

Case C-45/24**Request for a preliminary ruling****Date lodged:**

24 January 2024

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

13 December 2023

Appellant on a point of law:

Verein für Konsumenteninformation

Respondent in the appeal on a point of law:

Koninklijke Luchtvaart Maatschappij NV

The Oberster Gerichtshof (Supreme Court, Austria), sitting as the court ruling on appeals on points of law (*Revision*) [...], in the case of the appellant on a point of law ('the appellant'), the Verein für Konsumenteninformation (Association for Consumer Information), 1060 Vienna, [...], versus the respondent in the appeal on a point of law ('the respondent'), Koninklijke Luchtvaart Maatschappij NV, Netherlands, 1182 GP Amstelveen, [...], concerning EUR 95.14 [...], following the appeal on a point of law brought by the appellant against the judgment of the Landesgericht Korneuburg (Regional Court, Korneuburg, Austria), sitting as the court ruling on appeals on the merits (*Berufung*), of 21 March 2023, GZ 22 R 37/23f-23, by which the judgment of the Bezirksgericht Schwechat (District Court, Schwechat, Austria) of 17 November 2022, GZ 20 C 232/21 z-17 was amended, has made, in closed session, the following

O r d e r:

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

1. Is 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, and in particular Article 8(1)(a) thereof, to be interpreted as meaning that the price of the ticket to be taken into consideration for the purpose of determining the reimbursement owed by the air carrier to a passenger in the event of cancellation of a flight also includes the difference between the amount paid by the passenger and the amount received by the air carrier, which corresponds to a commission collected by a person acting as an intermediary between those two parties, if the air carrier, although aware that the other person regularly charges a commission (arrangement fee) for an intermediary service, does not know the amount of that commission in the specific case?

2. Does the burden of proving that the air carrier had the necessary knowledge lie with the passenger seeking reimbursement, or is it for the air carrier to prove that it lacked the necessary knowledge of the commission?

II. The proceedings relating to the appeal on a point of law brought by the appellant are stayed pending the preliminary ruling from the Court of Justice of the European Union [...].

G r o u n d s

A. The facts of the case:

- 1 The passengers had airline tickets booked via the online booking portal Opodo for the flights KL 1840 and KL 743 from Vienna to Lima via Amsterdam on 19 August 2020 and KL 744 and KL 1847 from Lima to Vienna via Amsterdam on 28 September 2020 to be operated by the respondent, an airline. Opodo is an IATA-certified travel agency and, as such, is entitled to issue airline tickets for the respondent. The respondent had been collaborating with Opodo for at least a decade. At the time of booking, there was a global incentive contract in place between the respondent and Opodo which provided for certain reward payments for the intermediary Opodo if a certain number of the respondent's tickets were sold. It has not been contractually established between the respondent and Opodo, either through the IATA agreements or through the incentive contracts, whether and at what amount Opodo can or is permitted to charge passengers an agency commission.
- 2 The passengers paid a total of EUR 2 053.48 to Opodo. The respondent cancelled the flights. The passengers received reimbursement of EUR 1 958.34 in respect of ticket costs before the action was brought. The difference of EUR 95.14 represents the arrangement fee (agency commission) of the travel agency Opodo. The respondent had no knowledge of its specific amount.
- 3 The passengers assigned their claims to reimbursement of the ticket costs to the appellant, a consumer protection association, which accepted the assignment.

B. The arguments of the parties in the proceedings and the procedure to date:

- 4 By its action, the appellant claims EUR 95.14 plus interest from the respondent on the basis of Article 8 of Regulation (EC) No 261/2004. It argues that the ticket costs should be reimbursed including the commission. The only necessary condition for that, it submits, is the respondent's awareness that a commission is regularly set and that it accepts the intermediary's setting of it. The appellant asserts that, by releasing its tickets to online travel agencies like Opodo, the respondent enlarges its field of operation. It would be unfair, it argues, not to require the respondent to reimburse the agency commission, given that the air carrier benefits from Opodo arranging ticket sales. The appellant submits that it cannot be inferred from the case-law of the CJEU that, for the commission to be included in the total price to be reimbursed, the respondent has to have authorised the specific amount of the commission.
- 5 The respondent contended that the action should be dismissed. It argued that no agreement was in place regarding the charging of an arrangement fee and that it was generally unaware of whether Opodo charged such a commission or of how high it was if so. The respondent asserted that it had not authorised prices which deviated from the ticket price; in its understanding of the case-law of the CJEU, such authorisation would be a necessary condition for airline passengers to be able to claim reimbursement of arrangement fees from it in the event of cancellation.
- 6 The court of first instance agreed with the appellant's legal position and upheld the action.
- 7 The court ruling on the appeal on the merits agreed with the respondent's legal position and dismissed the action.
- 8 The appellant's appeal on a point of law is brought against the judgment on appeal with an application for alteration claiming that the action should be upheld.
- 9 In its response to the appeal on a point of law, the respondent claims that the appeal on a point of law should be dismissed on grounds of inadmissibility or, in the alternative, should not be upheld on the merits.

