

Anonymised version

Translation

C-529/22 – 1

Case C-529/22

Request for a preliminary ruling

Date lodged:

9 August 2022

Referring court:

Landgericht Frankfurt am Main (Germany)

Date of the decision to refer:

7 July 2022

Applicant and appellant:

PA

Defendant and respondent:

trendtours Touristik GmbH

[...]

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

Frankfurt am Main, 7 July 2022

[...]

Order

In the case of

PA, [...] 60598 Frankfurt am Main,

applicant and appellant

[...]

v

EN

trendtours Touristik GmbH [...] 65830 Kriftel,

defendant and respondent

[...]

the 24th Civil Chamber of the Regional Court, Frankfurt am Main [...] made, on 7 July 2022, the following

order:

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 Article 12(2) of Directive (EU) 2015/2302 of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU 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, in his or her declaration of termination, unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination?

(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 when terminating the package and justifies the termination only subsequently by reference to unavoidable and extraordinary circumstances at the time of termination, this being determined by means of a prognosis, or occurring at the time of travel at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination?

II. The proceedings are stayed.

Grounds:

I.

The dispute rests on the following facts:

On 19 March 2019, the applicant booked with the defendant, a tour organiser, a holiday for himself and his wife entitled 'Israel & Jordanien' (Israel & Jordan) for the period from 26 April 2020 to 7 May 2020, at a travel price of EUR 2 908.00. The applicant made a payment on account of EUR 325.00 at the request of the defendant.

On 6 January 2020, 16 weeks before the planned trip, he declared his termination of the contract in the following words:

'Dear Sir/Madam,

with regard to [...] [the booking], I hereby inform you that we wish to terminate the trip.

Please provide me with confirmation of the termination and of the fact that the termination fees do not exceed 20% of the travel price. (...).'

The defendant issued a 'cancellation invoice' to the applicant on 8 January 2020 and charged, in accordance with its terms and conditions of travel, which were incorporated in the contract, 25% of the travel price as a 'flat-rate termination fee', in the total amount of EUR 727.00, and retained the payment on account which had been paid. The applicant paid the remaining EUR 402.00 without complaint to the defendant on 13 January 2020.

The defendant cancelled the trip due to the coronavirus pandemic. The applicant – first acting alone, by letter of 5 November 2020, and then on 2 December 2020, now represented by a lawyer – unsuccessfully sought from the defendant reimbursement of the EUR 727.00 which he had paid, now stating as the reason for his termination the spreading coronavirus pandemic and the non-performance of the trip.

The applicant took the view that a termination fee had not been incurred in favour of the defendant, since such a fee was excluded due to the cancellation of the trip by the defendant. According to the applicant, the Package Travel Directive does not preclude a traveller from providing reasons for a termination which had initially been declared without any reasons being stated.

The Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main) dismissed the action by judgment of 16 September 2021. It held that the defendant was entitled to an appropriate termination fee of EUR 727.00 in accordance with the third sentence of Paragraph 651h(1) of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB'), in conjunction with the defendant's general terms and conditions. The provisions establishing flat-rate compensation for termination were effective. The applicant, who bore the burden of raising and presenting an

issue and the burden of proof, had failed to prove a lower degree of specific damage. Entitlement to compensation was also not excluded under Paragraph 651h(3) of the BGB. Moreover, it appeared that the applicant had terminated the trip irrespective of the coronavirus pandemic and had cited the pandemic only subsequently, in order to justify his entitlement to reimbursement.

The applicant lodged an appeal against the judgment in due time and continues to pursue his claims for reimbursement of the amounts paid to the defendant.

The defendant defends the judgment of the Local Court as being correct. It submits that Paragraph 651h(3) of the BGB was not at all applicable in favour of the applicant because he had not invoked reasons within the meaning of that provision.

II.

The merits of the applicant's appeal depend largely on the interpretation of Article 12(2) of the Package Travel Directive, whether it provides for a further ground for termination in addition to that provided for in Article 12(1) of the Package Travel Directive, and whether termination is precluded where the traveller has not stated a reason for termination in his or her declaration of termination vis-à-vis the organiser.

Under the German legislation on package travel contracts, which transposes Article 12 of the Package Travel Directive, 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 trip. The national 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 by the traveller is that the organiser loses its entitlement to the price of the package. In accordance with the third sentence of Paragraph 651h(1) of the BGB, the organiser 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(3) of the BGB, the 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 (...).

In the present case, there were such unavoidable and extraordinary circumstances occurring at the place of destination and significantly affecting the trip 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 trip. 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; [...] – has no basis 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 requests for a preliminary ruling submitted to the Court of Justice in Cases C-776/21 and C-193/22 (see also: Oberster Gerichtshof (Supreme Court, Austria; ‘the OGH’), order of 25 January 2022 [...] (Case C-193/22)).

Furthermore, no clarification has as yet been provided of the question as to whether the traveller, in this case the applicant, cannot rely on the first sentence of Paragraph 651h(3) of the BGB because he or she did not state a reason in his or her declaration of termination and only subsequently justified the termination by reference to the coronavirus-related restrictions in Israel and Jordan.

According to the wording of Paragraph 651h(1) of the BGB, it is not necessary to state a reason for termination in the declaration of termination because no reason for termination is required in order to establish entitlement to reimbursement of the price of the trip. Paragraph 651h(3) of the BGB does not provide for an independent right of termination. Rather, the national legislature configured the provision as a defence that the traveller can raise against the termination fee – which is incurred as a general rule – where there are unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package.

Accordingly, the question arises as to whether Article 12(2) of the Package Travel Directive provides for an independent right of termination which the traveller, when terminating the package, must also invoke in a manner distinct from the termination within the meaning of Article 12(1) of the Package Travel Directive, in order to exclude a termination fee payable to the organiser.

