

Anonymised version

Translation

C-776/21 – 1

Case C-776/21

Request for a preliminary ruling

Date lodged:

15 December 2021

Referring court:

Amtsgericht Düsseldorf (Germany)

Date of the decision to refer:

8 December 2021

Applicant:

EV

Defendant:

Alltours Flugreisen GmbH

[...]

Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany)

Order

In the case

EV v Alltours Flugreisen GmbH

[...]

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 sentence of Article 267 of the Treaty on the Functioning of the European Union in the version of 9 May 2008, as last amended by Article 2 of European Council Decision 2012/419/EU of 11 July 2012 (OJ 2012 L 204, p. 131):

1. Is it sufficient, in determining whether unavoidable and extraordinary circumstances occur at the place of destination of the trip or holiday within the meaning of 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'), if the destination area of the trip or holiday is classified as a risk area by the specialist authority established at national level for the protection against communicable diseases, while the conditions for classification as a risk area are not satisfied at the place of origin?
2. Must the traveller be able to predict, at the time of the termination of the package within the meaning of the first sentence of Article 12(2) of the Package Travel Directive, whether there will be significant disruptions at the place of destination or its immediate vicinity on the date of departure or at the time of travel?
3. Must the termination take place close in time to the start of the trip or holiday or may it be declared at any time between the time of booking the trip or holiday and the start of the trip or holiday if it could not be excluded, at the time of termination, that the extraordinary circumstance might occur?

Grounds

I.

- 1 The questions referred for a preliminary ruling are based on a dispute concerning the following facts:
- 2 The applicant booked a package holiday with the defendant for himself and his wife to Antalya, Turkey, for the period from 3 June 2021 to 16 June 2021 at a price of EUR 2 108.00. Upon receipt of the defendant's invoice, the applicant paid a sum of EUR 648.00.
- 3 By letter of 10 March 2021, the applicant declared his termination of the booked package holiday and the travel contract and demanded reimbursement of the EUR 648.00 paid. The applicant justified his termination by citing travel warnings issued by the Federal Foreign Office, which were in place at the time of the termination. On the planned date of travel, there was no longer a travel warning in place from the Federal Foreign Office, but the country of destination of the holiday was still classified as a risk area by the Robert Koch Institute, which is responsible for the detection, prevention and control of communicable and non-communicable diseases in Germany pursuant to Paragraph 2(3)(1) of the BGA-Nachfolgegesetz (Law on BGA succession; 'the BGA-NachfG').

- 4 The applicant brought an action against the defendant before the referring Amtsgericht Düsseldorf (Local Court, Düsseldorf), as the court of first instance, for payment of EUR 648.00, plus interest of five percentage points above the European Central Bank base rate applicable since 10 April 2021, and, in addition, for payment of – or alternatively exemption from – the pretrial costs for the proceedings incurred by his legal representative in the amount of EUR 159.94.
- 5 The defendant contended that the action should be dismissed. It declared an offset with its right to compensation due to the termination of the holiday under the third sentence of Paragraph 651h(1), read in conjunction with Paragraph 651h(2) of the Bürgerliches Gesetzbuch (German Civil Code, ‘the BGB’), which, according to its General Terms and Conditions, amounted to 25% of the price of the holiday at the time of termination, which thus exceeded the claim. The applicant is of the opinion that, despite the termination, the defendant is not entitled to claim compensation as there were unavoidable and extraordinary circumstances at the place of destination of the holiday within the meaning of Paragraph 651h(3) of the German Civil Code, namely a specific health risk due to the consequences of the Covid-19 pandemic.
- 6 Paragraph 651h(1) to (3) of the German Civil Code, which also transposed Article 12 of the Package Travel Directive and entered into force on 1 July 2018, reads as follows:
 - 7 *‘(1) The traveller may terminate the contract at any time before the start of the trip or holiday. If the traveller terminates the contract, the organiser loses the right to the agreed price of the trip or holiday. However, the organiser may claim reasonable compensation.*
 - 8 *(2) Reasonable lump-sum amounts of compensation may be stipulated in the contract, including by means of pre-formulated contractual terms and conditions, which shall be calculated as follows:*
 - 9 *1. the period between the declaration of termination and the start of the trip or holiday,*
 - 10 *2. the organiser’s expected savings on expenses, and*
 - 11 *3. the expected income through alternative deployment of the travel services.*
 - 12 *If no lump-sum amounts of compensation are stipulated in the contract, the amount of compensation shall be determined according to the price of the trip or holiday minus the value of the expenses saved by the organiser and minus what it receives through alternative deployment of the travel services. The organiser is obliged to justify the amount of the compensation if asked to do so by the traveller.*
 - 13 *(3) By way of derogation from the third sentence of point (1), the organiser may not claim compensation 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, or which significantly affect the carriage of passengers to the destination. Circumstances are unavoidable and extraordinary within the meaning of this subtitle if they are beyond the control of the party who invokes them and the consequences of which could not have been avoided even if all reasonable measures had been taken.'

