

**Case C-51/22****Request for a preliminary ruling****Date lodged:**

25 January 2022

**Referring court:**

Pesti Központi Kerületi Bíróság (Hungary)

**Date of the decision to refer:**

12 January 2022

**Applicant:**

PannonHitel Pénzügyi Zrt.

**Defendant:**

WizzAir Hungary Légitársaság Zrt. (Wizz Air Hungary Zrt.)

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**Pesti Központi Kerületi Bíróság (Central District Court, Pest, Hungary)**

[...] [administrative information]

**Decision**in the judicial proceedings between **PannonHitel Pénzügyi Zrt.** ([...] Budapest, Hungary) [...], the applicant,and **WizzAir Hungary Légitársaság [Zrt.]** ([...] Budapest) [...], the defendant,concerning **reimbursement of the purchase price**

[...] [procedural considerations of national law]

The referring court **refers** the following question to the Court of Justice of the European Union for a preliminary ruling:

Must Article 5(1)(a), the first indent of Article 8(1)(a) and Article 8(2) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to

passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, be interpreted as meaning that a passenger may exercise his or her right to reimbursement of the full cost of the ticket at the price at which it was bought directly against the air carrier, even where the passenger has booked the ticket with the help of a third party acting as an intermediary, to whom the passenger paid the ticket price, and it was the intermediary who purchased the ticket from the air carrier and who paid [the carrier] the ticket price, and there is no indication that the intermediary was acting as the authorised agent of the air carrier or that it was a tour operator?

[...] [procedural considerations of national law]

### **Grounds**

The referring court [...] [procedural considerations of national law] sets out below the facts and the legislative framework that requires interpretation.

### **Succinct presentation of the facts**

The defendant operated flight W63163 (from OTP [Bucharest Henri Coandă Airport, Romania] to BLQ [Bologna Airport, Italy]), which was scheduled to depart on 18 June 2020. [A] passenger resident in Romania booked a ticket for the flight on the website [www.vola.ro](http://www.vola.ro), which is managed by VOLA.RO SRL [‘VOLA.RO’], a company operating in Romania.

According to point 21.1.a) of the General Conditions of Carriage for Passengers and Baggage issued by the defendant, unless otherwise provided by the Convention or other mandatory provisions of applicable law: a) these general conditions of carriage and any carriage which [the company agrees] to provide (in respect of [the passenger] and/or his or her baggage) are to be governed by the laws of Hungary.

The passenger paid the ticket price to VOLA.RO which, acting in its own name, purchased the ticket from the defendant. To this end it supplied the passenger’s personal details and issued the passenger with a booking confirmation. VOLA.RO paid the defendant for the ticket through its own business account, by offsetting the amount against its intermediation credits. According to point III.3.3 of the Terms and Conditions of Use issued by VOLA.RO, the company acts as an intermediary for providers such as airlines. According to point X.10.1, the company also markets packages of tourist services, but in the present case there is no indication that the ticket was purchased as part of linked arrangements falling within the scope of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

According to point XXIX.29.1 of the Terms and Conditions of Use issued by VOLA.RO, the terms and conditions are governed by the laws of Romania.

There is no indication in the case record as to whether there was any agreement between VOLA.RO and the defendant concerning intermediation of the defendant's services.

The defendant cancelled the aforesaid flight due to the pandemic caused by the new coronavirus. The passenger withdrew from the contract and did not take up a replacement flight. VOLA.RO sought reimbursement of the purchase price of the ticket from the defendant. This bank transfer did not work for technical reasons, but the defendant paid the amount into the business account held by VOLA.RO.

In parallel, the passenger assigned the claim he considers he is entitled to bring against the defendant under Regulation No 261/2004 to the applicant. There is no indication in the case record that VOLA.RO has reimbursed the passenger.

### **The applicant's arguments**

The applicant is seeking reimbursement of the price of the ticket pursuant to Article 5(1)(a) and the first indent of Article 8(1)(a) of Regulation No 261/2004. In its opinion, VOLA.RO acted merely as a travel agent, but that does not affect the passenger's right to apply directly to the defendant air carrier for reimbursement of the ticket price. Therefore, as the legal successor to the [passenger], the applicant may also claim reimbursement directly from the defendant.

According to the applicant, Articles 5(1) and 7(1) of Regulation No 261/2004 expressly establish that passengers must be offered assistance and reimbursed the price of their ticket.

The applicant refers to the judgment of the Court of Justice of the European Union in Case C-601/17, according to which, in essence, by virtue of Article 2(f) of Regulation No 261/2004, passengers may also claim, as part of the ticket price, the commission collected by the air carrier's authorised agent, provided that the air carrier was aware of that commission (paragraphs 13, 16 and 20).

The applicant therefore believes it is irrelevant whether the passenger purchased the ticket directly from the defendant or through VOLA.RO acting as an intermediary.

