

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

23 April 2020 (*)

(Reference for a preliminary ruling — Transport — Air services — Regulation (EC) No 1008/2008 — Article 23(1) — Indication of the final price to be paid — Online passenger check-in fees — VAT — Administrative fees for purchases made by means of a credit card other than that approved by the air carrier — Unavoidable and foreseeable elements of the final price to be paid — Optional price supplements — Concept)

In Case C-28/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 18 December 2018, received at the Court on 16 January 2019, in the proceedings

Ryanair Limited

Autorità Garante della Concorrenza e del Mercato — Antitrust

v

Autorità Garante della Concorrenza e del Mercato — Antitrust

Ryanair Limited

Ryanair D.A.C.

THE COURT (Seventh Chamber),

composed of P.G. Xuereb (Rapporteur), President of the Chamber, T. von Danwitz and A. Kumin, Judges,

Advocate General: M. Szpunar,

Registrar: Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

- Ryanair DAC, by M. Castioni, G. Mazzei and A. Pecchia, avvocati, and by B. Kennelly, QC,
- the Italian Government, by G. Palmieri, acting as Agent, and by A. Collabолletta, avvocato dello Stato,
- the French Government, by D. Colas and by A.-L. Desjonquères and I. Cohen, acting as Agents,
- the Austrian Government, by J. Schmoll and G. Hesse, acting as Agents,
- the European Commission, by L. Malferrari and B. Sasinowska, acting as Agents,

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

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 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, on the one hand, Ryanair Ltd and the Autorità Garante della Concorrenza e del Mercato — Antitrust (Competition and Market Authority, Italy) ('the AGCM') and, on the other hand, the AGCM and Ryanair Ltd and Ryanair DAC concerning unfair commercial practices alleged against the airline Ryanair ('Ryanair').

Legal context

European Union law

3 Recital 16 of 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. Community air carriers are also encouraged to indicate the final price for their air services from third countries to the Community.'

4 Article 2(18) of that regulation provides:

'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;

5 Article 23(1) of that regulation is worded 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 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.’

Italian law

- 6 Article 20 of decreto legislativo n. 206 — Codice del consumo (Legislative Decree No 206 on the Consumer Code), of 6 September 2005 (Ordinary Supplement to GURI No 235, of 8 October 2005), in the version applicable to the facts at issue in the main proceedings (‘the Consumer Code’), prohibits unfair commercial practices, such as misleading commercial practices, within the meaning of Articles 21 to 23 of that code. In particular, Article 20(2) of that code states that a commercial practice is to be considered unfair if it is contrary to professional diligence and if it distorts or is likely to distort to an appreciable extent the economic behaviour, as regards the product, of the average consumer that it concerns or to whom it is addressed, or of the average member of the particular group of consumers targeted by that practice.
- 7 Under Article 21(1) (d) of that code, misleading commercial practices may concern, inter alia, the price or the method of calculating the price or the existence of a specific price advantage.

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

- 8 By decision of 15 June 2011, the AGCM found Ryanair guilty of various unfair commercial practices under the Consumer Code and imposed several fines on it. In particular, the AGCM classified as an unfair practice, within the meaning of Article 20(2) and Article 21(1) (d) of the Consumer Code, the way in which the prices charged were presented, at the time of the facts at issue in the main proceedings, in Ryanair’s online booking system (<http://ryanair.com/it>).
- 9 According to the AGCM, the prices published on that website did not include certain elements, which were classified by Ryanair as optional costs, namely the passengers’ online check-in fees, the value added tax (VAT) applied to the fares and to the optional supplements relating to domestic flights and the administrative fees for purchases made by means of a credit card other than that approved by Ryanair (Mastercard prepaid), even though, according to the AGCM, those elements, which were in fact compulsory, were initially charged to consumers during the process of online booking and thus contributed to increasing the fare initially shown.
- 10 Ryanair brought an appeal against that decision before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court for Lazio, Italy).
- 11 As regards the commercial practice relating to the prices shown, that court, by judgment of 12 April 2012, upheld the AGCM’s decision of 15 June 2011, in finding that the passengers’ online check-in fees and VAT applied to the fares and to the optional supplements relating to domestic flights did not constitute optional costs, but those fees, together with the administrative fees for purchases made by means of a credit card other than that approved by Ryanair, had to be regarded as ‘unavoidable’ costs, within the meaning of Article 23(1) of Regulation No 1008/2008, and the failure to indicate those costs, at the start of the booking process, meant the consumer could not be correctly informed as to the actual price of the service offered by Ryanair.
- 12 As regards, in particular, the administrative fees for purchases made by means of a credit card other than that approved by Ryanair, the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio) held that to classify those as unavoidable was justified by the fact that an ordinary purchaser wishing to make an online booking on Ryanair’s website has no reasonable opportunity in practice to avoid the price increase resulting from those fees, since he or she does not have the credit card approved by Ryanair. In that regard, that court held that the purpose of Article 23(1) of Regulation No 1008/2008 is to ensure absolute transparency in the price of air tickets from the moment the person concerned has

