

Court of Justice EU, 15 January 2015, Air Berlin v Bundesverband



ADVERTISING LAW

In a computerised booking system, the final price to be paid must be indicated whenever the prices of air services are shown, not only for the air service specifically selected by the customer, but also for each air service in respect of which the fare is shown

• In the light of the foregoing, the answer to the first question is that the second sentence of Article 23(1) of Regulation No 1008/2008 must be interpreted as meaning that, in the context of a computerised booking system such as that at issue in the main proceedings, the final price to be paid must be indicated whenever the prices of air services are shown, including when they are shown for the first time.

• In the light of the foregoing, the answer to the second question is that the second sentence of Article 23(1) of Regulation No 1008/2008 must be interpreted as meaning that, in the context of a computerised booking system such as that at issue in the main proceedings, the final price to be paid must be indicated not only for the air service specifically selected by the customer, but also for each air service in respect of which the fare is shown.

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Court of Justice EU, 15 January 2015

(T. von Danwitz, C. Vajda (Rapporteur), A. Rosas, E. Juhász and D. Šváby)

JUDGMENT OF THE COURT (Fifth Chamber)

15 January 2015 (*)

(Reference for a preliminary ruling — Regulation (EC) No 1008/2008 — Air services — Second sentence of Article 23(1) — Price transparency — Computerised booking system — Air fares — Indication at all times of the final price)

In Case C-573/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 18 September 2013, received at the Court on 12 November 2013, in the proceedings
Air Berlin plc & Co. Luftverkehrs KG

v

Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband e. V.,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda (Rapporteur), A. Rosas, E. Juhász and D. Šváby, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Air Berlin plc & Co. Luftverkehrs KG, by M. Knospe and A. Walz, Rechtsanwälte,

– the Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband e. V., by P. Wassermann, Rechtsanwalt,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the Belgian Government, by J.-C. Halleux and T. Materne, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by W. Ferrante, avvocato dello Stato,

– the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the European Commission, by W. Mölls and F. Wilman, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second 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 (OJ 2008 L 293, p. 3).

2 The request has been made in proceedings between Air Berlin plc & Co. Luftverkehrs KG ('Air Berlin'), an air carrier, and the Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband e. V. (Federal Union of Consumer Organisations and Associations; 'the Bundesverband') concerning the way in which air fares are presented in the computerised booking system of Air Berlin.

Legal context

3 Recital 16 in the preamble to Regulation No 1008/2008 is worded as follows:

'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. Community air carriers are also encouraged to indicate the final price for their air services from third countries to the Community.'

4 According to Article 1(1), Regulation No 1008/2008 regulates the licensing of EU air carriers, the right of EU air carriers to operate air services within the EU and the pricing of air services within the EU.

5 Article 2 of Regulation No 1008/2008, headed 'Definitions', provides:

'For the purposes of this Regulation:

...

4. “air service” means a flight or a series of flights carrying passengers, cargo and/or mail for remuneration and/or hire;

...

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;

...

6 Article 23 of Regulation No 1008/2008, headed ‘Information and non-discrimination’, provides in paragraph 1:

‘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 questions referred for a preliminary ruling

7 Until the end of 2008, Air Berlin’s booking system was organised in such a way that, having selected a journey and a date, the customer would find, as a second step, a table listing the possible flight connections for the chosen date, and showing departure and arrival times and two fares for each flight. A box below that table showed the taxes and charges applicable to the air service selected and the fuel surcharge, while the ‘price per person’ including all those elements was set within a border. A double asterisk next to the box explained, with reference to the conditions applicable, that a service charge not yet included in the final price might apply. After entering the necessary personal details as a third step, the customer could, in the fourth step, establish the final price of travel, including the service charge.

8 As a result of the entry into force of Regulation No 1008/2008 on 1 November 2008, Air Berlin modified the second step of its booking system so that the air fare for the selected air service was displayed in the table together with the departure and arrival times and, separately, taxes and charges, the fuel surcharge and the total amount of those separately indicated elements.

A box below the table showed the price calculated on the basis of those figures, the service charge and, below that, the final price per person for the selected flight.

9 The Bundesverband took the view that this presentation of prices did not meet the requirements laid down by the second sentence of Article 23(1) of Regulation No 1008/2008, and brought an action against Air Berlin by which it sought an order requiring Air Berlin to discontinue this practice, and reimbursement of the costs incurred in connection with a warning notice relating to that action. The application of the Bundesverband having been granted by the court of first instance, whose judgment was upheld on appeal, Air Berlin brought an appeal on a point of law before the referring court.