### **The defendant's arguments**

The defendant does not deny that it is required to make reimbursement as a result of the cancellation of the flight but, in its opinion, it is required to make that reimbursement to VOLA.RO, not the passenger.

It states that, according to the grammatical meaning of the term ‘reimbursement’, it may only reimburse the price of the ticket to the person from whom it received that payment. It states that it did not issue any ticket to the passenger.

With regard to the ticket reservation in question, the defendant received payment only from VOLA.RO, and it has already reimbursed this company. It notes that if the passenger or his legal successor were also entitled to reimbursement, the defendant would be required to pay twice.

The defendant refers to the judgment of the Court of Justice of the European Union in Case C-163/18. According to that judgment, where passengers are entitled to seek reimbursement from their tour organiser under Directive 90/314/EEC, now repealed, they are not able to seek reimbursement of the ticket price from the air carrier (paragraphs 31, 35 and 44).

The defendant also relies on the first sentence of paragraph 3 of Article 6:212 of the a Polgári törvénykönyvről szóló 2013. évi V. törvény (Law V of 2013 on the Civil Code; ‘the Civil Code’). That provision establishes that where a contract is terminated with retroactive effect by mutual consent, the services already performed must be returned.

The defendant maintains that the passenger’s withdrawal from the contract equates to termination with retroactive effect by mutual consent. Consequently, the service performed, which consists in payment of the purchase price, must be returned. However, in this case too, the purchase price may only be reimbursed to the person who originally paid it, namely VOLA.RO.

As an example of a situation comparable to that at issue in these proceedings, the defendant cites the case of businesses which purchase plane tickets for their employees. If the flight is cancelled, the persons entitled to reimbursement are not the employees, who are the actual passengers, but the business which purchased the ticket.

### **Applicable national law**

In the view of the referring court, these proceedings must be decided on the basis of Regulation [No 261/2004], which has direct effect and is directly applicable. In terms of Hungarian law, reference should be made to the Civil Code, paragraph 1 of Article 6:59 of which enshrines the principle of freedom of contract, while Articles 6:77 to 6:81 of the Civil Code provide for standard contract terms to be treated as part of the contract.

The first sentence of paragraph 3 of Article 6:[212] of the Civil Code provides that, in the event of the termination of a contract with retroactive effect by mutual consent (*felbontás*), the services already performed must be returned.

Article 1(1) of the a légi személyszállítás szabályairól szóló 25/1999. (II. 12.) Korm. rendelet (Government Decree 25/1999 of 12 February 1999 governing air passenger transport) establishes that passenger air transport contracts between a passenger and an airline ('the parties') are to be governed by the general provisions of the [Civil Code] concerning contracts, by the provisions of the Civil Code concerning contracts imposing an obligation of result and, in the alternative, by the provisions of this decree.

Article 3(1) of that decree establishes that the airline must set out in its general conditions of carriage the detailed terms and conditions of the passenger air transport contract that are not provided for in the Civil Code or the decree. The general conditions of carriage will be governed by the provisions of the Civil Code concerning standard contract terms.

### **Applicable provisions of European Union law**

According to the first sentence of Article 3(1) 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); 'the Rome I Regulation'], a contract is to be governed by the law chosen by the parties. Article 6(2) of that regulation establishes that the choice of law also applies, within certain limitations, to consumer contracts.

Relevant provisions of Regulation No 261/2004:

#### Article 1

##### Subject

1. This Regulation establishes, under the conditions specified herein, minimum rights for passengers when:

[...]

(b) their flight is cancelled;

[...]

#### Article 2

##### Definitions

For the purposes of this Regulation:

[...]

(f) ‘ticket’ means a valid document giving entitlement to transport, or something equivalent in paperless form, including electronic form, issued or authorised by the air carrier or its authorised agent;

[...]

## Article 5

### Cancellation

1. In case of cancellation of a flight, the passengers concerned shall:

(a) be offered assistance by the operating air carrier in accordance with Article 8; ...

[...]

## Article 7

### Right to compensation

1. Where reference is made to this Article, passengers shall receive compensation amounting to:

[...]

3. The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

[...]

## Article 8

### Right to reimbursement or re-routing

1. Where reference is made to this Article, passengers shall be offered the choice between:

a) – reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger’s original travel plan, together with, when relevant,

[...]

## **Court of Justice of the European Union**

In Cases C-601/17 and C-163/18, the Court of Justice of the European Union examined similar issues to those in these proceedings but, in the view of the referring court, the judgments in those cases do not provide clear guidance on the legal issue that arises in the present case.

## **Explanation of the question referred**

The referring court has begun by considering what is the law applicable to the legal dispute. Pursuant to Article 3(1) of the Rome I Regulation, cited above, and point XXIX.29.1 of the Terms and Conditions of Use issued by VOLA.RO, the legal relationship between the passenger and VOLA.RO is governed by Romanian law.

