Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

6 July 2017 *

(Reference for a preliminary ruling — Transport — Common rules for the operation of air services in the European Union — Regulation (EC) No 1008/2008 — Provisions on pricing — Article 22(1) — Article 23(1) — Information required on presentation of fares and rates available to the general public — Obligation to indicate the actual sum of taxes, charges, surcharges or fees — Pricing freedom — Invoicing of handling fees in the event of cancellation of a flight booking by a passenger or failure to present for boarding — Consumer protection)

In Case C-290/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 21 April 2016, received at the Court on 24 May 2016, in the proceedings

Air Berlin plc & Co. Luftverkehrs KG

v

Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, C. Vajda, K. Jürimäe and C. Lycourgos (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 15 March 2017,

after considering the observations submitted on behalf of:

— Air Berlin plc & Co. Luftverkehrs KG, by M. Knospe, Rechtsanwalt,

— Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV, by P. Wassermann, Rechtsanwalt,

— the German Government, by K. Stranz and M. T. Henze, acting as Agents,

— the European Commission, by W. Mölls, K.-P. Wojcik and F. Wilman, acting as Agents,

* Language of the case: German.

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 Articles 22(1) and 23(1) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3).

2 The request has been made in proceedings between Air Berlin plc & Co. Luftverkehrs KG ('Air Berlin') and Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV (Federal Union of Consumer Organisations and Associations) ('the Bundesverband'), concerning an action brought by the Bundesverband for an order prohibiting practices of Air Berlin relating to the display of prices and the general terms and conditions which appear on its website.

Legal context

EU law

Directive 93/13/EEC

3 Article 3(1) and (2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) provides as follows:

'1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

…'

4 Article 6(1) of the directive provides that 'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

Regulation No 1008/2008

5 According to recital 16 of Regulation No 1008/2008:

'Customers should be able to compare effectively the prices for air services of different airlines. Therefore the final price to be paid by the customer for air services originating in the Community should at all times be indicated, inclusive of all taxes, charges and fees. …'

6 Article 2 of that regulation provides as follows:

‘For the purposes of this regulation:

…

(18) “air fares” means the prices expressed in euro or in local currency to be paid to air carriers or their agents or other ticket sellers for the carriage of passengers on air services and any conditions under which those prices apply, including remuneration and conditions offered to agency and other auxiliary services;

…’

7 Article 22 of that regulation, entitled ‘Pricing freedom’, provides in paragraph 1:

‘Without prejudice to Article 16(1), Community air carriers and, on the basis of reciprocity, air carriers of third countries shall freely set air fares and air rates for intra-Community air services.’

8 Article 23 of Regulation No 1008/2008, entitled ‘Information and non-discrimination’, provides in paragraph 1 thereof as follows:

‘Air fares and air rates available to the general public shall include the applicable conditions when offered or published in any form, including on the internet, for air services from an airport located in the territory of a Member State to which the Treaty applies. The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition to the indication of the final price, at least the following shall be specified:

(a) air fare or air rate;

(b) taxes;

(c) airport charges; and

(d) other charges, surcharges or fees, such as those related to security or fuel;

where the items listed [in subparagraphs (b), (c) and (d) of the third sentence of Article 23(1)] have been added to the air fare or air rate. Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an “opt-in” basis.’

German law

9 Paragraph 307(1) and (2) of the Bürgerliches Gesetzbuch (Civil Code), in the version applicable to the facts in the main proceedings (‘the BGB’), provides as follows:

‘(1) Provisions in general terms and conditions are of no effect if they unreasonably disadvantage the contracting partner of the party using them, contrary to the requirements of good faith. …

(2) In case of doubt, unreasonable disadvantage is to be assumed to exist if a provision

1. is incompatible with essential basic principles of the statutory rule from which it diverges, or

2. restricts essential rights or obligations arising from the nature of the contract in such a way that achieving the purpose of the contract is jeopardised.'

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

10 On 26 April 2010, the Bundesverband simulated a booking on Air Berlin's website for a single flight from Berlin-Tegel airport (Germany) to Cologne (Germany). At the first stage of the booking, a list in table form showing possible flight connections at different prices was displayed. After selecting one of the flight connections, a table containing various items and their prices indicated, inter alia, an amount of EUR 3 under 'Taxes and charges'. During another booking simulated by the Bundesverband on the same website, on 20 June 2010, for a return flight from Berlin-Tegel to Frankfurt am Main (Germany), an amount of EUR 1 was displayed under 'Taxes and charges'.