decided to commence the booking process and not to encourage the public to obtain the most advantageous means of payment beforehand.

- 13 Ryanair brought an appeal before the Consiglio di Stato (Council of State, Italy) against the parts of the judgment by which the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio) had dismissed its action and upheld the AGCM's decision.
- 14 The referring court observes that, in its case-law, the Court has not ruled specifically on the price elements at issue and notes that, for the purposes of resolving the dispute, it is necessary to determine whether those elements may be regarded as falling within the category of unavoidable and foreseeable price supplements, within the meaning of the second sentence of Article 23(1) of Regulation No 1008/2008, or that of optional price supplements within the meaning of the fourth sentence of that provision. In the latter case, the referring court wonders whether an optional supplement may designate costs that can be avoided by most consumers.
- 15 In those circumstances, the Consiglio di Stato (Council of State) 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 an online check-in fee and an 'administration fee' for credit card purchases, which are additional to the price of the ticket, and the VAT applied to air fares and to optional supplements for domestic flights, fall within the category of an unavoidable and foreseeable price supplement or that of an optional price supplements?
 - (2) Is the fourth sentence of Article 23(1) of Regulation No 1008/2008 to be interpreted in the sense that the word 'optional' covers price supplements which the majority of consumers are able to avoid?'

Consideration of the questions referred

- 16 By its two questions, which it is appropriate to answer together, the referring court asks, in essence, whether Article 23(1) of Regulation No 1008/2008 must be interpreted as meaning that passengers' online check-in fees, the VAT applied on fares and on optional supplements relating to domestic flights and the administrative fees for purchases made by means of a credit card other than that approved by the air carrier, fall within the category of unavoidable and foreseeable price supplements, within the meaning of the second sentence of that provision, or that of optional price supplements within the meaning of the fourth sentence of that provision.
- 17 In that regard, it should be recalled that, under the second sentence of Article 23(1) of Regulation No 1008/2008, the final price to be paid for the carriage by air of a passenger must be indicated at all times and must include, in particular, the air fare, as defined in point 18 of Article 2 of that regulation, as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication of the offer. The third sentence of Article 23(1) of that regulation states that the offer must at least show the airport charges and the charges, surcharges and fees related to security or fuel, where those components are added to the air fare.
- 18 The Court has stated in that regard that the taxes, charges, surcharges and fees referred to in the second and third sentences of Article 23(1) of Regulation No 1008/2008 must not be included in the air fare, but must be shown separately (judgment of 6 July 2017, *Air Berlin*, C-290/16, EU:C:2017:523, paragraph 36). It is also clear from paragraph 35 of the judgment of 15 January 2015, *Air Berlin* (C-573/13, EU:C:2015:11), that the various components making up the final price to be paid, within the meaning of the second sentence of Article 23(1) of Regulation No 1008/2008, must be indicated from the first time the price of air services is shown.