II.

- 14 The decision on the dispute turns on what conditions must be satisfied under Article 12(2) of the Package Travel Directive in order to constitute unavoidable and extraordinary circumstances in the event of a global pandemic and whether Paragraph 651h(3) of the German Civil Code must be interpreted to the effect that termination without payment of a termination fee is always possible if there were unavoidable and extraordinary circumstances within the meaning of the first sentence of Article 12(2) of the Package Travel Directive at the time of travel, irrespective of whether their existence could be predicted at the time of termination and of the period of time between termination and the time of travel. The referring court is inclined to take this view, contrary to the hitherto prevailing view in national case-law.

1.

- 15 In the opinion of the referring court, the conditions in respect of unavoidable and extraordinary circumstances pursuant to the first sentence of Paragraph 651h(3) of the German Civil Code and the first sentence of Article 12(2) of the Package Travel Directive were satisfied at the planned time of travel, because there was a significantly increased risk of illness at the planned time of travel compared to the place of origin and this was sufficient for a finding of extraordinary circumstances. According to its interpretation in national law, a significant disruption arises in particular if the personal safety of the traveller is affected. A global pandemic that threatens people's health only falls under the concept of extraordinary circumstances if the risk of falling ill at the destination and at places that have to be transited is significantly higher than at the place of origin [...] [references].
- 16 During the period in which the holiday was to be taken, the average seven-day incidence rate per 100 000 inhabitants in the State of Hesse, where the applicant's place of residence and usual abode is located, was 25.4. This value is the result of a steadily decreasing incidence rate of between 41 and 16 (source: the Robert Koch Institute). In that same period, the average seven-day incidence rate in Turkey was 53.1, although this too is the result of an overall decreasing incidence rate of between 61.2 and 49.6 (source: <https://www.corona-in-zahlen.de/weltweit/tuerkei/>). Thus, in the seven days that elapsed, the incidence rate in the applicant's travel area was almost 30 registered SARS CoV2 infections per 100 000 inhabitants higher than in his place of origin. This figure is more than double the incidence rate in the applicant's place of origin. At the same time, the

German Robert Koch Institute listed Turkey as a risk area at the time of travel, since the average seven-day incidence rate per 100 000 inhabitants remained higher than 50. At the time of travel, therefore, the Federal Foreign Office stated the following with regard to Turkey:

- 17 *‘The spread of COVID-19 continues to necessitate restrictions on international air transport and travel and disrupt public life. Non-essential tourist travel to Turkey as a whole is discouraged. [...]*
- 18 *Turkey is severely affected by COVID-19. The whole of Turkey is classified as a risk area.’*
- 19 According to a statement made by the Federal Foreign Office itself, this travel warning does not constitute a travel ban, but is instead an urgent appeal against undertaking such travel. This constitutes a situation where the risk is higher than in the country of origin and thus constitutes unavoidable and extraordinary circumstances. In the view of the referring court, a traveller cannot reasonably be expected to travel to a destination that is classified as a risk area for a serious disease according to the competent national authority, while the conditions for that classification have not been satisfied at the place of origin.

2.

- 20 However, at the time he made his declaration of termination, it was not yet possible for the applicant to predict that there would be extraordinary circumstances at the time of travel allowing him to terminate the package without any compensation being due. At the time of the termination by the applicant, the seven-day incidence rate for the whole of Germany was 65 (69 in Hesse), and it was around 100 in Turkey. The date of termination was in March, the holiday was scheduled for June. According to past experience a decrease in the incidence rate was to be expected in view of the warmer weather, which did actually occur – as described above – but not to such an extent, compared to the country of origin, as to prevent the classification as a risk area and thus the increased risk compared to the country of origin.
- 21 According to the Bundesgerichtshof (Federal Court of Justice, Germany), the threshold of severity of the disruption within the meaning of Paragraph 651(3) of the German Civil Code is only reached if, at the time the declaration of termination was made and taking into account the circumstances of the specific individual case, the health risks were to be expected with a certain degree of probability either at the time of departure or during the trip or holiday. From the traveller’s point of view, it did not have to be overwhelmingly likely that the risk would materialise, but rather a ‘substantial likelihood’ of 25% was sufficient [...] [references]. Therefore, the traveller had to make his decision based on a prediction. If, however, at the time of the traveller’s declaration of termination, it is not at least 25% likely that there would be a risk of significant disruption at the holiday destination, it is irrelevant whether this risk actually materialises later

