

Anonymised version

Translation

C-511/22 – 1

Case C-511/22

Request for a preliminary ruling

Date lodged:

29 July 2022

Referring court:

Landgericht Frankfurt am Main (Germany)

Date of the decision to refer:

9 June 2022

Applicant and appellant:

AQ

Defendant and respondent:

trendtours Touristik GmbH

Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main)
[...]

Order

In the case of

AQ, [...] 48167 Münster,

applicant and appellant

[...]

v

Trendtours Touristik GmbH [...], 65830 Kriftel,

defendant and respondent

[...]

the 24th Civil Chamber of the Regional Court, Frankfurt am Main

[...]

made the following order on 9 June 2022:

- I. The following questions on the interpretation of EU law are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to the second paragraph of Article 267 of the Treaty on the Functioning of the European Union [...]:
 1. Must the first sentence of Article 12(2) 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 (‘the Package Travel Directive’) be interpreted as providing for a further right of termination – in addition to that provided for in Article 12(1) of that directive – the legal consequences of which apply only if the traveller invokes that right in his or her declaration of termination?
 2. Must Article 12(2) of the Package Travel Directive be interpreted as meaning that an obligation to pay a termination fee does not cease to apply where the traveller does not state a reason in his or her declaration of termination of the package travel contract or states a reason which is not related to an unavoidable and extraordinary circumstance?
- II. The proceedings are stayed.

Grounds:

I.

The dispute rests on the following facts:

On 21 August 2019, the applicant booked with the defendant, a tour organiser, a package holiday for himself and his wife entitled ‘Italien pur in Rom & Sorrent’ (Pure Italy in Rome & Sorrento), which was to take place in the period from 30 March 2020 to 6 April 2020. The total price was EUR 1 886.00. The applicant paid a deposit of EUR 325.00 at the request of the defendant.

By letter of 27 February 2020, the applicant terminated the package. In that letter, the applicant cited his imminent hospitalisation as the reason for the termination. He stated that he was prepared to pay the defendant compensation for termination in the amount of 25% of the price of the package, that is to say EUR 466.50, with his deposit being offset against that amount. In the letter, he reserved the right, in

accordance with the defendant's terms and conditions of travel, 'to claim a refund of any amounts paid if, due to special circumstances arising from the coronavirus currently occurring in Italy or Germany or due to other reasons, the package could not have been performed in any event or the traveller could not have participated in the package.' The applicant paid the defendant the difference between the abovementioned amount and his deposit.

At the request of the defendant, which calculated the total amount of its compensation for termination at EUR 471.50, the applicant paid a further EUR 5.00 to the defendant.

The defendant subsequently cancelled the 'Italien pur in Rom & Sorrent' package organised by it, on account of the coronavirus pandemic.

By letter of 21 March 2020, the applicant demanded a refund of the payments that he had made to the defendant, in the total amount of EUR 471.50.

The defendant refused to refund those payments.

The applicant takes the view that the defendant was obliged to refund his payments because it did not actually perform the package.

The defendant takes the view that the applicant had terminated the package travel contract due to his hospitalisation and that the defendant was therefore entitled to charge the contractually agreed flat-rate termination fee. Circumstances arising subsequently could no longer change the entitlement to payment of a termination fee.

The Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main) dismissed the applicant's action at first instance. It held that the applicant's termination had given rise to the defendant's entitlement to payment of a termination fee, which it was entitled to set off against the applicant's entitlement to a refund. Paragraph 651h(3) of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB') was not applicable because, at the time of the declaration of termination, there were no circumstances indicating the existence of unavoidable and extraordinary circumstances. The defendant's entitlement had not subsequently lapsed on the ground that the package had not been performed.

The applicant lodged an appeal against the judgment of the Local Court within the time limit. He considers that, at the time of his declaration of termination, there were sufficient grounds which, in a prognostic evaluation, would have led to the conclusion that the package would have been significantly affected by unavoidable and extraordinary circumstances.

The defendant, which opposes the applicant's appeal, takes the view, inter alia, that the applicant cannot rely on Paragraph 651h(3) of the BGB because he terminated the package for a different, personal reason and not because of the coronavirus pandemic.

II.

In application of the German legislation on package travel contracts, the traveller is entitled, under Paragraph 651h(1) of the BGB, to terminate a package travel contract at any time before the start of the package. The law does not provide for a requirement to state a reason for the termination.

In accordance with the second sentence of Paragraph 651h(1) of the BGB, the legal consequence of a termination is that the organiser of the package loses its entitlement to the price of the package. In accordance with the third sentence of Paragraph 651h(1) of the BGB, the organiser of the package may claim reasonable compensation, which, in accordance with Paragraph 651h(2) of the BGB, it may also set at a flat rate in general terms and conditions. However, in accordance with the first sentence of Paragraph 651h(1) of the BGB, the tour organiser may not claim compensation for termination in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package (...).

There were such unavoidable and extraordinary circumstances occurring at the place of destination and significantly affecting the package because the latter could not be performed as a result of the coronavirus pandemic, which constitutes an unavoidable and extraordinary circumstance.