11 According to the Bundesverband, the amounts of the taxes and charges indicated on the Air Berlin website were much lower than those payable in practice by the airline company, under the schedules of charges of the airports in question, and were, as a consequence, likely to mislead the consumer. The Bundesverband, considering that that display was contrary to the third sentence of Article 23(1) of Regulation No 1008/2008, brought an action before the Landgericht Berlin (Regional Court, Berlin, Germany) for an order prohibiting that practice.

12 In the context of that action, the Bundesverband also disputed the legality of the term in point 5.2 of Air Berlin's general terms and conditions available on its website ('the general terms and conditions'), which states that Air Berlin is to charge, as a handling fee, an amount of EUR 25 per booking and per passenger on the amount to be reimbursed to the passenger when he has not taken a flight or cancelled his booking. The Bundesverband claimed that that term infringed Paragraph 307 of the BGB, in so far as it unduly disadvantaged the contracting partners of the airline company. It added that Air Berlin cannot charge any separate fees for the fulfilment of a legal obligation.

13 The Landgericht Berlin (Berlin Regional Court) upheld the application of the Bundesverband and ordered Air Berlin, on pain of penalties, first, to stop including, under the heading 'Taxes and charges', when displaying the prices of flights on its website, amounts which do not correspond to those which that airline company must in fact pay and, secondly, to remove point 5.2. from its general terms and conditions.

14 Following the dismissal of the appeal brought by Air Berlin before the Kammergericht Berlin (Higher Regional Court, Berlin, Germany), that airline company brought an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice, Germany).

15 The Bundesgerichtshof (Federal Court of Justice) raises a question, first, concerning the interpretation that should be given to the third sentence of Article 23(1) of Regulation No 1008/2008. Having regard to the case-law of the Court of Justice, the Bundesgerichtshof has doubts concerning the compliance of the price display on Air Berlin's website with the requirements of that provision.

16 In the second place, the referring court seeks clarification regarding the interpretation of Article 22(1) of that regulation in order to determine whether the rule laid down in that provision, in accordance with which air carriers are to freely set air fares and air rates for air services within the European Union, can justify the imposition, by means of Air Berlin's general terms and conditions, of separate charges for passengers who have not taken a flight or who have cancelled their booking.

17 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is the third sentence of Article 23(1) of Regulation (EC) No 1008/2008 to be interpreted as meaning that, when publishing their air fares, air carriers must specify the actual amount of taxes, airport charges and other charges, surcharges or fees listed in subparagraphs (b) to (d) and therefore may not partially include them in their air fares, referred to in subparagraph (a) of that provision?

(2) Is Article 22(1) of Regulation (EC) No 1008/2008 to be interpreted as meaning that it precludes the application of a national law on general terms and conditions, which is based on EU law, according to which a separate handling fee cannot be imposed on customers who have not taken a flight or cancelled their booking?’

Consideration of the questions referred

The first question

18 By its first question, the referring court asks whether the third sentence of Article 23(1) of Regulation (EC) No 1008/2008 must be interpreted as meaning that, when publishing their air fares, air carriers must specify the actual amount of taxes, airport charges and other charges, surcharges and fees referred to in subparagraphs (b) to (d) of the third sentence of Article 23(1) of that regulation and may not, as a consequence, partially include those elements in the air fare, referred to in subparagraph (a) of the third sentence of Article 23(1) of that regulation.

19 The second sentence of Article 23(1) of Regulation No 1008/2008 provides that, on publication, including on the internet, of air fares and air rates available to the general public ‘the final price to be paid is at all times to be indicated and is to include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication’. The third sentence of Article 23(1) of that regulation provides that, in addition to the indication of the final price, the air fare or air rate must be specified as well as taxes, airport charges and other charges, surcharges or fees, such as those related to security or fuel, where those items have been added to the air fare or air rate.