10 According to the referring court, the outcome of this appeal on a point of law depends on the interpretation of the second sentence of Article 23(1) of Regulation No 1008/2008.

11 The referring court considers, as does the appeal court, that a service charge such as that levied by Air Berlin constitutes remuneration that is unavoidable and foreseeable at the time of publication, within the meaning of the second sentence of Article 23(1) of Regulation No 1008/2008, and must therefore be included in the final price indicated.

12 Nevertheless, in the case of computerised booking systems such as that at issue in the main proceedings, the referring court identifies two distinct problems in the interpretation of the second sentence of Article 23(1) of Regulation No 1008/2008, concerning, respectively, the precise point in time at which the final price for air services must be indicated during the booking process, and the way in which that final price is to be shown.

13 As regards, in the first place, the precise moment in time at which the final price for air services must be indicated during the booking process, the referring court notes that the appeal court held that, taking into account the way in which the air fare was indicated in Air Berlin’s booking system, Air Berlin had infringed the second sentence of Article 23(1) of Regulation No 1008/2008. The appeal court considered that that provision, which provides that the final price to be paid is ‘at all times’ to be indicated, must be understood as meaning that the final price must appear whenever a price is indicated. The appeal court therefore held that that condition is not met if a table merely indicates the prices of the various flights corresponding to the selection criteria entered by the customer, without including the service charge, or indicating such charges separately.

14 According to the referring court, it is necessary to take account of the consumer protection objective of Article 23(1) of Regulation No 1008/2008, which is apparent from recital 16 to that regulation as well as from the wording of Article 23 and its title, and which is to ensure that there is information and transparency with regard to the prices for air services (judgment in *ebookers.com Deutschland*, C-112/11, EU:C:2012:487, paragraph 13). According to recital 16, that price

transparency must enable customers to compare effectively the prices for air services of different air carriers. The referring court states that Article 23 was introduced in order to combat the former practice of air service providers of publishing fares that excluded taxes, charges and fuel surcharges (see page 10 of the Proposal for a Regulation COM(2006) 396 final of the European Parliament and of the Council on common rules for the operation of air transport services in the Community (recast), presented by the European Commission, and points 8.1 and 8.4 of the Opinion of the European Economic and Social Committee of 31 May 2007 on that proposal (OJ 2007 C 175, p. 85)).

15 The referring court also notes that neither Article 23(1) of Regulation No 1008/2008 nor any other provision of that regulation contains a precise statement as to the point in time at which the final price must be indicated. Nevertheless, the fourth sentence of Article 23(1) of that regulation provides that optional price supplements must be communicated ‘at the start of any booking process’. However, the referring court considers that the EU legislature’s declared intention of ensuring that prices can be compared effectively suggests that the expression ‘at all times’ in the second sentence of Article 23(1) of Regulation No 1008/2008 should be interpreted in conjunction with the expression ‘at all times’ as used in recital 16 to the regulation. From that perspective, the final price referred to in that provision would have to be indicated at an earlier stage than is required in the case of the optional price supplements mentioned in the fourth sentence of Article 23(1) of the regulation. Construed in this way, the obligation to show the final price of air services at an early stage in the booking process could mean that the price must be indicated in the first read-out of the air service corresponding to the customer’s requirements as to destinations and dates.

16 As regards, in the second place, the way in which the final price of air services is presented, the referring court notes that that issue too is not precisely regulated by the second sentence of Article 23(1) of Regulation No 1008/2008. The fourth sentence of Article 23(1) merely states that optional price supplements are to be communicated in a clear, transparent and unambiguous way.

17 Like the court of first instance, the appeal court concluded from the second and fourth sentences of Article 23(1) of Regulation No 1008/2008 that the final price of air services must be stated always or whenever prices are shown, and therefore, in the case of a booking system consisting of several steps, the final price must be indicated when air fares are shown for the first time and on every page on which prices are shown. In the present case, the final price should have been shown in the immediate context of every single air service indicated in the table, and not only for the air services pre-selected by Air Berlin or clicked on by the customer.

18 The referring court takes the view, however, that the second sentence of Article 23(1) of Regulation No 1008/2008 could be interpreted less strictly as meaning

that indicating the final price at an early stage, as Air Berlin does for any specifically selected air service, and not only on completion of the booking process, also enables an effective comparison to be made with the prices of other air carriers, and, therefore, the need for consumer protection to be met, even if such comparisons may well be less convenient for the consumer.