On the basis of the wording of Article 12(2) of the Package Travel Directive, that provision formulates a separate right of termination, as distinct from that in Article 12(1) of the Package Travel Directive. This is established, in the view of the present Chamber, through the use of the words ‘the traveller shall have the right (...) *in the event of* (...)’. A condition of termination is formulated, and thus a ground for termination is provided for.

From a schematic viewpoint, Article 12(1) of the Package Travel Directive does not contain such a restriction, whereas Article 12(3) of the Package Travel Directive does, but in respect of the organiser. Under that provision, the organiser may terminate the package travel contract *if* the minimum number of participants is not reached (point (a)) or the organiser is prevented from performing the trip because of unavoidable and extraordinary circumstances (point (b)). The present Chamber takes the view that the fact that Article 12(1) and Article 12(2) provide for two different rights of termination and must be distinguished from one another also follows from the fact that Article 12(2) of the Package Travel Directive is to apply ‘notwithstanding paragraph 1’, that is to say, in addition to paragraph 1.

Recital 31 of the Package Travel Directive also confirms the present Chamber’s interpretation of the law in this sense. That recital also refers to the differentiation between a right of termination at any time – and thus without conditions – in return for payment of a termination fee (first sentence) and, in the second sentence, a termination without an obligation to pay a termination fee. Therefore, the Package Travel Directive, like the national legislature, proceeds on the basis of the principle of inurrence of a termination fee and, in accordance with the scheme of the directive, allows a derogation therefrom on an exceptional basis only, in the special case where there are extraordinary circumstances and the trip or the carriage of passengers is significantly affected.

The referring court submits that it follows from that scheme and the existence of a ground for termination that the traveller, when terminating the package, must invoke the right as provided for in Article 12(2) of the Package Travel Directive if he or she does not wish to incur the termination fee as provided for in the second sentence of Article 12(1) of the Package Travel Directive. That requirement relating to the traveller’s declaration could once more be derived from the fact that the scheme attaches precisely to the extraordinary circumstance and the significant impairment of the performance of the trip. The wording of Article 12(2) of the Package Travel Directive is intended to ensure that the legal consequence consisting in the absence of a termination fee takes effect only if the traveller, who accordingly has a choice between the two rights of termination, invokes it. Legal certainty for both contracting parties might also require that the traveller decide specifically (and also state) which of the two rights of termination he or she chooses.

Having regard once again to Directive (EU) 2015/2302 itself, the fact that a requirement to state reasons is not specifically provided for and that the traveller, who is usually unfamiliar with the law, is therefore not aware of such a requirement, could militate against a requirement to state reasons which follows from that directive. The first sentence of Article 12(2) of Directive (EU) 2015/2302 merely states that the traveller has a right of termination and not that he or she must also state a reason for such termination. Moreover, it does not follow from the provisions that the national court is required to attribute a termination to one of the provisions from an objective point of view.

Accordingly, if the traveller does not invoke extraordinary circumstances, he or she would be obliged to pay a termination fee. In the present dispute, the latter interpretation would have the consequence that the traveller could not rely on Article 12(2) of the Package Travel Directive (or Paragraph 651h(3) of the BGB) and would be required to pay a termination fee to the organiser. In that case, Paragraph 651h(3) of the BGB would have to be interpreted in conformity with the directive (Article 4 of the Package Travel Directive).

The present Chamber has already [...] referred that question to the Court of Justice by order of 9 June 2022. [...] [Case C-511/22]

Should the Court of Justice consider that a traveller has an obligation vis-à-vis the organiser to state reasons when terminating a package, the referring court asks the follow-up question – thus the second question referred for a preliminary ruling – as to whether, from a temporal point of view, the reason for the termination must be invoked directly in the declaration of termination, or whether the traveller can subsequently invoke objectively existing extraordinary circumstances within the meaning of Article 12(2) of the Package Travel Directive and thereby subsequently state the reason for his or her termination – as was done in the present case. If the traveller could take the latter approach, the requirement to state a reason would have been met in the present case.

The present Chamber takes the view that, in that respect, the interpretation is initially closely related to the questions already referred to the Court of Justice by the Austrian OGH on 25 January 2022 (Case C-193/22) and by the Amtsgericht Düsseldorf (Local Court, Düsseldorf) pursuant to its order of 8 December 2021 (Case C-776/21). The point in time to be taken into account for the purposes of the requirements of Article 12(2) of the Package Travel Directive could be (partly) decisive for that question of interpretation. If the point in time at which the trip was to be performed is to be taken into account for the purposes of the requirements of Article 12(2) of the Package Travel Directive, this could indicate that the traveller can still invoke, even subsequently and despite having previously declared a termination in respect of which he or she stated no reasons or stated different reasons, extraordinary circumstances and a significant impairment of the trip. However, the situation would in principle be different if a prognostic evaluation made at the time of the declaration of termination were to be decisive. In that case, there would be a strong argument that the reason must be stated at the time of termination.

The present Chamber takes the view that, on the one hand, the assumption that there is an obligation to state a reason in the declaration of termination is supported by the fact that only in that way can the organiser know whether or not it is entitled to claim a termination fee. In addition, a traveller who initially terminates the package travel contract for a different reason or for no reason at all and could then subsequently undermine the organiser's entitlement to compensation would be placed in a more favourable position. On the other hand, a requirement to state reasons already at the time of termination may well impair the

consumer protection afforded by Directive (EU) 2015/2302 if extraordinary circumstances which would have entitled the traveller to terminate without a termination fee arise subsequently. In addition – and this is also relevant in that respect – a requirement to state reasons is not specifically provided for.

[...] [stay of proceedings] [...]

WORKING DOCUMENT