Order of 5 October 2016 (C-32/16, EU:C:2016:753).

[14](#) Judgment of 19 November 2009 (C-402/07 and C-432/07, EU:C:2009:716, paragraphs 29 to 36).

[15](#) Judgment of 19 November 2009 (C-402/07 and C-432/07, EU:C:2009:716).

[16](#) Judgment of 19 November 2009 (C-402/07 and C-432/07, EU:C:2009:716).

[17](#) This is particularly clear from the Italian language version of Article 8 of Regulation No 261/2004, in which the term ‘re-routing’ is translated as ‘imbarco su un volo alternativo’ (my italics), which refers to ‘boarding an alternative flight’.

[18](#) Council Regulation of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport (OJ 1991 L 36, p. 5).

[19](#) Article 6(2) of Regulation No 295/91 was worded as follows: ‘When a town, city or region is served by several airports and an air carrier offers a passenger, who has been denied boarding, a flight to an airport other than the destination airport that the passenger had booked, the cost of travelling between the alternative airports or to an alternative close-by destination, agreed with the passenger, shall be borne by the air carrier’.

[20](#) See Article 6(1) of Regulation No 295/91, under which ‘Apart from the minimum compensation amounts set out in Article 4, the air carrier shall offer free of charge to passengers who are denied boarding: (a) the expenses for a telephone call and/or telex/fax message to the point of destination; (b) meals and refreshments in a reasonable relation to the waiting time; (c) hotel accommodation in cases where an additional stay of one or more nights is necessary’.

[21](#) This provision is worded as follows: ‘In the event of boarding being denied, a passenger shall have the choice between: – reimbursement without penalty of the cost of the ticket for the part of the journey not made, or – re-routing to his final destination at the earliest opportunity, or – re-routing at a later date at the passenger’s convenience’.

[22](#) Proposal for a regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights COM(2001) 784 final – 2001/0305(COD) (OJ 2002 C 103 E/17, p. 225).

[23](#) Among many possible examples, see the Court’s reference to the objectives of Regulation No 261/2004 when it was invited to interpret the word ‘flight’ in its judgment of 10 July 2008, *Emirates Airlines* (C-173/07, EU:C:2008:400, paragraph 35), where it observed that ‘to regard a “flight” ... as an outward and return journey would in fact have the effect of reducing the protection to be given to passengers under the regulation, which would be contrary to its objective of ensuring a high level of protection for passengers’.

[24](#) See judgment of 22 June 2016, *Mennens* (C-255/15, EU:C:2016:472, paragraph 26 and the case-law cited).

[25](#) See, in this regard, Proposal for a regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights COM(2001) 784 final – 2001/0305(COD), paragraph 5. See also judgment of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraph 83).

[26](#) Judgment of 19 November 2009 (C-402/07 and C-432/07, EU:C:2009:716).

[27](#) Judgments of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraphs 93 to 100); of 10 July 2008, *Emirates Airlines* (C-173/07, EU:C:2008:400, points 38 and 39); of 19 November 2009, *Sturgeon*

and *Others* (C-402/07 and C-432/07, EU:C:2009:716, paragraph 48 et seq.); of 23 October 2012, *Nelson and Others* (C-581/10 and C-629/10, EU:C:2012:657, paragraphs 33 to 40); and of 7 September 2017, *Bossen and Others* (C-559/16, EU:C:2017:644, paragraph 19 et seq.), and order of 5 October 2016, *Wunderlich* (C-32/16, EU:C:2016:753, paragraph 21 et seq.).

[28](#) Judgment of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716, paragraph 49).

[29](#) My italics.

[30](#) My italics.

[31](#) My italics.

[32](#) My italics.

[33](#) The German ('so können Fluggäste wählen zwischen ...'), Finnish ('matkustajalle on annettava mahdollisuus valita jokin seuraavista vaihtoehdoista ...'), Lithuanian ('keleiviams leidžiama rinktis ...') and Polish ('pasażerowie mają prawo wyboru pomiędzy ...') language versions merely refer to the fact that passengers may or have the right to choose between the various types of assistance available, without specifying if it is for the air carrier to offer passengers the assistance provided for in that provision or for the latter to ask for it, whereas the other language versions confirm the first alternative.

[34](#) Judgment of 29 July 2019 (C-354/18, EU:C:2019:637, paragraphs 53 to 55).

[35](#) Judgment of 13 October 2011 (C-83/10, EU:C:2011:652, paragraph 44).

[36](#) Judgment of 13 October 2011 (C-83/10, EU:C:2011:652).

[37](#) Opinion of Advocate General Sharpston in *Sousa Rodríguez and Others* (C-83/10, EU:C:2011:427, point 60).

[38](#) Judgment of 31 January 2013 (C-12/11, EU:C:2013:43).

[39](#) See judgment of 31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43, paragraphs 45 to 51).