

Case C-173/23

Request for a preliminary ruling

Date lodged:

20 March 2023

Referring court:

Juzgado de lo Mercantil n.º 1 de Palma de Mallorca (Spain)

Date of the decision to refer:

10 March 2023

Applicant:

Eventmedia Soluciones, S. L.

Defendant:

Air Europa Líneas Aéreas, S. A. U.

[...]

[...] [Identification of the referring court, the parties and their representatives and their respective addresses]

ORDER

PALMA DE MALLORCA, 10 March 2022.

[...]

FACTS

FIRST.- The commercial entity EVENTMEDIA SOLUCIONES, S.L. made a claim under the simplified procedure against the commercial entity AIR EUROPA LÍNEAS AÉREAS, S.A.U., which lodged a defence within the period and in the manner prescribed.

[...] [Domestic procedural issues]

SECOND.- By procedural order of 15 November 2022 [...] the parties who had entered an appearance and the Ministerio Fiscal (Public Prosecutor's Office) were

granted a hearing so that, in relation to the uncertainties regarding the interpretation of the EU law set out, they could make submissions on the need for, and, as the case may be, the scope of, a reference for a preliminary ruling on interpretation to the Court of Justice of the European Union.

THIRD.- If, in the light of the answers to the questions referred, a review of unfair terms needs to be conducted of the court's own motion, the parties will be notified of this so that they may exchange views on the subject, as stipulated by the case-law of the Court of Justice of the European Union ('CJEU').

LAW

FIRST.- *Subject matter of the main proceedings and relevant facts.*

1. The applicant brought an action against the airline AIR EUROPA LÍNEAS AÉREAS, S.A.U. The applicant claims the sum of EUR 766 as compensation for damage occasioned by the delayed carriage of baggage, pursuing the action provided for in Article 19 of the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999 ('the Montreal Convention').

2. The applicant is pursuing the action in its capacity as assignee of the claim. It has attached to the application the assignment contract with the passenger who suffered the effects of the delayed delivery of baggage when he took flight UX63 from Madrid to Cancún (Mexico).

3. The defendant airline has lodged a defence and opposes the claim. It does not deny that a delay occurred in the delivery of the baggage but it does deny the length of that delay, and, therefore, the factual situation leading to liability for delay in the carriage of baggage laid down in Article 19 of the Montreal Convention applies.

The applicant's *locus standi* is disputed on the grounds that the claim was not validly assigned in law because the prohibition of assignment of the passenger's rights, referred to in clause 15.1 of the general conditions of carriage, was infringed.

4. At the hearing of the parties [...], the court set out its interpretative doubts concerning the need to apply European Union law. In particular, those doubts concern the scope of the judicial review of unfair terms of the court's own motion, in accordance with Directive 93/13/EEC on unfair terms and the corresponding case-law of the CJEU, in a situation like that at issue, in which the assignee pursuing the claim in the proceedings does not have the status of consumer.

5. The airline AIR EUROPA stated that it was partially in favour of making a reference for a preliminary ruling.

The airline submitted that dialogue between the courts in relation to the contractual nature of passenger's rights under the Montreal Convention is unnecessary. It argued that the Court of Justice of the European Union has already given a ruling on the matter in its judgment of 17 February 2016 (Case C-429/14). Accordingly, no interpretative doubts exist in that respect which would justify a reference for a preliminary ruling.

In the light of the arguments put forward by the airline, the court takes the view that it is not necessary to ask the Court of Justice of the European Union for a preliminary ruling on that matter.

The interest in determining whether or not the carrier's liability, under the rules laid down in Article 19 of the Montreal Convention, for delay in the delivery of baggage is contractual in nature was due to the fact that clause 15.1 of the general conditions of carriage prohibits the assignment of the passenger's rights under the contract of carriage.

This court's uncertainties remain in relation to the right of compensation laid down in Article 7(1) in conjunction with Article 5(1)(c) of Regulation (EC) No 261/2004. That compensation is associated with a system of objective liability for mere 'trouble' or 'inconvenience' caused by denied boarding, cancellation or long delay of flights. It is also compatible and reconcilable with any other further compensation (Article 12 of Regulation (EC) No 261/2004). It amounts to objective liability of the air carrier that is separate from the actual breach of the contract of carriage, without prejudice to the fact that the carrier is not obliged to pay compensation 'if it can prove' that the cancellation, denied boarding or long delay 'is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken' (Article 5(3) of Regulation (EC) No 261/2004).

However, although Articles 39 and 40 of the Montreal Convention provide that the actual carrier is also subject to the provisions of the convention, the liability laid down in Article 19 for cases of delay in the carriage of baggage is, without doubt, an action for contractual damages resulting from failure to comply with the contract of carriage. Further, in accordance with Article 17(3), that liability entitles the passenger 'to enforce against the carrier the rights which flow from the contract of carriage', albeit, as provided for in Article 29(1), subject to the conditions and limits of liability provided for in the Montreal Convention.