20 According to Air Berlin, air carriers are not required separately to display the amount of the taxes, airport charges and other charges, surcharges or fees listed in subparagraphs (b) to (d) of the third sentence of Article 23(1) of Regulation 1008/2008, in the event that those items are included in the air fare, referred to in subparagraph (a) of the third sentence of Article 23(1) of that regulation. Air Berlin maintains that only the final price is decisive for the purposes of enabling customers to compare the different prices offered by air carriers.

21 The Bundesverband, the German Government and the European Commission submit that the third sentence of Article 23(1) of Regulation No 1008/2008 requires air carriers to specify the amount of the various components of the final price.

22 It should be noted that, in interpreting a provision of EU law, it is necessary 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 judgment of 19 July 2012, *ebookers.com Deutschland*, C-112/11, EU:C:2012:487, paragraph 12 and the case-law cited).

23 It is evident from the wording of the third sentence of Article 23(1) of Regulation No 1008/2008 that the obligation to specify at least the air fare, as well as the taxes, airport charges and other charges, surcharges or fees, where these items have been added to the air fare, is in addition to the obligation under the second sentence of Article 23(1) to indicate the final price (see, to that effect, judgment of 15 January 2015, *Air Berlin*, C-573/13, EU:C:2015:11, paragraph 44).

24 Accordingly, contrary to what Air Berlin claims, relying, in particular, on recital 16 of Regulation 1008/2008, an air carrier which merely referred to the final price would not satisfy the requirements of the third sentence of Article 23(1) of that regulation, since they impose an obligation to indicate the amounts of the various items which make up that price.

25 That finding is not called into question by the argument put forward by Air Berlin that the very wording of the third sentence of Article 23(1) of Regulation No 1008/2008 only obliges air carriers to specify the items listed in subparagraphs (b) to (d) of the third sentence of Article 23(1) of that regulation 'where [those] items … have been added to the air fare' and not when they have been included in that fare.

26 Article 2(18) of Regulation No 1008/2008, which defines 'air fares', does not refer to taxes, airport charges and other charges, surcharges and fees, as being items included in that fare. It follows that air carriers are not authorised to include those items in the air fare which they are obliged to specify by virtue of subparagraph (a) of the third sentence of Article 23(1) of that regulation.

27 Contrary to what Air Berlin also claims, such an interpretation of the third sentence of Article 23(1) of Regulation No 1008/2008 cannot have the effect of depriving that provision of its meaning. The phrase 'where the items listed [in subparagraphs (b) to (d) of the third sentence of Article 23(1)] have been added to the air fare' is clearly intended to distinguish a situation in which air carriers choose to pass the costs of those items on to their customers from one in which they choose to bear the costs themselves, with the obligation to specify those items existing only in the former case.

28 It follows from the foregoing that the various items which make up the final price to be paid, referred to in the third sentence of Article 23(1) of Regulation No 1008/2008 must always be brought to the customer's attention in terms of the amounts that they represent in that final price.

29 That interpretation is corroborated by an examination both of the objectives pursued by the regulation of which the provision at issue in the main proceedings is part and of its context.

30 Article 23(1) of Regulation No 1008/2008 seeks to ensure, in particular, that there is information and transparency with regard to prices for air services from an airport located in a Member State and accordingly to contribute to safeguarding protection of customers who use those services. In that respect, it lays down information and transparency obligations as regards, in particular, the conditions applicable to air fares, the final price to be paid, the air fare and the unavoidable and foreseeable items that are added to the fare, and the optional price supplements relating to services that supplement the air service itself (judgment of 18 September 2014, *Vueling Airlines*, C-487/12, EU:C:2014:2232, paragraph 32).

31 The objective of ensuring information and transparency with regard to prices would not be achieved if the third sentence of Article 23(1) of Regulation No 1008/2008 were to be interpreted as offering air carriers a choice between including taxes, airport charges and other charges, surcharges and fees in the air fare, and indicating those various items separately.

32 Moreover, a different interpretation of the third sentence of Article 23(1) of Regulation No 1008/2008 would deprive that provision of all practical effect. On the one hand, partial inclusion, in the air fare, of the items listed in subparagraphs (b) to (d) of the third sentence of Article 23(1) of Regulation No 1008/2008 would result in specifying only sums with no connection to reality. On the other hand,

full inclusion of those items in the air fare would have the effect that the amount indicated in respect of the air fare could be equal to the final price to be paid. Moreover, the obligation to specify the final price to be paid is already laid down in the second sentence of Article 23(1) of that regulation.

