



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

19 July 2012*

(Transport — Air transport — Common rules for the operation of air services in the European Union — Regulation (EC) No 1008/2008 — Obligation on the person selling air travel to ensure that the customer's acceptance of optional price supplements is on an opt-in basis — Concept of 'optional price supplements' — Price of flight cancellation insurance provided by an independent insurance company and forming part of the overall price)

In Case C-112/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Köln (Germany), made by decision of 2 March 2011, received at the Court on 4 March 2011, in the proceedings

ebookers.com Deutschland GmbH

v

Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász, G. Arestis (Rapporteur) and D. Šváby, Judges,

Advocate General: J. Mazák,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 11 January 2012,

after considering the observations submitted on behalf of:

- ebookers.com Deutschland GmbH, by P. Plog and S. Zimprich, Rechtsanwälte,
- the Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV, by J. Hennig, Rechtsanwalt,
- the Spanish Government, by S. Centeno Huerta, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli, avvocato dello Stato,

* Language of the case: German.

— the Austrian Government, by C. Pesendorfer, acting as Agent,
— the Finnish Government, by H. Leppo, acting as Agent,
— the European Commission, by K. Simonsson and K.-P. Wojcik, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 1 March 2012,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation 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 (OJ 2008 L 293, p. 3).
- 2 The reference has been made in proceedings between, on the one hand, ebookers.com Deutschland GmbH ('ebookers.com'), which sells air travel through an online portal which it operates, and, on the other, the Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV (federal union of consumer organisations and associations; the 'BVV'), concerning the lawfulness of the manner in which that travel is sold.

Legal context

- 3 As recital 16 in the preamble to Regulation No 1008/2008 states:

'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. ...'
- 4 Article 2(18) of that regulation defines 'air fares', for the purposes of that regulation, as being:

'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'.
- 5 Similarly, Article 2(19) of Regulation No 1008/2008 defines 'air rates', for the purposes of that regulation, as being:

'the prices expressed in euro or in local currency to be paid for the carriage of cargo and the conditions under which those prices apply, including remuneration and conditions offered to agency and other auxiliary services'.
- 6 Under the heading 'Information and non-discrimination', Article 23 of Regulation No 1008/2008 provides in paragraph 1 thereof:

'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 under (b), (c) and (d) 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.’

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

- 7 ebookers.com organises air travel through an online portal which it itself operates. When a customer has selected a specific flight during the booking process accessible through that portal, the costs relating to the reservation are listed in the top right-hand corner of the internet page of ebookers.com, under the heading ‘your current travel costs’ (‘Ihre aktuellen Reisekosten’). In addition to the actual price of the flight, that list also contains amounts in respect of ‘taxes and fees’ (‘Steuern und Gebühren’) and ‘travel cancellation insurance’ (‘Versicherung Rücktrittskostenchutz’), calculated automatically. The total of those costs represents the ‘total price of travel’ (‘Gesamtreisepreis’).
- 8 On finalisation of the booking, the customer must pay that total price of travel in a single sum to ebookers.com. The latter then pays the flight costs arising to the air carrier concerned and the costs of the cancellation insurance to an insurance company, which is legally and economically separate from the air carrier. Likewise, ebookers.com passes on the taxes and fees to their recipients. Should the customer not wish to take out cancellation insurance, there is a notice at the bottom of the internet page of ebookers.com indicating how the customer should proceed, namely by means of an opt-out.
- 9 The BVV takes the view that this method of selling air travel infringes Article 23(1) of Regulation No 1008/2008 and has called upon ebookers.com to refrain from presetting the taking out of travel cancellation insurance in the procedure for booking flights set up on its internet portal. On 28 December 2009, the BVV made an application to that effect to the Landgericht Bonn (Regional Court, Bonn), which decided to uphold that application in its entirety by decision of 19 July 2010.
- 10 In the context of the appeal lodged by ebookers.com on 23 August 2010 against that decision, the Oberlandesgericht Köln (Higher Regional Court, Cologne) seeks clarification as to whether the offer of ebookers.com at issue in the main proceedings falls within the scope of Article 23(1) of Regulation No 1008/2008. Taking the view that the outcome of the main proceedings depends on the interpretation of that provision, but that neither the wording nor origin of that provision show unambiguously whether it is applicable to the present dispute, the Oberlandesgericht Köln decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Article 23(1) of [Regulation No 1008/2008], according to which optional price supplements are to be communicated in a clear, transparent and unambiguous way at the start of any booking process and are to be accepted by the customer on an opt-in basis, also apply to costs connected with air travel

arising from services provided by third parties (in this case, an insurer offering travel cancellation insurance) and which are charged to the air traveller by the company organising the air travel together with the air fare as part of a total price?’