- 19 Furthermore, the fourth sentence of Article 23(1) of Regulation (EC) No 1008/2008 provides that optional 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.
- 20 In that regard, paragraph 14 of the judgment of 19 July 2012, *ebookers.com Deutschland* (C-112/11, EU:C:2012:487) states that the concept of ‘optional price supplements’ refers to price supplements which are not unavoidable, in contrast to air fares or air rates and other items making up the final price to be paid referred to in the second and third sentences of Article 23(1) of that regulation, and which therefore relate to services which, supplementing the air service itself, are neither compulsory nor necessary for the carriage of passengers with the result that the customer chooses either to accept or refuse them. The Court has held that price supplements in respect of flight cancellation insurance, or the carriage of checked-in baggage must be regarded as optional within the meaning of the fourth sentence of Article 23(1) of Regulation No 1008/2008 (judgments of 19 July 2012, *ebookers.com Deutschland*, C-112/11, EU:C:2012:487, paragraph 20, and of 18 September 2014, *Vueling Airlines*, C-487/12, EU:C:2014:2232, paragraph 39).
- 21 It therefore follows from Article 23(1) of Regulation No 1008/2008 and the case-law cited above that, in its online offers for the carriage of passengers, an air carrier such as Ryanair is obliged to indicate, from the first time that the price is shown, the air fare and, separately, taxes, charges, surcharges and fees that are unavoidable and foreseeable, whilst it must indicate the optional price supplements in a clear, transparent and unambiguous way at the start of the booking process.
- 22 The Court must examine the classification, as regards Article 23(1) of Regulation No 1008/2008, of the various price components at issue in the main proceedings on the basis of those foregoing factors.
- 23 As regards, in the first place, the passengers’ online check-in fees, it must be held that, contrary to the submissions of the Austrian Government and the European Commission in their written observations, it cannot be automatically inferred from the necessary and compulsory nature of check-in that those fees are unavoidable, within the meaning of the second sentence of Article 23(1) of Regulation No 1008/2008. Air carriers must be given the possibility of offering passengers various methods of check-in that are either to be paid for or free of charge, such as online check-in or physical check-in at the airport.
- 24 In those circumstances, where the consumer is required to choose between at least two check-in methods, it must be held, as the French Government submits in its written observations, that the check-in method offered to that consumer during the booking process is not necessarily a service that is compulsory or necessary for his or her transport. Where an air carrier offers an online check-in service for payment, while offering passengers alternative ways to check-in free of charge, passengers’ online check-in fees cannot be regarded as an unavoidable component of the final price to be paid, within the meaning of the second sentence of Article 23(1) of Regulation No 1008/2008, but must be regarded as an optional price supplement, within the meaning of the fourth sentence of that provision, which the consumer may choose to accept or refuse.
- 25 Such fees can be regarded as unavoidable only if all of the check-in methods offered by the air carrier must be paid for, or if, as the Italian Government submits in its written observations, the consumer is not offered a choice between a number of check-in methods. In the first case, the consumer will, one way or another, have to pay check-in fees, the consumer’s apparent freedom to choose being merely illusory, whilst in the second case, in reality, the consumer has no choice but to check-in online.
- 26 It is therefore for the referring court to verify whether Ryanair offered passengers a possibility of checking-in free of charge. If Ryanair only offered the possibility of online check-in which had to be paid for, as the Italian Government states in its written observations, or if it offered, as an alternative to the on-line check-in service, only check-in methods that had to be paid for, as the Commission states in its written observations, it must be concluded that the customer could not avoid paying check-in fees and that those fees, which the air carrier’s pricing policy renders foreseeable, are price elements that are unavoidable and foreseeable within the meaning of the second sentence of Article 23(1) of Regulation No 1008/2008.