According to the aforesaid provision of the Rome I Regulation and point 21.1.a) of the General Conditions of Carriage issued by the defendant, both the air passenger transport contract between the passenger and the defendant and the legal relationship between VOLA.RO and the defendant are governed by Hungarian law.

As both Romania and Hungary are Member States of the European Union, the legal issue raised by the proceedings must be decided principally on the basis of Regulation No 261/2004, which has direct effect and is directly applicable. To that end, an interpretation of the regulation in question is required.

Given that these are provisions of EU law, the Court of Justice of the European Union has sole jurisdiction to interpret them (Article 267 TFEU). Therefore, before judgment is given on the substance of the case, proceedings must be stayed and a request made to the Court of Justice of the European Union pursuant to Article 267 TFEU for a preliminary ruling on the question referred in the operative part of this decision.

The reasons for this are as follows.

On the [www.vola.ro](http://www.vola.ro) website, which is also available in English, passengers are able to search direct for flights that match their travel plans and to book and pay for the relevant tickets and services, but the person making the reservation with the air carrier is VOLA.RO.

It is not clear from Regulation No 261/2004 what assessment is to be made of the actions of a third-party intermediary such as the one described above, who cannot be considered an authorised agent of the air carrier for the purposes of Article 2(f) of the regulation, and whose service cannot be considered part of a package for the purposes of Article 8(2) of the regulation.



Under Articles 5(1)(a) and 8(1)(a) of Regulation No 261/2004 passengers must be offered assistance and certain options. With regard to methods of payment, the first indent of Article 8(1)(a) refers to Article 7(3) of the regulation. Under the latter provision, reimbursement may be made in travel vouchers or other services only with the signed agreement of the passenger. Unlike Article 7(1) of the regulation, these provisions do not expressly establish that the passenger is to be reimbursed the purchase price, although this was presumably the legislature's intention, having regard also to the provisions in Article 8(2) of the regulation. Indeed, from a grammatical perspective, the term 'reimbursement' can be interpreted as meaning that the air carrier may only reimburse the person who paid the carrier the purchase price.

The response to the question referred affects the referring court's decision since, if the passenger is entitled to make a direct claim, the court must find against the defendant. If the passenger is not entitled to make a direct claim, either the application must be dismissed or additional evidence must be heard to determine whether VOLA.RO can be classed as the defendant's authorised agent.

A decision on this issue is also needed from the standpoint of legal certainty, to ensure that passengers obtain reimbursement either from the air carrier or the intermediary, and that air carriers are not required to pay twice.

The Court of Justice of the European Union has not yet pronounced on this question, which cannot therefore be considered an 'acte éclairé'.

With regard to the case-law cited by the parties, the judgment in Case C-601/17 addressed a situation in which it was not disputed that the travel agent had acted as the authorised agent of the air carrier, while the judgment in Case C-163/18 concerned a case in which the passenger's right to be reimbursed by the tour organiser was based on special legislation.

The interpretation is not so obvious as to leave no scope for reasonable doubt within the meaning of 'acte clair'. Specifically, as argued above, it is not possible to determine unequivocally from the wording of the regulation alone whether, in a case such as the present one, a passenger may claim reimbursement directly from the air carrier.

Moreover, the referring court has discovered, of its own motion, by searching the internet, that, according to a press release published by the European Commission on its website ([https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/air-travel\\_en](https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/coordinated-actions/air-travel_en)) and an annex to the press release, 16 air carriers, including the defendant, have undertaken to refund the price of the ticket directly to passengers who bought their ticket through an intermediary and are having difficulties obtaining reimbursement from the intermediary. This is clear from the final bullet point in the press release: 'passengers who booked their flight through an intermediary and have difficulties getting reimbursement from the intermediary can turn to the



airline and request to be refunded directly. Airlines are expected to inform passengers about this possibility and any conditions for requesting a direct refund on their websites.’

The last row of the table in the annex available via the website cited above ([https://ec.europa.eu/info/sites/default/files/overview\\_of\\_measures\\_that\\_airlines\\_should\\_take.docx.pdf](https://ec.europa.eu/info/sites/default/files/overview_of_measures_that_airlines_should_take.docx.pdf)) contains a similar statement. According to this statement, in the absence of legislation or a contractual condition to the contrary, air carriers must generally reimburse passengers directly: ‘Accept direct reimbursement claims from the passenger unless specific legislation applies (e.g. in the context of package travel) or where contractual arrangements between the parties involved validly provide otherwise. This can be done by designing booking process in a way that allows passengers to claim reimbursement directly from the airline when necessary.’

In the view of the referring court, if the question referred were unequivocally clear or had already been decided in a previous judgment, there would be no need for agreements between the Commission and the air carriers, nor for voluntary commitments by the air carriers.

[...] [procedural considerations of national law]

Budapest, 12 January 2022

[...] [signatures]

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