

**Case C-469/20**

**Request for a preliminary ruling**

**Date lodged:**

29 September 2020

**Referring court:**

Amtsgericht Nürnberg (Germany)

**Date of the decision to refer:**

14 September 2020

**Applicant:**

RightNow GmbH

**Defendant:**

Wizz Air

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**Amtsgericht Nürnberg**

[...]

In the case between

**RightNow GmbH, [...]**

– Applicant –

Attorney of record:

[...]

and

**Wizz Air, [...]** Budapest, [...]

– Defendant –

Attorney of record:

[...] [**Or. 2**]

[...]

the Amtsgericht Nürnberg (Local Court, Nuremberg) [...] issued, on 14 September 2020, the following

### **Order**

I. [...]

II. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 19(3)(b) of the Treaty on European Union and Article 267 of the Treaty on the Functioning of the European Union:

Is Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts to be interpreted as meaning that a term in the general terms and conditions of a commercial air carrier which has not been individually negotiated, under which a contract of carriage concluded with a consumer in the course of electronic commerce is to be governed by the law of the Member State in which the air carrier is resident, which is not identical to the law of the place in which the passenger is habitually resident, is unfair in so far as it leads the consumer into error by failing to draw his attention to the fact that the choice as to the law applicable in accordance with the second subparagraph of Article 5(2) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) does not apply to any law and is limited to the law of the countries named in the second subparagraph of Article 5(2) of the Rome I Regulation? [**Or. 3**]

### **Grounds**

- 1 I. On the basis of the right assigned to it, the applicant is claiming from the defendant air carrier the reimbursement of taxes and charges not incurred due to cancelled contracts of carriage by air.
2. The passengers
- ...

[**Or. 4**]

[...] each booked their own flights (and some booked fellow passengers' flights) with the defendant which should have been operated either from and/or to Nuremberg. All of the passengers had their habitual residence in Germany. None of the passengers boarded the flights and they all assigned their claims against the defendant for reimbursement of taxes and charges not incurred to the applicant.

The applicant accepted the assignment of claims and asked the defendant, in vain, to disclose and reimburse the taxes, charges and other fees not incurred.

3 The defendant's general conditions of carriage were included in all cases at the time of booking the airline tickets. In extract these read as follows:

4 Point 21.1:

UNLESS OTHERWISE PROVIDED BY THE CONVENTION OR ANY MANDATORY PROVISIONS OF ANY APPLICABLE LAW:

a) THESE GENERAL CONDITIONS OF CARRIAGE AND ANY CARRIAGE WHICH WE AGREE TO PROVIDE YOU WITH (IN RESPECT OF YOURSELF AND/OR YOUR BAGGAGE) SHALL BE GOVERNED BY THE LAWS OF HUNGARY; AND

b) ANY DISPUTE BETWEEN YOU AND US CONCERNING OR ARISING OUT OF SUCH CARRIAGE SHALL BE SUBJECT TO THE NON-EXCLUSIVE JURISDICTION OF THE COURTS OF HUNGARY. 'NON-EXCLUSIVE JURISDICTION' MEANS THAT YOU MAY BRING A CLAIM AGAINST US IN A JURISDICTION OUTSIDE OF THE COURTS OF HUNGARY. [Or. 5]

5 Point 7.2.1 reads (in extract) as follows:

... Any taxes and charges imposed by an airport operator, even if they are based on the number of passengers, are not refundable.

6 Point 6.5:

6.5.1. You may cancel Your reservation up to the fourteenth (14th) day prior to the scheduled time of departure of Your flight. You will be entitled to a refund of the Total Fare after deduction of the Cancellation Fee.

6.5.2. If You cancel Your reservation within fourteen (14) days prior to the scheduled time of departure of Your Flight, You will be refunded the amount of the Total Fare after deduction of the Fee for Other Services and the Seat Protection Fee.

Where point 6.5 applies, the defendant charges a cancellation fee of EUR 60 per flight and passenger. Where point 6.5.2 applies, the defendant charges a seat protection fee of EUR 80 per flight and passenger. These fees are listed on the homepage of the defendant's website.