C. Relevant legal provisions:

- 10 Article 2(f), Article 5(1)(a) and the first indent of Article 8(1)[(a)] 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') reads as follows, including headings:

'Article 2

Definitions

For the purposes of this Regulation:

(a) ...

(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;

(g) ...

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; and*

(b) ...

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,*

–....’

D. Grounds for the referral:

- 11 The Air Passenger Rights Regulation is intended to ensure a high level of protection for passengers (recital 1). When flights are cancelled, passengers should be able either to obtain reimbursement of their tickets or to obtain re-routing under satisfactory conditions, and should be adequately cared for while awaiting a later flight (recital 13).
- 12 In pursuit of those objectives, Article 5(1)(a) of the Air Passenger Rights Regulation provides that, in the event of the non-operation of a scheduled flight on

which at least one seat was reserved ('cancellation'; Article 2(1) of the Air Passenger Rights Regulation), the operating air carrier must offer the passengers concerned assistance in accordance with Article 8 of that regulation. Article 8(1) of the Air Passenger Rights Regulation provides that the passenger has the right to choose. Under the first indent of Article 8(1)(a) of that regulation, he or she can claim reimbursement of the full cost of the ticket 'at the price at which it was bought'.

- 13 Article 2(f) of the Air Passenger Rights Regulation defines a ticket as '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'.
- 14 The CJEU has previously dealt with the scope of passengers' right to reimbursement under Article 5 of the Air Passenger Rights Regulation, read in conjunction with Article 8 of that regulation, in connection with agency commissions, in its judgment of 12 September 2018 in Case C-601/17, *Harms v Vueling Airlines SA*. The passengers in that case had – as in the present case – purchased airline tickets via the Opodo intermediary platform. Following the cancellation of the flight, the air carrier reimbursed only the ticket price and not the agency commission. The CJEU first notes generally that the objectives of the Air Passenger Rights Regulation were not only to ensure a high level of protection for passengers but also to strike a balance between the interests of passengers and those of air carriers (paragraph 15). In the light of those objectives, it holds, it must be considered that, 'while a commission collected by an intermediary from a passenger when a ticket was bought must, in principle, be regarded as a component of the price to be reimbursed to that passenger in the event of cancellation of the corresponding flight', its inclusion must nevertheless be subject to certain limits, in view of the interests of the air carriers which it affects (paragraph 16). In the view of the CJEU, it follows from the definition of a ticket in Article 2(f) of the Air Passenger Rights Regulation 'that the various elements of such a ticket, including its price, must, if that ticket is not issued by the air carrier itself, in any event be authorised by it, and therefore cannot be set without its knowledge' (paragraph 17). That interpretation is supported, it finds, by the case-law of the CJEU, from which it follows that the reimbursement of a part of the 'price of the ticket' provided for in Article 10(2)(a) to (c) of the Air Passenger Rights Regulation, in the event that the air carrier places a passenger in a class lower than that for which the ticket was purchased, must be determined by reference to solely 'unavoidable' components of that price, in the sense that it is necessary to pay them in order to avail of the service proposed by the air carrier in return (paragraph 18). According to that judgment, a component of the price of the ticket which is set without the knowledge of the air carrier cannot be regarded as necessary in order to avail of the service proposed by the air carrier (paragraph 19). In the light of all the foregoing, the Court's answer to the question referred was that the Air Passenger Rights Regulation, and in particular Article 8(1)(a) thereof, must be interpreted as meaning '*that the price of the ticket to be taken into consideration for the purposes of determining the reimbursement*

owed by the air carrier to a passenger in the event of cancellation of a flight includes the difference between the amount paid by that passenger and the amount received by the air carrier, which corresponds to a commission collected by a person acting as an intermediary between those two parties, unless that commission was set without the knowledge of the air carrier – which it is for the referring court to ascertain (paragraph 20).