Accordingly, even though Article 29 of the Montreal Convention, which governs the basis for claims under the convention, makes clear that it does not deal with questions relating 'to who are the persons who have the right to bring suit and what are their respective rights', the court believes that, unlike what occurs in relation to the right of compensation laid down in Article 7 of Regulation (EC) No 261/2004, the action provided for in Article 19 of the Montreal Convention for cases of delay in the carriage of baggage is based on infringement of the contract of carriage. Accordingly, the assignment of the claim for damages is affected by

the prohibition of assignment referred to in clause 15 of the general conditions of the contract of carriage.

That is the reason why the questions concerning the interpretation of Union law are confined to matters pertaining to the scope of the review of unfair terms of the court's own motion, since the factual and legal criteria for treating the term as unfair are considered to have been met in relation to the passenger/consumer.

With regard to that point, the defendant airline, AIR EUROPA, relying on legal provisions, Spanish case-law and case-law of the Court of Justice of the European Union, maintains that a review of unfair terms should not be carried out of the court's own motion for the protection of consumers and users. The defendant submits in short that a review of the court's own motion requires the consumer to be a party to the proceedings. In the present case, the action was brought by the assignee of the claim, to whom the passenger's status of consumer was not assigned with the claim. The defendant stresses that this case does not involve the assignment of a contract but rather the assignment of a claim which infringed the prohibition of assignment laid down in clause 15(1) of the general contractual conditions.

6. The Ministerio Fiscal lodged a report setting out its view.

The Ministerio Fiscal submitted that a reference for a preliminary ruling was not required on the grounds that there were factual and legal elements for treating the term as unfair and that, therefore, the court, in accordance with the case-law of the CJEU, should conduct a review of its own motion of the term prohibiting the assignment of the passenger's rights and compensate for the imbalance which exists between the consumer and the seller or supplier.

That position is inconsistent with the position put forward in the case file for simplified proceedings 564/22 before this court, which led to a reference for a preliminary ruling to the CJEU (Case C-11/23), the admissibility of which is currently being examined.

On that occasion, the Ministerio Fiscal argued that a reference for a preliminary ruling should not be made on the grounds that it was not possible to conduct a review of the term of the court's own motion since the consumer who assigned the claim was not a party to the proceedings. The Ministerio Fiscal contended that the assignee, as an entity specialising in claims in matters relating to carriage by air, was not a consumer or user. In support of its position, it relied on the order of the First Chamber of the Spanish Tribunal Supremo (Supreme Court) of 30 May 2018 (rec. 47/18), which held that when a claim is assigned the status of consumer is not transferred as though it were annexed thereto and that, accordingly, the assignee lacked the legal quality of consumer pursuant to Article 3(1) of R[oyal]D[ecreto]L[egislativo] 1/2007 por el que se aprueba el texto refundido de la Ley General de Consumidores y Usuarios (Royal Legislative Decree 1/2007

approving the consolidated text of the General Law on Consumers and Users) of 16 November 2007.

SECOND.- Relevant legal provisions.

1. The Court of Justice has held that, in order to guarantee the protection of consumers and users intended by Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, and on a uniform interpretation of Articles 6(1) and 7(1) thereof, the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action (judgments of 9 November 2010, *VB Pénzügyi Lízing*, C-137/08, EU:C:2010:659, paragraph 48, and of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, EU:C:2018:320, paragraph 28). In that connection, the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, provided that it has available to it the legal and factual elements necessary for that task (judgment of 20 September 2018, *OTP Bank and OTP Faktoring*, C-51/17, EU:C:2018:750, paragraph 87).

The Court of Justice of the European Union has gradually refined its case-law indicating to national courts when and under what circumstances they are required to conduct a review:

- The review is limited to the contractual terms which can be determined to be unfair on the basis of the factual and legal elements in the case file available to the national court (judgment of 13 September 2018, *Profi Credit Polska*, C-176/17, EU:C:2018:711, paragraphs 46 and 47)
- The review of a court's own motion must comply with the principle that the subject matter of an action is defined by the parties and the principle of *ne ultra petita*, and must be limited to the terms which are challenged in the proceedings or which are linked to the subject matter of the dispute as defined by the parties.
- The national court is required to take ex officio investigative measures, provided that the elements of law and fact already contained in the case file raise serious doubts as to the unfair nature of the term at issue (judgment of 11 March 2020, *Györgyné Lintner v UniCredit Bank Hungary Zrt*, C-511/17, EU:C:2020:188, paragraph 38).
- After finding of its own motion that a term is unfair, the national court 'is, as a general rule, required to inform the parties to the dispute of that fact and to invite each of them to set out their views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure' (see, in that connection, judgments of 21 February 2013, *Banif Plus Bank*, C-472/11, EU:C:2013:88, paragraphs 31 and 32; of 7 November 2019, *Profi Credit Polska*, C-419/18 and C-483/18, EU:C:2019:930, paragraph 70; and

of 11 March 2020, *Györgyné Lintner v UniCredit Bank Hungary Zrt*, C-511/17, EU:C:2020:188, paragraph 42).