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

‘(1) Is the second sentence of Article 23(1) of Regulation No 1008/2008 to be interpreted as meaning that the final price to be paid must, in the context of a computerised booking system, be indicated when the prices of air services are shown for the first time?’

‘(2) Is the second sentence of Article 23(1) of Regulation No 1008/2008 to be interpreted as meaning that the final price to be paid must, in the context of a computerised booking system, be indicated only for the air service specifically selected by the customer or for each air service shown?’

Consideration of the questions referred

The first question

20 By its first question, the referring court asks the Court of Justice whether the second sentence of Article 23(1) of Regulation No 1008/2008 must be interpreted as meaning that the final price to be paid must be indicated whenever prices of air services are shown, including when they are shown for the first time.

21 According to Air Berlin, the answer to the first question depends on the interpretation of the words ‘at all times’ in the second sentence of Article 23(1) of Regulation No 1008/2008. Air Berlin submits that those words do not require that the final price to be paid be indicated when the prices of air services are shown for the first time, but only that it be indicated after a particular flight has been selected by the customer and before the booking contract is finally concluded.

22 Air Berlin states in that regard that, within the table displayed in the second step of the computerised booking process it has set up, the least expensive connection is automatically pre-selected and the system indicates the final price within the meaning of Article 23(1) of Regulation No 1008/2008, including the price for the selected flight, taxes and charges, the fuel surcharge and the service charge. If the customer chooses an alternative connection, one that is necessarily more expensive, the system would then indicate the final price for that connection.

23 As the Bundesverband, the German, Belgian, Italian, Netherlands and Austrian Governments and the European Commission note, that interpretation is incompatible with the wording of the second sentence of Article 23(1) of Regulation No 1008/2008.

24 The second sentence of Article 23(1) of Regulation No 1008/2008 provides that 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.

25 It follows from the actual wording of that provision that the final price to be paid must be indicated ‘at all times’, without any distinction being made between the moment when that price is indicated for the first time, the moment when the customer selects a particular flight, or the moment when the contract is finally concluded.

26 Consequently, the obligation laid down by that provision — to indicate at all times the final price to be paid — means that, in the context of a computerised booking system such as that at issue in the main proceedings, the final price to be paid must be indicated whenever the prices of air services are shown, including when they are shown for the first time.

27 That interpretation is supported by a systematic reading of Article 23(1) of Regulation No 1008/2008 and by the ratio legis of the second sentence of that provision.

28 As pointed out by the Bundesverband, the German and Austrian Governments and the Commission, it should not be inferred from the expression ‘*at the start of any booking process*’ used in the fourth sentence of Article 23(1) of Regulation No 1008/2008 that the expression ‘at all times’ in the second sentence of Article 23(1) of that regulation must be interpreted as meaning that the final price must be indicated only at the start of the booking process.

29 The expression ‘*at the start of any booking process*’ used in the fourth sentence of Article 23(1) means that optional price supplements must be indicated at the start of the booking process itself, enabling customers to decide whether they do in fact wish to avail themselves of the supplementary service concerned (see, to that effect, judgment in *ebookers.com Deutschland*, EU:C:2012:487, paragraph 15).

30 Conversely, the obligation laid down in the second sentence of Article 23(1) of Regulation No 1008/2008 to indicate the final price ‘at all times’, which includes unavoidable and foreseeable costs, arises from the moment the air fares are published in any form, even before the start of the booking process.

31 The Bundesverband, the German, Belgian, Italian, Netherlands and Austrian Governments and the Commission rightly note that that interpretation is consistent with the ratio legis of the second sentence of Article 23(1) of Regulation No 1008/2008, as evidenced by recital 16 to that regulation.

32 According to recital 16 to Regulation No 1008/2008, customers should be able to compare effectively the prices for air services of different air carriers, and therefore, the final price to be paid by the customer for air services originating at an airport located in the territory of the EU should at all times be indicated, inclusive of all taxes, charges and fees.

33 The Court has already had occasion to point out that it is evident from both the title of Article 23 of Regulation No 1008/2008 and the wording of paragraph 1 thereof that that provision seeks to ensure that there is information and transparency with regard

to the prices for air services and that, consequently, it contributes to safeguarding protection of customers having recourse to those services (judgments in *ebookers.com Deutschland*, EU:C:2012:487, paragraph 13, and *Vueling Airlines*, C-487/12, EU:C:2014:2232, paragraph 32).