- 15 That decision of the CJEU makes it clear that the agency commission is, in principle, part of the reimbursement under Article 8(1)(a) of the Air Passenger Rights Regulation. However, differing interpretation possibilities are opened up by the exception specified by the CJEU that reimbursement of the arrangement fee (agency commission) is contingent on the commission not having been ‘set without the knowledge of the air carrier’ (paragraph 20). The question arises, in particular, to what degree of specificity the air carrier needs to have been informed about the commission in principle and possibly the amount thereof, and who bears the burden of proving the necessary knowledge or lack of knowledge on the part of the air carrier.
- 16 On those points, the courts of the Member States have to date applied the judgment of the CJEU in *Harms*, C-601/17, differently (see also, on the following points, Degott on Article 8 in Schmid, *BeckOK Fluggastrechte-Verordnung*, 28th edition, 2023, paragraph 4b):
- 17 (a) The Amtsgericht Eilenburg (Local Court, Eilenburg, Germany), for example, took the view that the air carrier (like others) was aware that the ticket agency usually charged a commission for its services as an intermediary, which the passenger must pay, in addition to the ticket price passed on to the air carrier, in order to be issued or provided with a ticket by the intermediary. It held that the air carrier had tacitly agreed to that approach by offering its flights for sale via the intermediary on the intermediary platform. It was not necessary for the air carrier to be aware of the specific amount of the commission charged by the intermediary company in each individual case. Rather, the court found that, within the parameters of a fair balance of interests it had to suffice that the air carrier was aware of an agency commission being charged at all (AG Eilenburg 14.5.2021, 2 C 706/20 = BeckRS 2021, 12201).
- 18 (b) The Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main, Germany) declared its position in light of the judgment of the CJEU to be that commissions were, in principle, to be reimbursed by the air carrier concerned in order to guarantee the highest possible degree of consumer protection. However, the court held, it could not have been intended that an air carrier would be able to plead ignorance where it knowingly avoids knowledge of the specific commission charges (AG Frankfurt am Main 13.7.2021, 31 C 736/21 [96], published on dejure.org).
- 19 (c) The Amtsgericht Köln (Local Court, Cologne Germany), in response to an airline’s objection that a commission had been set without its knowledge, declared

it to be obvious that a travel agency operating commercially in the market would charge a commission when an activity was carried out. It was not apparent to the court why the airline should have been unaware of that fact, and the airline had not provided an adequate explanation. In so far as the airline may have no prior knowledge of the amount of the arrangement fee set in a particular case, that was irrelevant. The court found that it could not be inferred from the decision of the CJEU that such exact knowledge of the amount was required, especially given that, if it were, the basic obligation, accepted by the CJEU, to reimburse the commission under Article 8(1) of the Air Passenger Rights Regulation would be meaningless and the airline could circumvent that obligation by taking suitable precautions (AG Köln 17.11.2021, 117 C 128/21 = BeckRS 2021, 47798).

- 20 (d) Referring to the judgment of the CJEU, the Landgericht Landshut (Regional Court, Landshut, Germany), in the case of an airline which has no influence over whether and in what amount the travel agency chosen by the passengers charges a commission but which ‘knowingly and willingly – without any further authorisation being required – releases its tickets for sale by travel agencies from a global reservation system in the knowledge that the travel agencies sell the tickets to final customers at prices the travel agencies set themselves’, took the view that knowledge of the specific amount of the arrangement fee charged by the travel agencies was not necessary (LG Landshut 3.12.2021, 14 O 2303/21 = BeckRS 2021, 55342).
- 21 (e) By contrast, the Oberlandesgericht München (Higher Regional Court, Munich, Germany), ruling on the appeal against the abovementioned judgment of the Regional Court, Landshut, inferred from the considerations of the CJEU in *Harms* that ‘what matters is the air carrier’s specific knowledge regarding how the price of the ticket sold was set’. Contrary to the view of the Regional Court, Landshut, the abstract possibility or probability, accepted by the air carrier, of a fee charged by the travel agency at an amount unknown to the air carrier did not suffice. Only in so far as the air carrier is aware that a commission paid by it or an arrangement fee collected with its knowledge by the travel agency is reflected in the ticket price is it appropriate for the air carrier to reimburse those amounts as part of the ticket price if the flight is cancelled. Otherwise, it would be appropriate not to treat arrangement fees as part of the ticket price, because it was the passenger who had recourse to the intermediary when booking tickets, with the result that the charging of arrangement fees must in principle be seen as part of that contractual relationship (OLG München 20.7.2022, 20 U 8835/21e = BeckRS 2022, 17623).
- 22 In the present case, the lower courts also differ in their interpretations of the CJEU judgment. While the court of first instance considers it unnecessary for the air carrier to know the specific amount of the commission, the court ruling on the appeal on the merits takes the opposite view.
- 23 In the assessment of this Chamber, clarification from the CJEU is necessary to guarantee uniform application by the courts of the Member States of its *Harms*

judgment in future. It would seem obvious to this Chamber that the air carrier cannot object that it did not know the specific amount of the commission, unless the commission was unusually high, which would be for the air carrier to prove. It is clear that an air carrier must assume that a commercial ticket agency with which it collaborates normally only works for a commission.

Supreme Court
Vienna, 13 December 2023
[...]

WORKING DOCUMENT