The question referred for a preliminary ruling

- 11 By its question, the Oberlandesgericht Köln asks, in essence, whether the concept of ‘optional price supplements’, referred to in the last sentence of Article 23(1) of Regulation No 1008/2008, must be interpreted as meaning that it covers costs, connected with the air travel, arising from services, such as the travel cancellation insurance at issue in the main proceedings, supplied by a party other than the air carrier and charged to the customer by the company selling that travel, together with the air fare, as part of a total price.
- 12 In that regard, it should be borne in mind that, according to the Court’s settled case-law, in interpreting a provision of European Union 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, inter alia, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case C-34/05 *Schouten* [2007] ECR I-1687, paragraph 25; and Case C-433/08 *Yaesu Europe* [2009] ECR I-11487, paragraph 24).
- 13 As is evident from both the title and the wording of Article 23(1) of Regulation No 1008/2008, that provision seeks to ensure that there is information and transparency with regard to the prices for air services and, consequently, it contributes to safeguarding protection of customers having recourse to those services.
- 14 In particular, the last sentence of Article 23(1) of Regulation No 1008/2008 refers to ‘optional price supplements’, which are not unavoidable, in contrast to air fares or air rates and other items making up the final price of the flight, referred to in the second sentence of Article 23(1) of that regulation. Those optional price supplements therefore relate to services which, supplementing the air service itself, are neither compulsory nor necessary for the carriage of passengers or cargo, with the result that the customer chooses either to accept or refuse them. It is precisely because a customer is in a position to make that choice that such price supplements must be communicated in a clear, transparent and unambiguous way at the start of any booking process, and that their acceptance by the customer must be on an opt-in basis, as laid down in the last sentence of Article 23(1) of Regulation No 1008/2008.
- 15 That specific requirement in relation optional price supplements, within the meaning of the last sentence of Article 23(1) of Regulation No 1008/2008, is designed to prevent a customer of air services from being induced, during the process of booking a flight, to purchase services additional to the flight proper which are not unavoidable and necessary for the purposes of that flight, unless he chooses expressly to purchase those additional services and to pay the corresponding price supplement.
- 16 The requirement in question corresponds, moreover, to the general requirement concerning consumer rights in the sphere of additional payments, laid down in Article 22 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64). In accordance with that provision, before the consumer is bound by an offer, the trader must seek his express consent to any extra payment in addition to the remuneration agreed upon for the trader’s main contractual obligation, and that consent cannot be inferred by the trader by using default options which the consumer is required to reject in order to avoid the additional payment.

- 17 In that connection, as the Advocate General observed in point 39 of his Opinion, it would be at odds with the purpose of protecting a customer for air services — pursued by the last sentence of Article 23(1) of Regulation No 1008/2008 — if that protection were to depend on whether the optional additional service, connected with the flight itself, and the corresponding price supplement offered during the process of booking that flight originate from an air carrier or from another party which is legally and economically separate from it. If it were permissible to make that protection dependent on the status of the provider of that additional service, by granting protection only where the service was provided by an air carrier, that protection could easily be circumvented and, consequently, the objective in question certainly compromised. In any event, such a procedure would be incompatible with Article 22 of Directive 2011/83.
- 18 It follows that, contrary to what ebookers.com claims, for the purposes of granting the protection referred to in the last sentence of Article 23(1) of Regulation No 1008/2008, what matters is not that the optional additional service and the corresponding price supplement are offered by the air carrier concerned or by a service provider linked to it, but that that service and the corresponding price are offered in relation to the flight itself during the flight booking process.
- 19 In addition, it must be noted that, contrary to what ebookers.com claims, that interpretation is not incompatible with the scope of Regulation No 1008/2008. Although, in accordance with Article 1(1) thereof, the purpose of the regulation is defined by reference to air carriers — since Article 1(1) provides that the regulation regulates the licensing of Community air carriers and their right to operate intra-Community air services — the fact remains that the purpose of the regulation also includes, in the words of Article 1(1) thereof, ‘the pricing of intra-Community air services’. Likewise, it is clear from the wording of the last sentence of Article 23(1) of Regulation No 1008/2008, which is drafted in general terms, and from its objective of providing protection, that, as established in paragraph 17 above, the requirement for protection laid down in that provision cannot depend on the status of the provider of the optional additional service connected with the flight.
- 20 In the light of all of the foregoing considerations, the answer to the question is that the concept of ‘optional price supplements’, referred to in the last sentence of Article 23(1) of Regulation No 1008/2008, must be interpreted as meaning that it covers costs, connected with the air travel, arising from services, such as the flight cancellation insurance at issue in the main proceedings, supplied by a party other than the air carrier and charged to the customer by the person selling that travel, together with the air fare, as part of a total price.

Costs

- 21 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 (Third Chamber) hereby rules:

The concept of ‘optional price supplements’, referred to in the last 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 it covers costs, connected with the air travel, arising from services, such as the flight cancellation insurance at issue in the main proceedings, supplied by a party other than the air carrier and charged to the customer by the person selling that travel, together with the air fare, as part of a total price.

[Signatures]