33 Finally, it is necessary to examine Air Berlin's argument that the indication of the actual amounts of the items referred to in subparagraphs (c) and (d) of the third sentence of Article 23(1) of Regulation No 1008/2008 is impossible, since those amount are unknown at the time of booking of the flight.

34 In that regard, it should be noted that, when purchasing a ticket, the customer must pay a final and not a provisional price. Consequently, although the amount of certain charges or certain surcharges or fees, such as those relating to fuel, can only, as Air Berlin claims, be known exactly when the flight has taken place, and sometimes even several month later, the amounts of the taxes, airport charges and other charges, surcharges and fees listed in subparagraphs (b) to (d) of the third sentence of Article 23(1) of Regulation No 1008/2008, to be paid by the customer, correspond to the estimate made by the air carrier at the time the flight was booked.

35 To that effect, the second sentence of Article 23(1) of Regulation No 1008/2008 indeed provides that the components of the final price to be paid by the customer are, in addition to the air fare or air rate, all applicable taxes, and charges, surcharges and fees which are 'foreseeable at the time of publication'.

36 Having regard to the foregoing, the answer to the first question is that the third sentence of Article 23(1) of Regulation (EC) No 1008/2008 must be interpreted as meaning that, when publishing their air fares, air carriers must specify separately the amounts payable by customers in respect of taxes, airport charges and other charges, surcharges or fees referred to in subparagraphs (b) to (d) of the third sentence of Article 23(1) of that regulation and may not, as a consequence include those items, even partially, in the air fare, referred to in subparagraph (a) of the third sentence of Article 23(1) of that regulation.

The second question

37 By the second question, the referring court asks in essence whether Article 22(1) of Regulation No 1008/2008 must be interpreted as precluding the application of a national law transposing Directive 93/13 from leading to a declaration of invalidity of a term in general terms and conditions which allows separate flat-rate handling fees to be billed to customers who did not take a flight or who cancelled their booking.

38 The referring court considers that point 5.2 of the general terms and conditions, which provides for a charge of EUR 25 per passenger and per booking for handling costs in the event of cancellation of a flight booking at the economy rate and in the event that a flight is not taken, unduly disadvantages Air Berlin customers and, in accordance with Paragraph 307(1) of the BGB, is of no effect.

39 The referring court also explains that the first sentence of Paragraph 307(1) and point 1 of Paragraph 307(2) of the BGB transposes Article 3(1) and the first part of the first sentence of Article 6(1) of Directive 93/13 into German law.

40 In that regard, Air Berlin maintains, in its written observations, that the finding by the German courts of first instance and appeal that the term in point 5.2 of the general terms and conditions was unfair was based exclusively on national law and not on EU law.

41 It should be noted that, in the context of a reference for a preliminary ruling, the Court is only empowered to rule on the interpretation or validity of EU law in the light of the factual and legal situation as described by the referring court, in order to provide that court with such guidance as will assist it in resolving the dispute before it (see, to that effect, judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 35).

42 Under those circumstances, the answer to the second question referred for a preliminary ruling must start from the premiss, which is that of the referring court, that the national legislation, which is intended to protect consumers from abusive practices, namely Paragraph 307 of the BGB, on the basis of which the term in point 5.2 of the general terms and conditions is considered by the referring court to be unfair, is based on EU law, in so far as that provision transposes Directive 93/13.

43 The referring court asks whether, in the light of judgment of 18 September 2014, *Vueling Airlines* (C-487/12, EU:C:2014:2232), it is necessary to consider that the freedom recognised for air carriers to determine air fares under Article 22(1) of Regulation No 1008/2008 precludes the application to such a term of national legislation which transposes EU law on consumer protection.

44 Without there being any need to rule on the question whether the flat-rate handling fees provided for in point 5.2 of the general terms and condition are covered by the concept of 'air fares' within the meaning of Regulation 1008/2008, and consequently, whether that term may benefit from the pricing freedom set out in Article 22(1) of that regulation, it must be noted that the purpose of Directive 93/13, in accordance with Article 1(1) thereof, is to approximate the laws of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer. It is accordingly a general directive for consumer protection, intended to apply in all sectors of economic activity. The objective of that directive is not to restrict the pricing freedom of air carriers but to require Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair for the purposes of the protection granted to a consumer on account of the fact that he is in a position of weakness vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (see, to that effect, judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, paragraph 51 and the case-law cited).

