



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 23 January 2014¹

Case C-487/12

Vueling Airlines SA

v

Instituto Galego de Consumo de la Xunta de Galicia

(Request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No 1 de Ourense (Spain))

(Air transport — Common rules for the operation of airline services in the European Union — Regulation (EC) No 1008/2008 — Pricing freedom — Protection of consumers' rights — Charge for checking in passengers' baggage in the form of an optional price supplement — National legislation precluding airline operators from imposing such a surcharge)

1. By the request for a preliminary ruling in the present case, the Court of Justice has been asked to clarify the scope of the principle of pricing freedom laid down in Article 22(1) of Regulation (EC) No 1008/2008.²
2. In particular, the Juzgado de lo Contencioso-Administrativo No 1 de Ourense (Court for Contentious Administrative Proceedings, Ourense) (Spain) asks the Court whether national legislation which prohibits air carriers from charging for checking in passengers' baggage³ in the form of an optional price supplement is compatible with such a provision.
3. Article 22 of Regulation No 1008/2008 is entitled 'Pricing freedom' and is part of Chapter IV relating to '[p]rovisions on pricing' of air services. Paragraph 1 thereof states:

'Without prejudice to Article 16(1) [relating to general principles for public service obligations]', Community air carriers and, on the basis of reciprocity, air carriers of third countries shall freely set air fares and air rates for intra-Community air services.'
4. The request for a preliminary ruling has been made in proceedings between Vueling Airlines SA ('Vueling'), which sells air travel inter alia through a website, and the Instituto Galego de Consumo de la Xunta de Galicia (consumer body established by the Autonomous Community of Galicia – the 'IGC'), concerning the imposition by that body of a fine on Vueling in response to the content of its contracts of carriage by air.

1 — Original language: French.

2 — Regulation of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3).

3 — The concept of checked baggage is not defined in Regulation No 1008/2008. In the present Opinion, I will assume that it covers the personal effects accompanying the passenger during his voyage, which the carrier takes into its care and for which it issues an identification tag, unlike carry-on baggage, which remains in the care of the passenger.

5. In August 2010, Vueling added a surcharge of EUR 40 to the base price of airline tickets (EUR 241.48 euros) purchased by Ms Arias Villegas when she checked in two pieces of baggage online.

6. On 15 November 2010, when Ms Arias Villegas returned from her trip, she lodged a complaint against Vueling, claiming that the contract of carriage by air contained an unfair term. The IGC, to which the complaint was forwarded, then imposed an administrative fine of EUR 3 000 on Vueling on the basis of Article 97 of Law 48/1960 of 21 July 1960 on air navigation (*Ley 48/1960 sobre Navegación Aérea*),⁴ and Articles 82, 86, 87 and 89 of the consolidated version of the General Law for the protection of consumers and users and other related laws (*texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*).⁵

7. Article 97 of the LNA provides as follows:

‘The carrier is required to carry passengers’ baggage with them, subject to weight limits, irrespective of the number of items, and size limits established by regulation, as part of the price of the ticket.

Separate provisions shall govern excess baggage.

For these purposes, baggage does not include objects and items of hand baggage carried by passengers themselves. The carrier is required to carry free of charge in the cabin, as hand baggage, objects and items carried by passengers themselves, including items purchased in airport shops. The carrier may refuse to allow such objects and items on board only on grounds of security connected with the weight or size of the object in relation to the characteristics of the aircraft.’

8. After unsuccessfully challenging the penalty in administrative proceedings before the IGC, Vueling brought an action before the referring court on 27 April 2012, arguing that the administrative fine imposed on it is contrary to the principle of pricing freedom as laid down in Article 22 of Regulation No 1008/2008.

9. In its order for reference, the referring court takes the view that Article 97 of the LNA clearly enshrines the right of an air passenger to check in baggage at no extra cost over and above the base price of the plane ticket. That right forms part of the legal definition of a contract of carriage by air and is a logical and reasonable consumer protection measure which is not contrary to the liberalisation of air fares enshrined under EU law.

10. Nevertheless, the referring court observes that this point of view is not shared by all Spanish courts. Some of them take the contrary view that Article 22 of Regulation No 1008/2008 does allow air carriers to apply a surcharge to the base price of a plane ticket when a piece of baggage is registered for check-in, and that that provision prevails over Spanish legislative provisions to the contrary.