- 27 On the other hand, if Ryanair offered, alternatively, one or more possibilities for checking-in free of charge, the fees payable for online check-in would have to be regarded as optional price supplements within the meaning of the fourth sentence of Article 23(1) of Regulation No 1008/2008.
- 28 As regards, in the second place, the VAT applied to fares for domestic flights, it must be held that that is a tax, within the meaning of the second and third sentences of Article 23(1) of Regulation No 1008/2008, and that that tax, applicable to the air fare, is unavoidable and foreseeable, within the meaning of the third sentence of that provision, in so far as it is provided for by national legislation and applies automatically on any booking of a domestic flight.
- 29 As regards, in the third place, the VAT applied to optional supplements relating to domestic flights, it must be held, as the Commission points out in its written observations, that that VAT is an optional price supplement within the meaning of the fourth sentence of Article 23(1) of Regulation No 1008/2008. Although it may be classified as unavoidable because it is compulsory, the VAT applied to optional supplements relating to domestic flights cannot be regarded as foreseeable, since it is intrinsically linked to the optional supplements which are chosen exclusively by the passenger. The air carrier cannot know at the outset which optional supplements the customer will choose, so that the amount of VAT relating to those supplements cannot be included in the foreseeable final price that must be indicated at the time the offer is published.
- 30 In those circumstances, it must be observed that the indication of a specific tax must always follow the price element to which that tax relates, as is moreover apparent from the last part of the third sentence of Article 23(1) of Regulation No 1008/2008, under which taxes ‘applicable [to the air fare]’ must be indicated in the final price to be paid. Thus, if a tax applies to the air fare, it must be shown separately with that tariff from the first time the final price to be paid is indicated, whereas, if it relates to an optional price supplement, it is only required to be indicated — and can only be indicated — in the final price to be paid once the supplement is indicated.
- 31 In the latter case, it should be clarified that, as the Commission points out in its written observations, the amount of tax must be clearly indicated in the price of optional services from the first time that they are shown. The requirement for clarity and transparency with which an air carrier must comply in the communication of optional price supplements, under the fourth sentence of Article 23(1) of Regulation No 1008/2008, means that the portion represented by VAT in the amount for the supplement must be communicated to the passenger as soon as he or she has opted for an optional service. The communication of that part of the price also meets the objective pursued by Regulation No 1008/2008, according to recital 16 thereof, of ensuring effective comparability of the price of air services, as the consumer must be able to compare price supplements excluding VAT offered by air carriers on the domestic route concerned.
- 32 In fourth place and lastly, as regards the administrative fees for purchases made by means of a credit card other than that approved by the air carrier, it must be held that there can be no doubt that those fees are foreseeable, since their application results from the air carrier’s policy itself as regards the method of payment.
- 33 As to whether those fees are unavoidable within the meaning of the second sentence of Article 23(1) of Regulation No 1008/2008, it should be noted that, *prima facie*, the customer may avoid paying them by using the credit card approved by the air carrier to settle payment of the final price that is to be paid. However, it cannot be accepted that a price supplement is avoidable and therefore optional where the option offered to the consumer is subject to a condition imposed by the air carrier, by reserving the free nature of the service in question for the benefit of a restricted class of privileged consumers and by requiring, *de facto*, the consumers who do not form part of that class to either refuse the service that is free of charge, or not to proceed with their purchase immediately and to undertake steps that may entail costs in order to satisfy the condition required, at the risk, once those steps have been completed, of no longer being able to benefit from the offer or of no longer being able to benefit from the price originally indicated.

- 34 It follows that such fees must be classified as not only foreseeable but also unavoidable and that they cannot therefore fall within the concept of optional price supplement, within the meaning of the fourth sentence of Article 23(1) of Regulation No 1008/2008.
- 35 It should also be clarified that it is of no consequence, for the purposes of classifying such fees, whether the majority of consumers have the card approved by the air carrier and are thus in a position to avoid payment of the fees concerned. Since Regulation No 1008/2008 aims to protect individual consumers (see, to that effect, the judgment of 15 January 2015, *Air Berlin*, C-573/13, EU:C:2015:11, paragraph 33), whether a price supplement is unavoidable cannot be determined in accordance with a criterion that only a majority of consumers fulfil.
- 36 In the light of all the foregoing considerations, the answer to the questions referred is that Article 23(1) of Regulation No 1008/2008 must be interpreted as meaning that passengers' check-in fees whose payment cannot be avoided because there is no alternative method of checking-in free of charge, VAT applied to fares for domestic flights, and administrative fees for purchases made by means of a credit card other than that approved by the air carrier constitute price elements that are unavoidable and foreseeable within the meaning of the second sentence of that provision. By contrast, that provision must be interpreted as meaning that passengers' check-in fees whose payment can be avoided by using a free check-in option and the VAT applied to optional supplements relating to domestic flights constitute an optional price supplement within the meaning of the fourth sentence of that provision.

Costs

- 37 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 (Seventh Chamber) hereby rules:

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 passengers' check-in fees whose payment cannot be avoided because there is no alternative method of checking-in free of charge, the value added tax (VAT) applied to fares for domestic flights, and administrative fees for purchases made by means of a credit card other than that approved by the air carrier constitute price elements that are unavoidable and foreseeable within the meaning of the second sentence of that provision. By contrast, that provision must be interpreted as meaning that passengers' check-in fees whose payment can be avoided by using a free check-in option and the VAT applied to optional supplements relating to domestic flights constitute an optional price supplement within the meaning of the fourth sentence of that provision.

[Signatures]

* Language of the case: Italian.