45 In that context, it would be possible to find that that directive does not apply in the field of air services governed by Regulation No 1008/2008 only if it is clearly provided for by the provisions of that regulation. However, neither the wording of Article 22 of Regulation No 1008/2008 relating to pricing freedom nor that of the other provisions of that regulation permits such a view, even though Directive 93/13 was already in force on the date of adoption of that regulation.

46 Nor can it be inferred from the objective pursued by Article 22(1) of Regulation No 1008/2008 that contracts of carriage by air are not subject to compliance with the general rules protecting consumers against unfair terms.

47 In that regard, the Commission is right to note that the pricing freedom laid down in Article 22 of Regulation No 1008/2008 is the culmination of progressive elimination of price controls by Member States in order to open up the sector to competition. As Advocate General Bot observed in point 27 of his Opinion in *Vueling Airlines* (C-487/12, EU:C:2014:27), the objective of the liberalisation of the airline market was to achieve greater variety in supply and lower prices for consumers. Thus, Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ 1992 L 240, p. 15), repealed by Regulation No 1008/2008, indicated in the fifth recital thereof that it was appropriate 'to complement price freedom with adequate safeguards for the interests of consumers and industry'.

48 The judgment of 18 September 2014, *Vueling Airlines* (C-487/12, EU:C:2014:2232) cannot lead to a different conclusion. In that judgment, the Court considered that Article 22(1) of Regulation No 1008/2008 precludes legislation, such as that at issue in that case, which requires air carriers to

carry, in all circumstances, baggage checked-in by their passengers without it being possible to charge any price supplement to carry such baggage. By contrast, the Court did not in any way state that pricing freedom precludes, in general, the application of any consumer protection rule. On the contrary, the Court noted that, without prejudice to the application, in particular, of rules enacted in the field of consumer protection, EU law does not preclude Member States from regulating aspects of the contract of carriage by air, in order, in particular, to protect consumers against unfair practices, provided that the pricing provisions of Regulation (EC) No 1008/2008 are not affected (see, to that effect, judgment of 18 September 2014, *Vueling Airlines*, C-487/12, EU:C:2014:2232, paragraph 44).

49 It cannot therefore be concluded from that judgment that Article 22(1) of Regulation No 1008/2008 precludes the application of national legislation transposing the provisions of EU law on consumer protection, such as those of Directive 93/13.

50 It follows from the foregoing considerations that the pricing freedom of air services within the European Union, laid down in Article 22(1) of Regulation No 1008/2008, cannot prevent the application of such national legislation to the terms of contracts of carriage by air.

51 To answer otherwise would be to deprive consumers of rights derived from Directive 93/13 in the field of pricing of air services and to enable air carriers, in the absence of any control, to include unfair terms concerning pricing in contracts concluded with passengers.

52 Having regard to the foregoing, the answer to the second question is that Article 22(1) of Regulation No 1008/2008 must be interpreted as not precluding the application of national legislation transposing Directive 93/13 from leading to a declaration of invalidity of a term in general terms and conditions which allows separate flat-rate handling fees to be billed to customers who did not take a flight or who cancelled their booking.

Costs

53 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 (Fourth Chamber) hereby rules:

1. **The third sentence of Article 23(1) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community must be interpreted as meaning that, when publishing their air fares, air carriers must specify separately the amounts payable by customers in respect of taxes, airport charges and other charges, surcharges or fees referred to in subparagraphs (b) to (d) of the third sentence of Article 23(1) of that regulation and may not, as a consequence include those items, even partially, in the air fare referred to in subparagraph (a) of the third sentence of Article 23(1) of that regulation.**

2. **Article 22(1) of Regulation No 1008/2008 must be interpreted as not precluding the application of national legislation transposing Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts from leading to a declaration of invalidity of a term in general terms and conditions which allows separate flat-rate handling fees to be billed to customers who did not take a flight or who cancelled their booking.**

[Signatures]