4 — BOE No 176 of 23 July 1960, p. 10291, article as amended by Law 1/2011 of 4 March 2011, BOE No 55 of 5 March 2011, p. 24995 (‘the LNA’).

5 — Text adopted by virtue of Royal Legislative Decree (Real Decreto Legislativo) 1/2007 of 16 November 2007, BOE No 287 of 30 November 2007, p. 49181.

11. It is against that background that the Juzgado de lo Contencioso-Administrativo No 1 de Ourense decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is Article 22(1) of [Regulation No 1008/2008] to be interpreted as precluding a national rule (Article 97 of [the LNA]) that requires passenger airlines to grant passengers the right always to check in a suitcase without paying a supplement or surcharge on top of the base price of the ticket purchased?’

12. In the present Opinion, I will set out the reasons why I consider that, through the principles laid down in Articles 22 and 23 of Regulation No 1008/2008, the EU legislature has managed to allow air carriers freedom in pricing of all commercial services associated with the performance of the contract of carriage by air, including services such as checking in baggage, whilst protecting consumers’ rights and interests, through the introduction of rules relating to the information to be provided to consumers.

I – My interpretation

13. By its question, the referring court asks the Court whether the principle of pricing freedom laid down in Article 22(1) of Regulation No 1008/2008 precludes national legislation such as that at issue in the main proceedings, which prohibits airline companies from charging for checking in passengers’ baggage in the form of an optional price supplement.

14. In other words, do air carriers such as Vueling, Ryanair Ltd, easyJet Airline Co. Ltd, HOP! or Germanwings infringe EU law when they classify services such as passengers checking in pieces of baggage optional and apply a surcharge?

A – Preliminary observations

15. The question has arisen because of the arrival on the airline market of so-called low-cost carriers, brought on by the liberalisation of the airline sector and the opening-up of competition in that sector, as well as the development of those companies’ business model.

16. That model consists in offering customers wishing to minimise their travel expenses short- and medium-haul flights at particularly low prices, by guaranteeing the same level of safety as any other company whilst offering a lower quality of service. The low-cost airlines thus concentrate on offering the absolute minimum of service in pursuing the lowest-possible-cost model.⁶ In charging for each service which is usually included in the price of a traditional airplane ticket, they make greater use of differentiated, progressive prices. Thus, incidental services which have hitherto been offered by more established operators, such as seat reservation, baggage transport, in-flight catering and newspapers, become optional services. Consequently, it is not always an easy task to estimate the incidental charges which may or may not form part of the purchase price for the ticket offered at the beginning of the booking process and to compare prices being offered by different airlines.

17. Vueling markets flights *inter alia* through a website. If I were to make a hypothetical booking today, this is how the marketing strategy will appear.

⁶ — It should be remembered that this economic model is not present only in the airline sector. In the hotel sector, the French Formule 1 hotel chain focuses on the customer’s principal requirement – sleeping at the lowest possible cost – and brings its level of service down to its most basic form, generally offering no incidental services such as a restaurant or night reception, whilst the usual services offered, such as television, are offered in the form of an option for which a charge must be paid. In the distribution sector, certain supermarket chains, such as Leader Price, Lidl or Ed develop shelving systems of the utmost simplicity offering a limited choice of basic products. In the automobile sector, future ultra low-cost Renault-Nissan vehicles such as the Logan models made by Dacia are being developed with a view to achieving extreme simplicity, retaining only what is absolutely necessary for the driver and/or mandatory under European standards.

18. When a customer selects a given flight in the booking procedure accessible through the website, three types of fares are shown in the centre of the page: ‘Basic’, ‘Optima’ and ‘Excellence’. Under each of those fares is a description of the features of each fare, symbolised with logos, where applicable.⁷

19. The ‘Basic’ fare allows the customer to travel at the lowest price. It is not embellished with any particular logo.

20. The ‘Optima’ fare is symbolised by a graphical representation of a seat, a suitcase and a clock. It allows for check-in of one piece of baggage weighing up to 23 kilogrammes, choice of a seat at the front or back of the aircraft and advantageous terms for check-in and changes to the ticket. Lastly, as at the date of drafting the present Opinion, the ‘Excellence’ fare was symbolised by the graphical representation of a seat, a suitcase and a clock. In addition to the advantages of the ‘Optima’ fare, it allows for hand baggage of up to 14 kilogrammes and a seat in the first row of the aircraft. It also allows the customer to effect instant check-in at the end of the booking process, and to have access to VIP lounges, priority at check-in counters, fast-track through security control and priority boarding, as well as allowing the customer to enjoy in-flight catering, to make changes to the booking and, where applicable, to receive a refund in the event of cancellation and to cumulate fidelity points.