- Positive action by the national court requires legal proceedings to have been brought by one of the parties to the contract (see, in that connection, judgment of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 63).
- The national court is not required under Directive 93/13 to exclude the possibility that such a term may be applicable, if the consumer, after having been informed of it by that court, does not intend to assert the unfair or non-binding status of the term (judgment of the Court of Justice of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 33).

THIRD.- *Grounds for the decision.*

1. The airline claims that the assignee does not have *locus standi*, arguing that the assignment is invalid and ineffective because it was carried out contrary to clause 15(1) of the general conditions of the contract.

The clause is worded as follows:

‘The liability of AIR EUROPA and of any other carrier, in accordance with Article 1, shall be determined by the conditions of carriage of the carrier that issues the ticket, unless otherwise stipulated. The rights to which the passenger is entitled shall be strictly personal and the assignment of those rights shall not be permitted’.

After examining clause 15(1) of the airline’s general contractual conditions, the referring court considers that it has sufficient factual and legal elements to conduct a review of the content of the clause and, following an exchange of views, to declare that it is unfair.

The clause was not individually negotiated and is instead a standard term widely used in contracts. Further, it appears that, contrary to the requirements of good faith, it creates, to the detriment of consumers and users, a significant imbalance in the rights and obligations of the parties under the contract of carriage. Without any justification at all, a limitation is imposed on the right of consumer and users to assign their rights as provided for in Article 1112 of the Código Civil (Civil Code) (Articles 82(1) and 86(7) of Royal Legislative Decree 1/2007 approving the consolidated text of the General Law for the Protection of Consumers and Users and other ancillary laws of 16 November 2007).

In turn, the review by the court of its own motion complies with the principle that the subject matter of an action is defined by the parties and the principle of concordance and applies to a term which has not been challenged but which is linked to the subject matter of the dispute. The need for a review arises since the

assignee's *locus standi* has been called into question in accordance with the term at issue.

However, the proceedings were not commenced by a consumer but rather by the assignee of the claim, who is not a consumer. Accordingly, in addition to the obstacle of compliance with the condition laid down in the judgment of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 63, to the effect that the proceedings must have been brought by a party to the contract, it is not possible to take into account the wishes of the consumer by informing the consumer that the term is unfair and obtaining his or her view on the subject in order to determine whether the consumer is asserting the unfair or non-binding status of the term (judgment of the Court of Justice of 4 June 2009, *Pannon GSM*, C-243/08, EU:C:2009:350, paragraph 33).

Since an action has been brought claiming damages for delay in the carriage of baggage as provided for in Article 19 of the Montreal Convention, and since the airline has disputed the *locus standi* of the assignee of the credit because assignment is prohibited under the contract of carriage, it is considered to be necessary to seek a preliminary ruling from the Court of Justice of the European Union. The purpose of that ruling is to clarify certain matters related to the case-law of the CJEU on the interpretation of Articles 6(1) and 7(1) of Directive 93/12/EEC in connection with the review of unfair terms in consumer contracts by a court of its own motion.

Those are the reasons which call for the following questions to be referred for a preliminary ruling to the Court of Justice of the European Union, as guarantor of the uniform interpretation and application of EU law.

OPERATIVE PART

On those grounds, this court decides to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

- 1) Must Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as meaning that a national court hearing an action seeking compensation for damage occasioned by delay in the carriage of baggage under Article 19 of the Montreal Convention is required to review of its own motion whether a clause in the contract of carriage that does not allow the passenger to transfer their rights is unfair, where the claim is brought by the transferee[,] who[,] unlike the transferor, is not a consumer or user?
- 2) If it is appropriate to carry out a review of the court's own motion, may the obligation to inform the consumer and establish whether they claim that the clause is unfair or consent to it be disregarded in the light of the conclusive act of having transferred their claim in breach of any unfair term that does not permit the claim to be transferred?

[...] [Notification to the Court of Justice concerning the close similarity between those questions and questions 3 and 4 referred for a preliminary ruling in Case C-11/23. In that case, those questions were referred in the alternative; in the present case, they are referred principally]

The proceedings are stayed pending a ruling from the Court of Justice of the European Union on the questions referred.

[...]

[...] [Closing standard wording and signature]

WORKING DOCUMENT