On the basis of the wording of the German provisions in Paragraph 651h(1) and (3) of the BGB, the defendant cannot claim compensation for termination because the wording in Paragraph 651h(3) of the BGB attaches to the actual circumstances occurring during the agreed period of the package. The view taken in the case-law of German courts and in the legal literature on travel law – according to which the question as to an unavoidable and extraordinary circumstance depends on a prognosis made at the time of the declaration of termination on the basis of an *ex-ante* evaluation (see, inter alia, Oberlandesgericht Hamm [Higher Regional Court, Hamm], judgment of 30 August 2021, 22 U 33/21, BeckRS 2021, 24178; Amtsgericht Düsseldorf [Local Court, Düsseldorf], judgment of 8 February 2021, 37 C 471/20, NJW-RR 2021, 930; Amtsgericht Frankfurt [Local Court, Frankfurt], judgment of 11 August 2020, 32 C 2136/20, juris, paragraph 38; Amtsgericht München [Local Court, Munich], judgment of 27 October 2020, 159 C 13380/20, juris, paragraph 19; Landgericht Kassel [Regional Court, Kassel], judgment of 2 November 2021, 5 0 459/21, paragraph 35, juris; [...] – is not reflected in the wording of the text of the German law. The question as to whether the wording of Paragraph 651h(3) of the BGB corresponds to the provision in Article 12(2) of the Package Travel Directive or whether it is to be interpreted in conformity with that directive is the subject of a request for a preliminary ruling submitted to the Court of Justice in Case C-776/21.

However, the question arises as to whether an applicant cannot rely on Paragraph 651h(3) of the BGB where he or she has terminated a package for a

reason which related to him or her personally and does not constitute an extraordinary and unavoidable reason within the meaning of Paragraph 651h(3).

In the present case, the applicant cited his hospitalisation as the reason for his termination. According to the wording of his letter, the reservation of the right to a refund in the event that the package could not be performed due to the coronavirus was not the decisive factor for his termination, but was intended only to guarantee claims to a refund, which the applicant regarded as only possible, but not guaranteed.

According to the wording of the text of Paragraph 651h of the BGB, the traveller has a right of termination in Paragraph 651h(1) of the BGB which has the legal consequences of the third sentence of Paragraph 651h(1) of the BGB, in conjunction with Paragraph 651h(2) thereof (compensation for termination), or the legal consequences of Paragraph 651h(3) of the BGB (lapse of entitlement to compensation for termination). The question as to whether or not the traveller states a reason for his or her termination is irrelevant for the triggering of the legal consequences, with the result that, even having regard to the reason stated in the letter of termination, there is no entitlement to compensation for termination in the present case because the package could not be performed due to an extraordinary and unavoidable circumstance.

However, the question arises as to whether the provisions of Article 12(1) and (2) of the Package Travel Directive contain a different rule which deviates therefrom.

Article 12(1) of the Package Travel Directive provides for the traveller's right freely to terminate the package at any time before the start of that package, whereby, however, that right triggers the compensation for termination as provided for in the second sentence of Article 12(1) of the Package Travel Directive. By contrast, Article 12(2) of the Package Travel Directive provides for a further right of termination which does not trigger compensation for termination because the traveller is entitled to a full refund of the price of the package, namely in the event of unavoidable and extraordinary circumstances occurring at the place of destination (...) and significantly affecting the performance of the package. It can be inferred from the wording 'notwithstanding paragraph 1, the traveller shall have the right' that the Package Travel Directive provides for two rights of termination in Article 12, which are subject to different conditions and trigger different legal consequences. If it is to be assumed that there are two different rights of termination, it is necessary that the traveller indicate in his or her declaration which of them he or she wishes to invoke and, in particular, that he or she must specify the unavoidable and extraordinary circumstance if he or she wishes to invoke the legal consequences of Article 12(2) of the Package Travel Directive. That requirement for the traveller's declaration could be derived from the fact that the provision in the first sentence of Article 12(2) of the Package Travel Directive attaches certain conditions to the right of termination ('... terminate ... in the event of ...'). The requirement can also be derived from the wording of the second sentence of Article 12(2) of the Package Travel Directive,

according to which ‘in the event of termination of the package travel contract under this paragraph, the traveller shall be entitled to a full refund of any payments made for the package’. The wording is intended to ensure that the legal consequence referred to takes effect only if the traveller invokes that paragraph, because otherwise he or she would have the choice of whether to invoke the right of termination provided for in Article 12(1) of the Package Travel Directive or that provided for in Article 12(2) thereof. However, it cannot be inferred from the formulations referred to above that the court in a given dispute is required to attribute a declared termination to either Article 12(1) or Article 12(2) of the Package Travel Directive, for which reason a termination declared without reference to an unavoidable and extraordinary circumstance is subject to the legal consequences under Article 12(1) (and not Article 12(2)) of the Package Travel Directive.

In the present case, that interpretation would have the consequence that a termination fee as provided for in the second sentence of Article 12(1) of the Package Travel Directive would have to be paid even if the package could not be performed as a result of the coronavirus pandemic, because the applicant relied on a different reason in his declaration of termination.

If Article 12(1) and (2) of the Package Travel Directive is to be interpreted in that manner, the provisions in Paragraph 651h(1) and (3) of the BGB would also have to be interpreted in the same manner, in conformity with the Package Travel Directive, because the latter is to effect full harmonisation (Article 4 of the Package Travel Directive).

[...] [stay of proceedings]