21. When the customer selects the ‘Basic’ fare for the entire trip, a statement of the charges relating to the booking appears on the right-hand side of the page, under the title ‘Your travel plan’. It includes, in addition to the ‘Basic Fare’ for the flight including taxes, an amount for management charges and, where applicable, credit card fees. The total of the fare and those charges amounts to the ‘All-inclusive final price’. At that point, in order to continue the booking, the customer must provide his or her personal details. He must then accept the ‘Travel conditions’ and ‘Conditions of carriage’ of the website. Point 8.4 of the ‘Conditions of carriage’ stipulates the following:

‘With the Basic fare, checking in one case of up to 23 kg per passenger is subject to the payment of a variable supplement according to the individual characteristics of each flight. The Optima and Excellence fares include one checked-in case of up to 23 kg per passenger at no extra cost.

All of the fares allow Passengers to check in more than one item of luggage of up to 23 kg each, providing they pay the corresponding charge per item. The allowance may be increased by paying the corresponding charge, subject to a limit of 32 kg per item of luggage.

...’

22. After accepting those terms, the customer is then asked to continue the booking process by clicking on ‘Customise your flight’ Vueling thus offers various services to complete the airline service itself, which the customer is free to refuse or accept in return for payment of an optional price supplement. It is at this stage that the customer may, for example, choose, as ‘from’ EUR 13 (call charge), to check in a piece of baggage or travel with a pet. At each of these stages, the ‘All-inclusive final price’ is modified, depending on the options selected by the customer. The customer may then finalise the booking by effecting payment of a single amount corresponding to the total price of the trip.

23. As stated by Vueling in its observations,⁸ the objective is thus to offer customers customised airline services, adapted to their needs and financial means, by breaking down the services offered into segments. The implementation of that strategy means, first of all, that a distinction must be drawn between the essential components of the airline service and the incidental components of that service

7 — I have noticed that the symbols shown under each of the fares may change depending on the day the booking is made, whilst remaining included in the fare in question.

8 — Paragraphs 4 to 9 of the observations.

and, secondly, that the incidental components must be made into optional components enabling customers to choose those options if they deem it necessary, on the basis of an actual ‘opt-in’. Travelling at the lowest price, as is possible under the ‘Basic’ fare, involves doing without a certain number of services which are included in the higher ‘Optima’ and ‘Excellence’ fares.

24. The strategy of a low-cost airline can thus be summarised as follows:

‘In order for a customer to enjoy the advantages of extremely attractive fares, [the airline] takes care of the customer’s flight, but only the flight.’⁹

25. Is EU law, in particular Article 22(1) of Regulation No 1008/2008, liable to call that economic model into question? Is such a strategy, which charges for services such as baggage check-in as options, contrary to consumers’ rights and the rules laid down by the EU legislature in the context of that regulation?

26. I think not.

27. It is true that the liberalisation of the airline market and the ensuing deregulation of the sector have been accompanied by abusive and misleading practices on the part of the airline companies, particularly the low-cost airlines. Many of them have been found guilty of using clauses held to be unlawful or abusive in their contracts of carriage¹⁰ or conditions of employment of their staff. The low-cost airlines have accordingly received bad publicity, all the more so because they are based on a business model which breaks with the traditional codes in the airline sector. Many passengers have been surprised at having to pay surcharges for services which were hitherto included in the base price of the airline ticket. Is this the other side of the market liberalisation coin? Apparently it is. The liberalisation begun by the EU legislature in 1987 was aimed at decompartmentalising the national markets and improving airlines’ competitiveness by opening the market up to competition and restricting the regulatory powers hitherto held by the Member States. The objective, ultimately, was to achieve greater variety in supply and lower prices for consumers.

28. That objective has, indisputably, been achieved. The arrival of new companies on the airline market has forced traditional operators – who have been criticised in the past for abusing their dominant position or collaborating on fares – to review their pricing policies. The prices of flights have, accordingly, fallen dramatically, thereby enabling consumers who previously did not have the means to travel to enjoy flights. The liberalisation has thus responded to the needs of a customer base previously constrained by limited purchasing power. The low-cost airlines have found their target public. Traditional airlines have responded by launching their version of low-cost airlines: Air France SA has created its subsidiary HOP! whilst Deutsche Lufthansa AG has developed Germanwings.