34 It thus follows from recital 16 to Regulation No 1008/2008 that the obligation imposed on air carriers ‘at all times’ to indicate the final price to be paid is necessary in order to enable customers to compare effectively the prices for air services of different air carriers, in accordance with the objective that it should be possible effectively to compare prices for air services, pursued by Article 23(1) of that regulation (see, to that effect, judgment in *Vueling Airlines*, EU:C:2014:2232, paragraph 33).

35 In the light of the foregoing, the answer to the first question is that the second sentence of Article 23(1) of Regulation No 1008/2008 must be interpreted as meaning that, in the context of a computerised booking system such as that at issue in the main proceedings, the final price to be paid must be indicated whenever the prices of air services are shown, including when they are shown for the first time.

The second question

36 By its second question, the referring court asks the Court of Justice whether the second sentence of Article 23(1) of Regulation No 1008/2008 must be interpreted as meaning that the final price to be paid must be indicated only for the air service specifically selected by the customer or for each air service shown.

37 Air Berlin maintains that the second sentence of Article 23(1) of Regulation No 1008/2008 requires only that the final price be indicated for the flight selected by the customer, not for each flight shown. According to Air Berlin, an effective comparison, for the purposes of recital 16 to that regulation, can be made only if the customer has selected a particular flight linking the airport of departure to the airport of arrival at a specific time. Consequently, the obligation to indicate the final price, laid down in the second sentence of Article 23(1) of Regulation No 1008/2008, would apply only where the customer has selected a particular flight, and only in respect of that flight.

38 That interpretation cannot be accepted.

39 As the Bundesverband, the German, Belgian, Netherlands and Austrian Governments and the Commission correctly submit, the obligation laid down in the second sentence of Article 23(1) of Regulation No 1008/2008 to indicate the final price ‘at all times’ applies to all forms of publication of air fares, including fares proposed for a series of air services presented in the form of a table. Consequently, indicating the final price for the only flight specifically selected is not sufficient to satisfy the obligation laid down by that provision.

40 That interpretation is supported by the ratio legis of the second sentence of Article 23(1) of Regulation No 1008/2008, which is recalled in paragraphs 31 to 34 of the present judgment.

41 The obligation to indicate the final price to be paid for each flight in respect of which the fare is displayed, and not for the only flight specifically selected, enables customers to compare effectively the prices for air services of different air carriers, in accordance with the general objective of transparency of prices for air services, pursued by Article 23(1) of Regulation No 1008/2008.

42 According to Air Berlin, to interpret the second sentence of Article 23(1) as meaning that the final price to be paid must be indicated for each flight shown would mean that only the final price may be indicated and, therefore, that indicating the 'flight-only' price would be generally prohibited. Yet the third sentence of that provision requires the 'flight-only' price to be indicated separately alongside the final price.

43 That argument must, however, be rejected as being entirely unfounded, since it does not in any way follow from the obligation to indicate the final price to be paid for each flight shown that is laid down in the second sentence of Article 23(1) that indicating the air fare or air rate for each of those flights, as provided in the third sentence of that provision, is prohibited.

44 On the contrary, it is evident from the actual wording of the third sentence of Article 23(1) of Regulation No 1008/2008 that the obligation to specify at least the air fare or air rate, as well as the taxes, airport charges and other charges, surcharges or fees, where these items have been added to the air fare or air rate, is in addition to the obligation under the second sentence of Article 23(1) to indicate the final price.

45 In the light of the foregoing, the answer to the second question is that the second sentence of Article 23(1) of Regulation No 1008/2008 must be interpreted as meaning that, in the context of a computerised booking system such as that at issue in the main proceedings, the final price to be paid must be indicated not only for the air service specifically selected by the customer, but also for each air service in respect of which the fare is shown.

Costs

46 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 (Fifth Chamber) hereby rules:

1. The second 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, in the context of a computerised booking system such as that at issue in the main proceedings, the final price to be paid must be indicated whenever the prices of air services are shown, including when they are shown for the first time.

2. The second sentence of Article 23(1) of Regulation No 1008/2008 must be interpreted as meaning that, in the context of a computerised booking system such as

that at issue in the main proceedings, the final price to be paid must be indicated not only for the air service specifically selected by the customer, but also for each air service in respect of which the fare is shown.

* Language of the case: German.