

# Anonymised version

Translation

C-76/23 – 1

## Case C-76/23

### Request for a preliminary ruling

**Date lodged:**

13 February 2023

**Referring court:**

Landgericht Frankfurt am Main (Germany)

**Date of the decision to refer:**

2 January 2023

**Applicant:**

Cobult UG

**Defendant:**

TAP Air Portugal SA

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**Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, Germany)**

**24<sup>th</sup> Civil Chamber**

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### Order

**In the case of**

Cobult UG, ...Berlin,

Applicant and appellant

...v

TAP Air Portugal S.A.,... Lisbon, Portugal, ... Frankfurt am Main,

Defendant and respondent

... on 2 January 2023 the 24<sup>th</sup> Civil Chamber of the Regional Court, Frankfurt am Main ...

**ordered as follows:**

- I. The following question on the interpretation of EU law is referred to the Court of Justice of the European Union (CJEU) for a preliminary ruling under Article 267(2) of the Treaty on the Functioning of the European Union, as last amended by Article 2 of the European Council Decision of 11 July 2012 (2012/419/EU) (OJ L 204, p. 131):**

**Must Article 7(3) 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 ('the Air Passenger Rights Regulation') be interpreted as meaning that a signed agreement of the passenger on the reimbursement of the cost of the ticket with a travel voucher within the meaning of the first indent of Article 8(1)(a) of Regulation (EC) No 261/2004 exists where the passenger selects a voucher of this type on the website of the operating air carrier to the exclusion of a subsequent refund of the cost of the ticket in monetary form and receives it by email, while reimbursement of the cost of the ticket in monetary form is only possible after first contacting the operating air carrier?**

- II. The proceedings are stayed.**

**Grounds:**

**I.**

The dispute between the parties to the appeal proceedings centres on the reimbursement of ticket costs under assigned rights and the reimbursement of pre-judicial legal fees.

The assignor booked a flight on 1 July 2020 from Fortaleza (Brazil) via Lisbon to Frankfurt am Main (flight numbers TP2520 and TP2858) with the defendant and respondent ('the defendant') acting also as the operating air carrier under the flight booking reference number O6PUCJ. The cost of the ticket amounted to EUR 1 447.02. The defendant cancelled the flight. The assignor transferred her rights against the defendant to the applicant and appellant ('the applicant') on 30 July 2020. In a letter of 30 July 2020, the applicant unsuccessfully called on the defendant to refund the airfare, setting a deadline for payment of 14 days. A solicitor's letter dated 3 September 2020 also remained unanswered.

Since 19 May 2020, the defendant has made a procedure available on its website for initiating refunds, including for flights it has cancelled. This gave passengers the choice between online reimbursement by voucher or, after contacting the defendant's 'Contact Center', other forms of reimbursement, such as refunds in monetary form, after an examination of the facts by employees of the defendant. According to the 'Conditions of acceptance' (now written in English), which the passenger, when selecting the voucher option, had to accept after being required to enter ticket number, surname, email address and telephone number, a reimbursement of the cost of the ticket in cash was precluded. ...

The defendant claimed that on 4 June 2020 the assignor had applied to be issued with a refund in the form of a voucher and had also been sent the voucher for the amount of EUR 1 737.52 by email. The defendant named a witness in this regard.

The local court dismissed the action. The assignor's rights were extinguished by the issuing of the voucher, which was not sufficiently contested by the applicant (Paragraph 362(1) of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB')). With regard to Article 7(3) of Regulation No 261/2004, the local court states that the requirement for putting matters in writing should serve to warn the passenger against making too hasty a decision. Due to flight bookings predominantly being processed digitally, a reimbursement procedure on the airline's booking portal was sufficient. ...

The applicant is now pursuing her claims against the defendant further through the permissible appeal.

## II.

### 1.

In the view of the referring court, it is not clear from the outset how Article 7(3) of Regulation No 261/2004 is to be interpreted:

According to Article 7(3) of Regulation No 261/2004, to which Article 8(1)(a) of the regulation refers, reimbursement of the cost of the ticket following cancellation and in accordance with the choice of the passenger is to 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.

In this respect, in the absence of a definition in Article 2 of Regulation No 261/2004, the term 'signed agreement' must be given a uniform and autonomous interpretation in EU law. In that regard, according to settled case-law, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it forms part (CJEU, judgment of 2 April 2020, *kunsthhaus muerz, gmbh v Zürich Versicherungs AG*, C-20/19, EU:C:2020:273 ...).