29. The deregulation of the sector has led to excesses on the part of the traditional airline companies and the low-cost carriers, as has been amply demonstrated by the proceedings brought successfully against easyJet Airline Co. Ltd, Ryanair Ltd, Brussels Airlines and Air France SA. It must not be forgotten, however, that in stimulating competition and opening up the market to new operators, this market liberalisation has also ultimately brought with it numerous direct benefits for consumers through substantially lower prices.

9 — Statement by Mr Kelleher, Chairman of Southwest Airlines, the first American low-cost airline.

10 — Possibility of increasing the fare after the booking has been made, liability disclaimers, refusal to reimburse in the event of force majeure, no compensation for flights cancelled due to technical problems, refusal to board passengers, passing on airport charges, various management and other fees, processing of personal data, etc.

30. Therefore, as regards pricing for airline services, in particular for checking in baggage, it is imperative to focus on the real issue. Whilst the wish to rein in airline companies' commercial practices may be perfectly legitimate, the fact remains that Regulation No 1008/2008 aims to deregulate the sector by allowing those companies pricing freedom. In the present proceedings, the issue is thus one of determining whether charging for checking in passengers' baggage in the form of an optional price supplement comes within the scope of that freedom or whether it is an unlawful practice which may be caught by the general and specific provisions laid down in consumer protection legislation. Under no circumstances must the issue be used to re-establish regulation which the EU legislature has taken care to abolish, unless it is to take its place.

31. In the present case, I take the view that the optional charge comes within the pricing freedom allowed by the EU legislature in Article 22(1) of Regulation No 1008/2008.

B – *My interpretation of the legislation*

32. In reaching that conclusion, recourse must be had to traditional methods of interpretation, including the teleological, or purposive, approach. As we will see, the terms employed by the EU legislature in Articles 2(18) and 22(1) of Regulation No 1008/2008 are extremely broad, to the point of being imprecise.

33. It is patently obvious that the system established under Regulation No 1008/2008 is aimed at liberalising the airline market. That movement was begun by Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services¹¹ and was aimed at achieving greater variety in supply and lower prices for consumers by opening the market up to competition.

34. To that end, the EU legislature allowed air carriers complete freedom in setting 'air fares'.¹² It thus placed a restriction on the unfettered sovereignty hitherto held by the Member States in this area by replacing the Member States' power to approve fares with a mere prior notification measure and limiting Member States' involvement to situations where fare levels either were excessive to the point of penalising users, or on a sustained downward path, in order to put a stop to the trend.

35. Article 1(1) states that Regulation No 1008/2008 is also aimed at regulating intra-Community air services.

36. In Article 22(1) thereof, the EU legislature reaffirms the principle of freedom in setting 'air fares'. It thus pursues the movement towards deregulation of the sector by restricting the Member States' scope for intervention by abolishing the measures relating to the prior notification of prices and safeguard provisions referred to above.

37. In Article 23 of that regulation, the EU legislature introduced specific consumer protection provisions in respect of airlines' abusive or misleading practices. As we will see, that freedom in setting prices is combined with an obligation to be clear in the detail of the services provided, so that the user may make an accurate assessment of pricing levels when comparing offers. That can be achieved only at the cost of relative complexity, which is, to my mind, the very consequence of the spirit of the system which the EU legislature wished to put in place in order to achieve the objectives it set for itself, that is to say, one in which there is diversity of supply and, consequently, a wide variety of services adapted to the user's purchasing power.

11 — OJ 1992 L 240, p. 15.

12 — See Article 5(1) of Regulation No 2409/92. Air fares are defined in Article 2(a) of that regulation as the prices to be paid by passengers 'for the carriage of them and for the carriage of their baggage on air services and any conditions under which those prices apply, including remuneration and conditions offered to agency and other auxiliary services'.

38. At the current juncture, a discussion of the principles on which pricing freedom is based is in order.

1. The principle of pricing freedom

39. As I have stated, the EU legislature reaffirms the principle of freedom in setting ‘air fares’ in Article 22(1) of Regulation No 1008/2008. Before examining the scope of that principle in greater detail, the following two observations are in order.

40. First, the EU legislature does not define the concept of fare per se. Nevertheless, in the present Opinion, I will assume that ‘fare’ refers to the price that a passenger has to pay for routes, flights, dates and, where applicable, a given class for the travel contemplated.