during the holiday. It is only the time of the termination that is taken into account in this respect, meaning that the traveller remains liable for compensation [...] [references]. There is no termination period. Against the background of the decision made on the basis of a prediction, in respect of which there are generally no reliable connecting criteria so far in advance of the start of a trip or holiday, a rule of thumb of at most four weeks before the start of a trip or holiday has been established [...] [reference]; Local Court, Düsseldorf, judgment of 8 February 2021 – 37 C 471/20; Amtsgericht Hannover (Local Court, Hanover), judgment of 23 April 2021 – 539 C 12352/20, in which a declaration of termination as early as six weeks before the start of the trip or holiday was still regarded as being soon before the trip or holiday (Amtsgericht Aschaffenburg (Local Court, Aschaffenburg), judgment of 18 January 2021 – 126 C 1267/20). Since an objectively justified decision made on the basis of a prediction was impossible at the time of the termination (almost three months before the start of the holiday), due to a lack of knowledge about the further development of the pandemic, the action would have to be dismissed on the basis of this interpretation of Paragraph 651h(3) of the German Civil Code, since the defendant could offset its counterclaim for payment of reasonable compensation for the termination of the travel contract.

III.

- 22 The referring court has doubts as to whether the interpretation of Paragraph 651h(3) of the German Civil Code by the national courts with regard to the required possibility of prediction and the resulting termination period is compatible with EU law. Article 12(2) of the Package Travel Directive allows for termination without charge ‘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, or which significantly affect the carriage of passengers to the destination’.
- 23 It is not apparent from the wording of this provision that it must be possible to predict the existence of extraordinary circumstances at the time of the termination. This is also not apparent, in particular, from recital 31 to the Package Travel Directive. The directive can be understood only as meaning that it is the actual situation at the start of the trip or holiday or during the trip or holiday that is decisive for making a decision on the significance of disruptions. The first sentence of recital 31 to the Package Travel Directive states that travellers may terminate the contract ‘at any time’ before the start of the package. Although this wording is no longer used in the second sentence of that recital, it can be concluded that, by intentionally positioning the two sentences in the same recital, the intention was that this wording also apply to the second sentence. Article 12(2) of the Package Travel Directive also makes reference to paragraph 1, which sets out the possibility of termination, including compensation. According to that wording, this provision could be interpreted to the effect that the entirety of paragraph 1 is to be disregarded, that is to say also the provision on termination ‘at any time’. However, the purpose of Article 12(2) of the Package Travel Directive

is precisely that of establishing an exemption to paragraph 1 on the traveller's obligation to pay compensation. To add the possibility of prediction or a termination period to that wording would contradict its purpose.

- 24 The Federal Court of Justice based its interpretation of this provision (justifying the possibility of the traveller making a prediction at the time of the termination) on its previous findings relating to Paragraph 651j(1) of the German Civil Code, in the version applicable until 31 December 2001, which set out the possibility of terminating the contract if the trip or holiday was made considerably more difficult or dangerous or was disrupted as a result of unforeseeable force majeure. In its 'Hurrikan' decision (BGH X ZR 147/01), the Federal Court of Justice ruled in relation to Paragraph 651j(1) of the German Civil Code that it must at the time of the termination be possible to assume with a 'substantial likelihood' that the travel risk will materialise. The earlier provision of Paragraph 651j of the German Civil Code now appears in Paragraph 651h thereof. Furthermore, the introduction of the new Paragraph 651h of the German Civil Code was accompanied by the transposition of the Package Travel Directive (see Bundestag Document No 18/10822). Article 12(2) of the Package Travel Directive thus transposed does not – unlike Paragraph 651j(1) of the German Civil Code in the version applicable until 31 December 2001 – contain any reference to a 'risk' to the package or the traveller. A risk is deemed to exist if a situation is sufficiently likely to cause damage if the course of events runs unchecked. According to that definition, a risk can result solely from a prediction in this respect. In contrast to a risk, however, a significant disruption at the place of the trip or holiday need not be predicted. This can only be assessed on the basis of the actual circumstances. According to the opinion given here, requiring a prediction by the traveller or a proximity, in terms of time, to the date of travel thus contradicts the wording and purpose of Article 12(2) of the Package Travel Directive (see also Landgericht Frankfurt (Regional Court, Frankfurt), judgment of 10 August 2021, 24 S 31/21, BeckRS 2021, 23370). A restriction on the possibility of termination without charge, while maintaining an appropriate standard of consumer protection, only appears necessary from the point of view of good faith if the occurrence of the extraordinary circumstances was completely unpredictable at the time of the declaration of termination, that is to say it was an accidental event that occurred at the planned time of travel for which there were no indications at the time of the termination. This is not the case, however, if the extraordinary circumstances at issue concern the spread of a pandemic at the destination, the worldwide spread of which was already known at the time the declaration of termination was made.

IV.

- 25 The Court has so far not identified the conditions to be satisfied in respect of unavoidable and extraordinary circumstances within the meaning of the first sentence of Article 12(2) of the Package Travel Directive during a global pandemic, whether a decision based on a prediction made by the traveller may be required at the time of termination of the travel contract, and whether, from the

point of view of good faith, a maximum period is required between the date of termination and the start of the trip or holiday.

26 [...] [Stay of proceedings]

[...]

[...] [Signatures]

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