In view of the uniform principles of interpretation in the territory of the European Union, the referring court considers that it is not possible, first of all, to infer from the use of the term ‘written’ within the meaning of Paragraph 126(1) of the BGB and from the general requirement for a handwritten signature laid down therein in German (and presumably also in Austrian) law that the defendant’s policy is unlawful (see, however, judgment of Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany) of 25 June 2021, 50 C 49/21 = BeckRS 2021, 19274, margin number 4, partial judgment of Landesgericht Korneuburg (Regional Court, Korneuburg, Austria) of 18 August 2022, 22 R 58/22 = BeckRS 2022, 25277, margin number 13, and judgment of Bezirksgericht für Handelssachen Wien (District Court for Commercial Matters, Vienna, Austria) of 11 March 2021, 7 C 12/21x = BeckRS 2021, 12057, margin number 15, with reference to Article 11(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). Contrary to the decision of the District Court for Commercial Matters, Vienna, it is not a national formal requirement that is relevant, but a standardised requirement of EU law.

First of all, it must be inferred from the concept of reimbursement within the meaning of Article 8(1)(a) of Regulation No 261/2004 that – in principle – without the consent of the passenger, only monetary compensation can be considered ....

This is confirmed by Article 7(3) of Regulation No 261/2004 which, by also requiring the signed agreement of the passenger, establishes a rule-exception relationship. It follows from that provision that reimbursement in the form of vouchers and other services should be the exception. In principle, derogations are to be interpreted strictly in EU law (see also, for comparison, CJEU judgment of 4 October 2012, *Finnair Oyj v Timy Lassooy*, C-22/11, EU:C:2012:604, = *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2012, 945, 947, margin number 38 – *Finnair Oyj/Timy Lassooy*).

On the one hand, that strict interpretation could indicate that it is not sufficient to allow a voucher reimbursement procedure on the website of the operating air carrier because the wording of Article 7(3) of Regulation No 261/2004 specifically provides for an additional hurdle for reimbursement in the form of a voucher and thereby discharge from the liability within the meaning of Article 8(1)(a) of Regulation No 261/2004. The additional formal requirement that the agreement should be in writing is, according to the local court, intended to serve as a warning to the passenger against choosing a voucher rashly and without due consideration, which the EU legislature regarded as ... with the scheme [of the Regulation]\* being a less favourable option for the passenger. That interpretation could accordingly serve the purposes of recitals 1 and 4 and the high level of consumer protection to be achieved, in line with the rule-exception

\* N.d.t: Text missing in the German

relationship in Article 7(3) of Regulation No 261/2004. If, on the other hand, one were to take a different view and solely an online reimbursement procedure were to be allowed or deemed sufficient which, as in the present case, even makes reimbursement in the form of a voucher more difficult than a monetary refund due to the requirement of first contacting the operating air carrier, Article 7(3) of Regulation No 261/2004 and its scheme would be turned on its head to the detriment of passengers.

On the other hand, the passenger is already protected by Article 14(2) of Regulation No 261/2004, which provides for sufficient information, in writing, to be given to the passenger with regard to the rights under the regulation. Furthermore, it is precisely with a view to the level of consumer protection that Regulation No 261/2004 also stipulates, in Article 8(1)(a) of the regulation, the closeness in time of a reimbursement to the cancellation.

The requirement of actual written consent from the passenger, in the form of consent by post or even just individual consent by email, would, where applicable, extend the reimbursement period while at the same time limiting the administrative options for operating air carriers, whose interests must also be taken into account. The local court also implied this when it explained that, nowadays, flight bookings are predominantly processed digitally. Consequently, an online reimbursement procedure in multiple stages, such as in the present case, could also fulfil the function of providing adequate information and warnings, particularly in the high-volume business of flight bookings (see also, in terms of result, the judgment of the District Court for Commercial Matters, Vienna, of 11 March 2021, 7 C 12/21x = BeckRS 2021, 12057, margin number 16, and the decision of the local court).

2.

The interpretation of Article 7(3) of Regulation No 261/2004 is relevant to the present case. If the defendant's online reimbursement procedure since 19 May 2020 is not sufficient, the applicant's claim continues to exist, and the appeal would be well-founded for that reason alone. If the defendant satisfies the requirements of Article 7(3) of Regulation No 261/2004 through the online reimbursement procedure, the witness named by the defendant (with whom the burden of proof lies) should be heard by the court of appeal on the matter of the issuing of the voucher to the assignor. In this respect, unlike the local court, the court of appeal proceeds on the assumption that the choice of a voucher has been sufficiently challenged by the applicant.

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