

EUROPEAN COURT RULES ON OPT-IN AIR TRAVEL INSURANCE

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Introduction

A recent decision of the European Court of Justice confirms that a party which sells air travel, whether it be an air carrier or a travel agency, can only offer optional price supplements, such as flight cancellation insurance, on an 'opt-in' basis. The ruling was delivered on 19 July 2012 in Case C-112/11 *ebookers.com Deutschland GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV*.

Background

The ruling came about as a result of a challenge by a German consumer group, the BVW, to the manner in which the well-known online travel agency, ebookers.com, sold air travel on its German website. When a customer booked a flight through the site, the total price presented at the end of the transaction automatically included flight cancellation insurance. A customer who did not wish to purchase the cancellation insurance had to actively click through several steps to remove it from the total price payable to ebookers.com, i.e. the customer had to 'opt-out'.

In 2009, the BVW brought an action before the Regional Court in Bonn, Germany calling on ebookers.com to refrain from its opt-out practice, which it claimed infringed 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 (the "Air Services Regulation"). One of the objects of the Regulation is to enable customers to effectively compare the prices of flights offered by different airlines and online travel operators.

A party which sells air travel can only offer optional price supplements on an 'opt-in' basis

Article 23(1) requires that the air fares or air rates which are offered to the public or published in any form, including on the Internet, must include all applicable conditions. The final price to be paid by a customer must always be

indicated and this price must include all applicable taxes and charges, surcharges and fees which are unavoidable and foreseeable at the time the fare is published. Where taxes, airport charges and any other charges, surcharges or fees (e.g. those relating to security or fuel) are added to the air fare or air rate, these must be specified. Importantly, Article 23(1) also requires that:

" ... 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 Regional Court upheld the BVW's complaint in its entirety. ebookers.com subsequently lodged an appeal with the Higher Regional Court in

Cologne, which considered it necessary to refer a question on the interpretation of Article 23(1) to the European Court of Justice for a preliminary ruling. The question referred was as follows:

"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 purpose of the
Air Services Regulation was
to enhance customer
protection**

Put simply, the Regional Court asked whether costs connected with air travel, such as flight cancellation insurance, can be presented as part of the total price where the party organising the air travel is not itself an air carrier and instead organises the flights and insurance separately.

Submissions of the Parties

Both the BVW and ebookers.com agreed that the costs of the flight cancellation insurance at issue in the case fell to be regarded as an 'optional price supplement' within the meaning of Article 23(1), with the consequence that, if the Air Services Regulation applied, the insurance could only be offered on an opt-in basis.

However, ebookers.com argued that the Air Services Regulation was intended to apply only to contracts between a customer and an air carrier, and not to the costs of services which are

not part of an air service contract and which are not provided by an air carrier.

The BVW, on the other hand, drew the Court's attention to the purpose of the Air Services Regulation, which it said was to enhance customer protection and to enable customers to effectively compare the prices of flights offered by different airlines. It submitted that it was clear that the Regulation applied not only to air carriers, but also to agents, intermediaries and third parties and to the services offered by them in connection with the selling of airline tickets. The BVW was supported in its view by the European Commission and the Spanish, Italian and Finnish

Governments, all of which submitted written observations to the Court.

Advocate General's Opinion

The question was first considered by Advocate General Mazák, who delivered his opinion on 1 March 2012. The role of an Advocate General is to produce a written opinion for the Court in which he sets out his view of the law and recommends, in an impartial and independent manner, how the case should be decided. An opinion does not bind the Court, but is very influential and is often followed by the Court.

The Advocate General first noted that Article 23(1) is intended to "ensure information and transparency with regard to prices for air services" and that it serves the general objective of protecting the consumer of air services.

He further noted that central to Article 23(1) is the concept of a 'final price'. In order to enable the effective comparison of air service prices, which is one of the objectives of the Regulation, 'final prices' should relate to similar services and should contain similar price components. If

different parties included different categories of charges in the final price, it would be difficult for customers to make an effective price comparison. It is for this reason that Article 23(1) defines the cost components which must at all times be included in the final price as those which are "unavoidable and foreseeable at the time of publication" of the price.

The Advocate General reasoned that the 'optional price supplements' referred to in the last sentence of the Article cannot be regarded as forming part of the 'final price' or one of the components of the air fare itself. 'Optional price supplements' by definition are not costs which are 'unavoidable', rather they are extras which the customer can choose to accept or not. He reiterated his view that if such optional price supplements were included in the final price "the comparability of the prices for air services of different airlines would in fact be undermined".

The Advocate General further observed that the Article was obviously intended to prevent customers from being induced, when purchasing a flight, into paying for extra services which are not unavoidable or necessary for the flight, unless, of course, they actively choose to do so. This purpose would be defeated if the Air Services Regulation only applied to services offered directly by an air carrier. He considered that a price or cost component is not to be excluded from the scope of the Air Services Regulation merely because it arises from a service provided by a third party (as distinct from an air carrier) or because it arises in connection with air services (as distinct from the carrying out of air services themselves).

Accordingly, the Advocate General concluded that the question referred should be answered in the affirmative.

The European Court Decision

In a judgment delivered on 19 July 2012, the European Court of Justice reached the same conclusion as the Advocate General.

The Court noted that the 'optional price supplements' referred to in Article 23(1) relate to costs which are not unavoidable and that such costs are to be distinguished from the 'air fares and air rates' referred to in the second sentence of the Article. Echoing the comments of the Advocate General, the Court stated that optional price supplements relate to services which supplement the air service itself and are neither compulsory nor necessary for the carriage of passengers. A

customer can choose to accept or reject such supplements and it is precisely for this reason that they 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.

The Court further noted that this requirement corresponded to the general requirement as regards additional payments in Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (the 'Consumer Rights Directive'). The Consumer Rights Directive requires that, before a consumer is bound by an offer, the trader must seek his express consent to any extra payment over and above that agreed for the trader's main contractual obligation. Such 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.

The Court agreed with the Advocate General that it would be at odds with the objective of the Air Services Regulation if the protection afforded to consumers depended on the status of the provider of the optional additional service. If the

This purpose would be
defeated

interpretation proposed by ebookers.com was correct, namely that the Regulation only applied in circumstances where the provider of the additional service was an air carrier, then the Regulation could be easily circumvented and its objective compromised. The Court considered that the critical point was not the status of ebookers.com, but rather the fact that the flight cancellation insurance and the consequent additional charge were offered in relation to a flight during the flight booking process.

Accordingly, the Court concluded that the concept of 'optional price supplements' covers costs connected with air travel, arising from services, such as flight cancellation insurance, 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.

Lessons to be Learned

The decision of the European Court is binding throughout the twenty-seven EU member states. It will undoubtedly be of interest to airlines and businesses in the travel sector, as well as to customers.

Airlines and travel agents located in any European member state must now exercise particular care as regards the charges which can be automatically included in the price of a flight. To recap, it is permissible to automatically include charges which cannot be avoided, e.g. taxes, airport charges, charges relating to security or fuel, provided a full breakdown of all such charges is provided. However, any optional extras,

such as flight cancellation insurance or extra luggage allowance, cannot be automatically included and must be offered on an opt-in basis only.

Previously, it was not unknown for online operators to set

flight cancellation insurance and other optional extras on a default setting and to make it relatively difficult for customers to opt-out of purchasing such extras. Many consumers who were not 'technically-savvy' were induced to purchase extras they did not need, and perhaps could not afford. The judgment of the European Court has now put paid to this suspect selling practice. Online travel companies would be well advised to review their existing sales practices to ensure they are fully compliant with the judgment.

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