41. Second, it should be noted that under Article 22(1) of Regulation No 1008/2008, pricing freedom does not extend to prices for air services which are part of a public service obligation. Nor does that freedom apply in respect of charges imposed by public authorities or airport managers, that is to say, in respect of taxes and airport charges and also other charges, surcharges or fees, such as those related to security or fuel which, by their very nature, cannot be left to the discretion of economic operators and which the EU legislature addresses specifically and separately in Article 23(1) of Regulation No 1008/2008.

42. That being said, apart from those two categories of costs, it seems to me that the freedom enjoyed by air carriers in setting prices for their services is absolute.

43. In the first place, the EU legislature uses a particularly broad expression to define the substantive scope of that freedom.

44. In the French version of Regulation No 1008/2008, pricing freedom applies in respect of ‘tarifs des passagers’ [passenger fares], which is very broad in scope. In the German and English versions the EU legislature uses an even more broadly-drafted expression: ‘flugpreise’ and ‘air fares’, which both cover the broader notion of air fares generally. The Spanish version goes as far as to use the term ‘tarifas ... de los servicios aéreos’ [fares for air services].

45. Moreover, the terms ‘tarifs des passagers’, or ‘air fares’, have identical definitions, irrespective of the language version, in Article 2(18) of Regulation No 1008/2008, referring to: *‘the prices expressed ... to be paid to air carriers or their agents or other ticket sellers for the carriage of passengers on air services and any conditions under which those prices apply, including remuneration and conditions offered to agency and other auxiliary services’*.¹³

46. The concept of the ‘price ... to be paid ... for the carriage of passengers’ within the meaning of Article 2(18) of that regulation is capable of covering all net costs associated with the performance of the carriage service, from the booking of the flight by the customer to the delivery of the baggage to the customer on the carousels in the arrivals area. The performance of a contract of carriage by air involves numerous services, including booking, boarding and receiving passengers on board the aircraft, the safe carriage of those passengers from the point of departure to the point of destination, taking care of the passengers during the flight, disembarkation of the passengers and, lastly, the delivery of their baggage. All of those services involve costs associated not only with the carriage of the passenger in the strict sense of the term, but also processing the booking, issuance of the boarding

13 — Emphasis added.

pass, use and maintenance of the aircraft and airport infrastructures and processing baggage. In the interests of the proper performance of the contract of carriage by air, they also require the involvement of various professionals, such as commercial agents, flight crew and ground crew, mechanics and other handlers.

47. Moreover, the EU legislature does not regulate only the ‘price ... to be paid ... for the carriage of passengers’. It also covers prices relating to the ‘remuneration ... offered to agency and other auxiliary services’, thereby going well beyond costs stemming directly from the performance of the air service in the strict sense. I do not think that the concept of ‘auxiliary services’ within the meaning of Article 2(18) of Regulation No 1008/2008 is necessarily linked to the services offered by agents. It can, therefore, encompass a plethora of services.

48. In the light of the foregoing, it seems to me that the concept of air fares covers a broad range of commercial services, be they compulsory or necessary services for the carriage of the passenger or more auxiliary services for which an optional price supplement may be charged.¹⁴

49. As regards charges for booking baggage, to my mind there can be no doubt that they are included in that concept and therefore come under the pricing freedom as provided for in Article 22(1) of Regulation No 1008/2008. The booking of baggage, it must be remembered, is a commercial service involving costs for the air carrier for processing, sorting, storage and delivery of baggage, including possibly under guarded watch.

50. Secondly, air carriers’ freedom in setting prices also covers the detailed rules for the implementation of air fares. Subject to compliance with the rules laid down in Article 23 of Regulation No 1008/2008 relating to information to be provided to consumers, air carriers are free to determine the terms of their pricing. In other words, apart from airlines accomplishing a public service mission, air carriers are free to determine the range of services they intend to include in their contract of carriage and how they intend to charge for them, free of any involvement by the Member States in the matter. As noted by the European Commission in its observations, that regulation does not confer any power on the Member States to determine the pricing conditions applicable to the price of the airline ticket or even to specify which services must be included in that price.¹⁵ This rule allows the airline companies to design their various business models and competitive strategies, including diversifying and segmenting what they offer on the market.

51. Thus, air carriers are free to offer the option of checking in baggage under a separate charge, in so far as that service is not required by safety rules, as is, for example, available seating.