7 According to point 18.3.1 of the general conditions of carriage, the passenger's right to make any claim is extinguished 2 years after the date of arrival at the destination or the date on which the aircraft ought to have arrived or the date on which the carriage stopped. The defendant has therefore raised a plea alleging

expiry of the limitation period. However, the period has only expired for one passenger.

8 The defendant is of the opinion that the choice of law clause and the other clauses are effective under Hungarian law.

9 The applicant contests that. **[Or. 6]**

10 [...]

11 II. 1. [...]

12 2. The success of the action depends on the interpretation of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. [...]

13 3. The existence of the claims depends essentially on whether the choice of law clause is effective under Hungarian law.

14 Although the effectiveness of a clause in accordance with Article 3(1), read in combination with Article 10(1), of the Rome I Regulation must be judged in accordance with the applicable law chosen, which in this case was Hungarian law, the criteria for that examination include the effectiveness of the transposition of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, which must be interpreted in conformity with the Directive [...] **[Or. 7]** [...]. If the choice of law clause were to be judged ineffective, German law would be applicable in all cases in accordance with the first paragraph of Article 5(2) of the Rome I Regulation, as all the passengers have their habitual residence in Germany and Nuremberg was the place of departure or the place of destination of all the flights. Under German law, the other clauses in the defendant's general terms and conditions would be ineffective.

15 4. The Court of Justice of the European Union has already ruled that, when publishing their air fares, air carriers must specify separately the amounts payable by customers in respect of taxes and charges and may not include those items, even partially, in the air fare (judgment of 6 July 2017, C-290/16). In that same decision it was clarified that a term in general terms and conditions which allows a flat-rate handling fee for the reimbursement of such taxes and charges may be regarded as being of no effect on the basis of national legislation transposing Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Under German law, the clause in point 4.2.1 of the defendant's general conditions of carriage would therefore be of no effect under the first sentence of Paragraph 307(1) of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB') on grounds of unreasonable disadvantage.

16 Under German law, a term precluding reimbursement of taxes and charges and curtailment of the period of limitation would be equally ineffective under Paragraph 307 of the BGB. According to Paragraph 307(1) of the BGB, terms are

of no effect if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. That would be the situation in the present case. The defendant does not appear to have any apparent legitimate interest whatsoever in collecting for itself, in cases where the flight is not boarded, the taxes and charges to which the State, the airport operator or other stakeholders, but not the defendant, are entitled [...] **[Or. 8]** [...] and it has not argued any such interest. Nor does it have any apparent legitimate interest in significantly curtailing the standard period of limitation under German law [...].

- 17 5. Therefore, the issue is whether or not the choice of law clause in the defendant's general conditions of carriage (point 21) is effective.
- 18 The Court has found with regard to Article 6(2) of the Rome I Regulation that a choice of applicable law clause in the general terms and conditions of an entrepreneur may be misleading within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts if the consumer was not made aware of the more favourable principle in the second sentence of Article 6(2) of the Rome I Regulation (judgment of 28 July 2016, [...], C-191/15). On account of Article 6(4)(b) of the Rome I Regulation, the second sentence of Article 6(2) of that Regulation is not applicable to contracts of carriage. The order for reference therefore seeks to ascertain whether the abovementioned case-law is applicable *mutatis mutandis* to Article 5(2) of the Rome I Regulation.
- 19 The Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main) [...] has assumed that it is. It has held that the choice of law clause is misleading, as the limitation on the choice of law was not drawn to the attention of the passenger in his capacity as consumer, and that this has to be treated in the same way as for Article 6(2) of the Rome I Regulation. The Amtsgericht Brühl (Local Court, Brühl) [...] has taken the same view.
- 20 [...] **[Or. 9]** [...] the Oberlandesgericht Frankfurt (Higher Regional Court, Frankfurt) has ruled that the principles established in the judgment in Amazon (judgment of 28 July 2016, [...], C-191/15) do not apply to contracts for carriage by air due to the absence of any structural similarity and the different scopes.
- 21 6. As far as can be seen, the question referred has not yet been clarified.  
[...]