52. They may choose to include the cost of that service in the base price of the airline ticket, as do the majority of traditional operators, who wish to emphasise and promote the quality of their service, given the competition from low-cost airlines.

53. Air carriers may also decide to reduce the costs associated with processing, sorting carriage and delivery of baggage by removing that service from the base price of the ticket and offering it in return for an optional price supplement. This type of practice allows them to offer flights at lower prices than those offered by other companies and is part of the commercial logic covered by Regulation No 1008/2008, but above all it enables the price to be proportional to the services requested by the user.

14 — The Court held in Case C-112/11 *ebookers.com Deutschland* [2012] ECR, that optional price supplements ‘relate to services which, supplementing the air service itself, are neither compulsory nor necessary for the carriage of passengers or cargo, with the result that the customer chooses either to accept or refuse them’ (paragraph 14).

15 — Paragraph 19 of those observations.

54. This type of interpretation is clearly not applicable to hand baggage or carry-on baggage, as the airline must keep those free, for two reasons. The first reason is that, unlike checked-in baggage, hand baggage remains the sole responsibility of the passenger and, moreover, is not part of the commercial services provided by the airline as covered by Regulation No 1008/2008 because there are no costs for checking it in, tracing it and storing it, as there is with checked-in baggage.

55. The second reason is that the passengers' ability to have their personal effects and objects they consider most precious or indispensable with them under their own care forms part of their personal dignity, as recognised by the referring court in the order for reference. In those circumstances, charging for carry-on baggage, even notionally, is unacceptable.

56. In the light of all the foregoing, I take the view that Article 22(1) of Regulation No 1008/2008 does not preclude an airline company such as Vueling from charging for checking in baggage in the form of an optional price supplement.

57. Should the Court not share this view and find that checking in a piece of baggage is a compulsory service the cost of which is included in the base price of the airline ticket, then it is necessary to come up with a generally-applicable definition of the very content of that service. This would require the Court to define, for the 28 Member States of the European Union, the size and maximum allowed weight of baggage, taking into account the safety requirements for the type of aircraft likely to be used. It is clear, however, that such a decision aimed at defining the technical rules for checking in baggage goes beyond the powers and remit of the Court.

58. That kind of approach is, moreover, difficult to reconcile with the requirements of free competition and consumer protection on which Regulation No 1008/2008 is based. First of all, irrespective of the form such a definition might take, such an approach would have the effect of restricting competition for a commercial service, which would obviously compromise the effectiveness of that regulation. Secondly, it would prevent the establishment of proportional pricing for the services in demand from users, with the result that passengers traveling with only hand baggage would bear the costs associated with checking in other passengers' baggage, which runs counter to the idea of consumer protection.

2. Protection of consumers' rights

59. The EU legislature has, however, placed boundaries on airlines' pricing freedom in the form of the obligation to comply with the consumer protection requirements laid down in Article 23 of Regulation No 1008/2008.

60. Under the heading 'Information and non-discrimination', Article 23 of Regulation No 1008/2008 provides in paragraph 1 thereof:

'Air fares ... shall include the applicable conditions when offered or published in any form, including on the internet, for air services from an airport located in the territory of a Member State to which the Treaty applies. The final price to be paid shall at all times be indicated and shall include the applicable air fare ... as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition to the indication of the final price, at least the following shall be specified:

- (a) air fare ...;
- (b) taxes;
- (c) airport charges; and

(d) other charges, surcharges or fees, such as those related to security or fuel;

where the items listed under (b), (c) and (d) have been added to the air fare ... Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an “opt-in” basis.’

61. That provision on pricing of air services constitutes *lex specialis* in relation to the general rules laid down in Directive 2005/29/EC of the European Parliament and of the Council¹⁶ and Directive 2011/83/EU of the European Parliament and of the Council.¹⁷ It is aimed at achieving greater transparency in air carriers’ pricing practices in order to ensure greater protection of consumers against misleading or abusive practices, which are reported all too often by passengers.

62. It goes without saying that price is a decisive factor in passengers’ choice of airline company. Yet there is a substantial difference between the basic price of the airline ticket and the total price paid by the passenger at the end of the booking process, due to the considerable cost of other components, including taxes, charges and other optional supplements.

63. Moreover, commercial practices, but also various charges imposed on airline companies, have given rise to a myriad of price components for passengers’ tickets, which does not enhance the transparency of pricing schedules.

64. Lastly, some of those costs are hidden for marketing reasons, which runs counter to the need to communicate prices in a transparent manner.

65. In Article 23(1) of Regulation No 1008/2008, the EU legislature therefore establishes a clear distinction between, on the one hand, air fares, taxes and other types of charges, which are unavoidable and foreseeable at the time of their publication and, on the other, optional price supplements.

66. For air fares, taxes and other types of charges, the airline carrier is required to mention the applicable conditions for each of them, irrespective of the form in which they are published.

67. As regards optional price supplements, the Court held in *ebookers.com Deutschland* that the airline carrier must make sure that they are communicated in a clear, transparent and unambiguous way at the start of any booking process and ensure that the customer is then in a position to accept or refuse the service in question on an opt-in basis.¹⁸

68. Thus, although an air carrier may, by virtue of the pricing freedom allowed it under Article 22(1) of Regulation No 1008/2008, charge an optional price supplement for checking in baggage, it must, at the very least, comply with the consumer information requirements specifically laid down in Article 23(1) of that regulation.

69. It is appropriate at this point to examine whether those provisions preclude national legislation such as that laid down in Article 97 of the LNA. Let us recall that that article is interpreted by the referring court as prohibiting air carriers from charging for checking in passengers’ baggage in the form of an optional price supplement.

16 — Directive of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) (OJ 2005 L 149, p. 22).

17 — Directive of 25 October 2011 on consumer rights and amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64).

18 — Paragraph 14 of the judgment.

70. Interpreted thusly, that legislation is clearly not compatible with EU law. It in effect reintroduces State regulation which the EU legislature took great care to abolish in Regulation No 1008/2008 through deregulation and liberalisation of the airline sector. As stated above, except with respect to airlines accomplishing a public service mission, Member States no longer have the right to be involved in air carriers' pricing practices, the applicable pricing conditions and the types of services included in the basic price of the airline ticket.

71. Moreover, such legislation is the beginning of the harmonisation the EU legislature is seeking to achieve through the establishment of '*common* rules for the operation of air services in the Community',¹⁹ in keeping with the title of Regulation No 1008/2008. It is clear from recitals 2, 5, 16 and 18 in the preamble to that regulation that the objective is to achieve a more efficient, consistent and homogenous application of Community legislation for the internal aviation market in order to avoid a distortion of competition arising from the different application of the rules at national level whilst enabling consumers to compare effectively the prices for air services. Given that air transport is, by its very nature, an international market on which similarly-sized airline companies are present through completely borderless booking tools, it is essential, in the light of the objectives pursued by the EU legislature, that their activity actually be regulated by rules which are common to all Member States of the European Union. Legislation such as that at issue here clearly runs counter to those objectives.

72. Consequently and in the light of all the foregoing considerations, I take the view that the principle of pricing freedom laid down in Article 22(1) of Regulation No 1008/2008 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which prohibits air carriers from charging for checking in passengers' baggage in the form of an optional price supplement.

73. I consider, nevertheless, that it is for the competent national authorities to ensure that, in applying a surcharge for such a service, air carriers comply with the consumer protection requirements laid down in Article 23(1) of that regulation by communicating in a clear, transparent and unambiguous way, at the start of any booking process undertaken by the customer, the detailed rules for pricing relating to checking in of baggage and allowing the customer to accept or refuse the service in question on an opt-in basis.

74. In the present case, therefore, it is for the referring court to ascertain whether Vueling has complied with those requirements with regard to Ms Arias Villegas.

II – Conclusion

75. In the light of the foregoing considerations, I therefore propose that the Court give the following answers to the questions referred for a preliminary ruling by the Juzgado de lo Contencioso-Administrativo No 1 de Ourense:

The principle of pricing freedom laid down in Article 22(1) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, must be interpreted as precluding national legislation such as that at issue in the main proceedings, which prohibits air carriers from charging for checking in passengers' baggage in the form of an optional price supplement.

Nevertheless, it is for the competent national authorities to ensure that, in applying a surcharge for such a service, air carriers comply with the consumer protection requirements laid down in Article 23(1) of Regulation No 1008/2008 by communicating in a clear, transparent and unambiguous

¹⁹ — Emphasis added.

way, at the start of any booking process undertaken by the customer, the detailed rules for pricing relating to checking in of baggage and allowing the customer to accept or refuse the service in question on an opt-in basis.